ARIZONA
LAW REVIEW

VOLUME 19 1977 NUMBER 3

# INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS: NEW USES, NEW PROBLEMS

James A. Strazzella*

## INTRODUCTION

At a time when the claim of ineffective assistance of counsel is assuming a more pervasive importance in criminal procedure, the law governing basic aspects of such claims remains in an unsettled and transitional stage. The claim of ineffective assistance of counsel can trace its lineage back nearly a century in American law,[1] but the claim was only guardedly recognized and it developed slowly until a growth spurt in the 1960's. This development was reflected in an increased number of ineffec-

* Professor of Law, Temple University School of Law. A.B. 1961, Villanova University; J.D. 1964, University of Pennsylvania. Member of the Pennsylvania and District of Columbia bars. This article is an adaption of a paper presented to an ABA Appellate Judges' Seminar, 1977.

1. Missouri produced some of the earliest cases in the 1880's. As with the other early ineffectiveness cases, there was a generally cautious approach from the Missouri courts. State v. Dreher, 137 Mo. 11, 38 S.W. 567 (1897), involved a direct appeal with new appellate counsel contending that the defendant did not have a fair trial due to the appointed trial counsel's ineffectiveness. Although the court undertook a substantial discussion to rebut the claimed ineffectiveness, it cautioned that even if negligence or want of skill had been found, such would not have afforded any ground for reversal. *Id.* at 23, 38 S.W. at 570. Imputing the negligence of attorneys to their clients, the court stated: "The decisions are too numerous to cite; but their uniform tenor is to the effect that neither ignorance, blunders nor misapprehension of counsel not occasioned by his adversary is ground for setting aside a judgment or awarding a new trial." *Id.* Fearing collusion and "endless confusion in the administration of justice," *id.* at 23, 38 S.W. at 570, the *Dreher* court chastised the lower appellate court which had also decided State v. Jones, 12 Mo. App. 93 (1882), the one case found by the *Dreher* court in which a new trial had been granted on the basis of trial counsel's gross incompetence. The *Dreher* court concluded:

tiveness claims being raised and litigated. There are three basic reasons for this growth which merit brief discussion.

The first of these notable reasons for the sizeable increase in the number of ineffectiveness claims being raised may be traced to the general expansion of an available vehicle for litigating such claims at a time when there was judicial willingness to more closely scrutinize criminal trial defects. This vehicle is the procedural device of collateral attack, and its expansion is a phenomenon of relatively recent legal history. By 1963, significant scholarly attention was being devoted to the evaluation of post-conviction attacks on state convictions by way of federal habeas corpus and to the evolution of federal collateral-type attacks upon federal convictions.[2] This murky and complex area of the law underwent a major redefinition by the Supreme Court in a trilogy of landmark cases: *Fay v. Noia*,[3] *Townsend v. Sain*,[4] and *Sanders v. United States*.[5] That opinional triumvirate in turn provoked an increasing number of challenges to the validity of convictions and supplied the courts with the tools for a more intensive reevaluation of convictions. Concomitantly with the collateral attack vehicle, there developed an expanded judicial interest in reviewing defects in criminal trials, especially federal review of state trials. The general upsurge in the use of collateral attack precipitated a large growth in the number of ineffective assistance claims as but one further constitutional basis upon which to challenge a conviction.

A second significant factor in the increased number of ineffective assistance claims was the Supreme Court's decision in *Gideon v. Wainwright*.[6] During the same term in which *Noia, Townsend*, and *Sanders*

---

> The business of the courts cannot be conducted on any other terms than that parties must be held by the acts of their attorneys in their behalf in causes in which they are authorized to appear, and, in the absence of fraud, leaving the client to his remedy against the attorney for his negligence.

137 Mo. at 23-24, 38 S.W. at 570. Presumably, such a civil remedy would be of particularly little solace to a legitimately aggrieved person in a position like Dreher, who was sentenced to hang.

An earlier case than *Jones*, involving an aspect of ineffectiveness and not mentioned in *Dreher*, is State v. Lewis, 9 Mo. App. 321 (1880), *aff'd*, 74 Mo. 222 (1881). In *Lewis*, a new trial was granted upon showing that a continuance had been improperly denied in view of possible, "wilful and deliberate treachery" in the original defense attorney's "persistent refusal to make any preparation whatever for defence at the trial." *Id.* at 324. For other examples of early ineffectiveness cases, see cases cited note 17 *infra*.

The ineffectiveness claim originated in America, having no real ancestor in English law. For an example of the English law's attitude toward attacks on trial counsel, see Rondel v. Worsley, [1969] 1 A.C. 191, [1967] 3 W.L.R. 1666 (dealing with civil immunity of barristers for criminal conviction negligence).

2. *See, e.g.*, Bator, *Finality in Criminal Cases and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Hart, *Forward, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84 (1959); Reitz, *Federal Habeas Corpus: Impact of An Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960).

3. 372 U.S. 391 (1963).

4. 372 U.S. 293 (1963).

5. 373 U.S. 1 (1963).

6. 372 U.S. 335 (1963).

were decided, the Supreme Court in *Gideon* expanded the federal right to counsel in state court proceedings. *Gideon* and its progeny resulted in an increase in the number of attorneys at work in criminal cases. It was natural that more attorneys would be targeted as ineffective, especially since many of these attorneys were not experts in the criminal law field. Moreover, *Gideon*'s extension of the sixth amendment to state cases afforded a clearer constitutional basis for state defendants to assert deprivation of a federal constitutional right via ineffective assistance claims.

Coupled with the expansion of collateral attack and the right to counsel came the extension of a sizeable array of other underlying bill of rights and due process guarantees to defendants.[7] Accompanying this latter extension was an increased complexity in modern criminal cases. That increased complexity has supplied both increased reason and increased opportunity for counsel default. All of these reasons contributed to the growth of the ineffectiveness claim.[8]

---

7. *See, e.g.*, Stovall v. Denno, 388 U.S. 293 (1967) (due process exclusionary rule for certain extrajudicial identifications); Malloy v. Hogan, 378 U.S. 1 (1964) (applying fifth amendment self-incrimination privilege to states); Mapp v. Ohio, 367 U.S. 643 (1961) (applying fourth amendment exclusionary rule to states).

8. A rough measure of the increase in incompetent counsel claims can be garnered from a survey of the number of such claims which reached the reported opinion stage in the federal circuit courts of appeals. The figures reflected in such a survey are informative, in spite of their obvious limitations; the reported cases reflect neither claims made in the state courts and not raised in a federal forum, nor claims asserted in the district courts but not raised on appeal. Moreover, the claim may have been raised on appeal but not expressly addressed in an opinion.

Reported opinions filed between May 1963 and May 1965 (*see* 318 F.2d-345 F.2d) may be thought to roughly encompass and reflect an early 1960's period before the *Noia-Gideon*-due process explosion took full effect on the ineffectiveness claim. This time period seems appropriate since it would take some time for ineffectiveness issues to wend their way to the circuit court opinion stage from the initiation of the attack in state and federal district courts. In this 1963-1965 period, the circuit court opinions contain 78 ineffective assistance claims. In a comparable number of months six years later, November 1969 to November 1971 (*see* 418 F.2d-451 F.2d), the opinions address nearly 282 claims of ineffectiveness, a 262% increase over the earlier period. Even though the number of cases surveyed is limited, other data reflected in these opinions may be of some interest.

In the first period, approximately 73% of the claims were claims against the federal court representation (32% arose on direct appeal and 41% arose on § 2255 federal post-conviction attack, *see* 28 U.S.C. § 2255 (1970)); 27% involved state convictions attacked via federal habeas corpus. In the second period, the comparable percentages show that 58% of the claims were against federal representation (38% on direct appeal and 20% on post-conviction attack), with the remainder involving habeas corpus attacks upon state convictions.

With the first and second periods shown respectively in parenthesis, the opinions also reflect the following approximate general percentages on all the claims mentioned in the opinions: counsel found effective (82%, 77%); counsel found ineffective (8%, 16%); hearing ordered (10%, 7%). Of the cases in which deficiency was found, a determination of no prejudice was made in some instances (0%, 35%).

The following figures represent the particular stage of proceedings at which counsel was claimed to have been ineffective: *arraignment* (arose in two cases in each period) (no ineffective assistance found in any instance); *preliminary hearing* (arose in three cases in each period) (no ineffectiveness found); *pretrial preparation* (7%, 11%) (found effective, 82%, 73%; remainder are findings of ineffectivness or hearing ordered); *plea of guilty* (19%, 27%) (found effective, 93%, 82%); *pretrial practice* (13%, 4%) (found effective, 85%, 73%); *trial* (41%, 47%) (found effective, 83%, 80%); *sentencing* (arose in two cases in each period) (found effective, two cases, one case); *appeal* (principally failures to perfect appeal or advise of appeal) (7.7%, 6.7%) (found effective, 17%, 42%; at this particular stage, *appeal*, the remainder figures were, interestingly: found ineffective, 16.7%, 31.6%, and hearing ordered, 66.7%, 26.3%). In some of the cases reported, the claim was discussed in general terms or it was otherwise impossible to tell exactly which stage of the proceedings was in question.

The development of ineffective assistance law has left unresolved a significant number of issues, many of which are procedural in nature and others of which are central to the claim.

Against a background of the growth of ineffective assistance of counsel claims and the reasons for that growth, this Article will explore several areas of the law governing the claim which are still very much in transition. It will discuss the new uses to which the claim is being put, giving particular attention to the new stages of counsel representation to which the claim is being increasingly applied and to the recent development of the claim as one recurringly used to negate the forfeiture of a remedy otherwise resulting from counsel's failure to assert rights in a timely fashion. Particular emphasis will be given to this latter transitional area in light of the Supreme Court's recent reemphasis of foreclosure notions in collateral attack litigation.

## STANDARDS AND SOURCES

The standard for determining instances of constitutionally unacceptable ineffectiveness is a major unresolved issue. Although in any rapidly expanding area of the law transitional periods in the courts' conceptualization and definition of workable standards are expected, the law on the standards for measuring ineffective assistance of counsel, as well as the source of those standards, remains in an especially troublesome and shifting transitional state.

Judicial standards to measure the adequacy of counsel have intentionally been formulated in vague terms[9] because of the nature of the animal being measured. Widely used standards of early origin have, by their terms, called for a disastrous nonfeasance or misfeasance by counsel before a label of constitutionally "ineffective" will be applied for purposes of granting the defendant a new trial. Under often-cited traditional standards, a convicted prisoner has had to show that deficient representation produced proceedings that were a "farce" and a "mockery of justice,"[10] a "travesty"[11] or a

9. *See* Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945) (court indicated that there is no set number of mistakes an attorney can make to constitute ineffective assistance).

10. *E.g.*, United States *ex rel.* Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir. 1970), *cert. denied*, 402 U.S. 909 (1971) ("shock the conscience of the Court and make the proceedings a farce and mockery of justice"); Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); United States *ex rel.* Feeley v. Ragen, 166 F.2d 976, 980-81 (7th Cir. 1948) ("travesty on justice," "farce"); Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945); Hendrickson v. Overlade, 131 F. Supp. 561, 563 (N.D. Ind. 1955); Simpson v. State, 164 So. 2d 224, 227 (Fla. Dist. Ct. App. 1964); People v. De Simone, 9 Ill. 2d 522, 524, 138 N.E.2d 556, 557 (1956) ("farce"); State v. Benson, 247 Iowa 406, 411, 72 N.W.2d 438, 440 (1955); Rice v. Davis, 366 S.W.2d 153, 156-57 (Ky. 1963); People v. Brown, 7 N.Y.2d 359, 361, 165 N.E.2d 557, 558, 197 N.Y.S.2d 705, 707 (1960) ("farce and mockery of justice" appearing to the trial court). *See also* cases cited note 17 *infra*.

11. United States *ex rel.* Feeley v. Ragen, 166 F.2d 976, 981 (7th Cir. 1948); State v. Keller, 57 N.D. 645, 648, 223 N.W. 698, 700 (1929).

"sham."[12] The representation, it has been said, must "shock the conscience of the court,"[13] amounting to a "denial of a fair trial"[14] or to "no representation at all."[15] This mockery and farce test is still articulated by a significant number of courts.[16]

Other courts have attempted to define what constitutes an unacceptable counsel performance by reference to its obviousness to the trial judge or to other state officers, that is to say, representation "so lacking in competence that it becomes the duty of the court or the prosecution to observe it and correct it."[17] One line of cases in the Fifth Circuit has spoken in terms of "counsel reasonably likely to render and rendering reasonably effective

12. Lunce v. Overlade, 244 F.2d 108, 110 (7th Cir. 1957).

13. United States *ex rel.* Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir. 1970), *cert. denied*, 402 U.S. 909 (1971).

14. Harried v. United States, 389 F.2d 281, 285 (D.C. Cir. 1967); Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); State v. Robinson, 75 Wash. 2d 230, 233, 450 P.2d 180, 182 (1969).

15. United States *ex rel.* Feeley v. Ragen, 166 F.2d 976, 980-81 (7th Cir. 1948); Tompsett v. Ohio, 146 F.2d 95, 98 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945). *See also* Jones v. Balkcom, 210 Ga. 262, 268, 79 S.E.2d 1, 4 (1953), *cert. denied*, 347 U.S. 956 (1954) (representation so negligent that defendant was "virtually unrepresented," or "did not in any real or substantial sense have the aid of counsel").

16. *Compare* LiPuma v. Department of Corrections, 560 F.2d 84, 90-91 (2d Cir.), *cert. denied*, 98 S. Ct. 189 (1977); United States v. Ramirez, 535 F.2d 125, 129 (1st Cir. 1976); Coney v. Wyrick, 532 F.2d 94, 98-99 (8th Cir. 1976); United States v. Stern, 519 F.2d 521, 524 (9th Cir.), *cert. denied*, 423 U.S. 1033 (1975); Sullivan v. Warden, 91 Nev. 563, 566, 540 P.2d 112, 114 (1975); *and* Slayton v. Weinberger, 213 Va. 690, 691, 194 S.E.2d 703, 705 (1973), *with* cases cited in Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 820 n.48 (1976).

In State v. Watson, 114 Ariz. 1, 559 P.2d 121 (1976), the court reiterated the farce, sham, and mockery standard. In response to the contention that the standard should be rejected, the court noted a modification by another court but stated: "[I]t is the substance of the standard which is significant." *Id.* at 13, 559 P.2d at 133. Most cases in the Ninth Circuit have professed to follow the farce and mockery test. *See* United States v. Stern, 519 F.2d 521, 524 (9th Cir.), *cert. denied*, 423 U.S. 1033 (1975). However, some cases have alluded to the "reasonably likely to render and rendering reasonably effective assistance" standard. *See* Leano v. United States, 457 F.2d 1208, 1209 (9th Cir.), *cert. denied*, 409 U.S. 889 (1972); Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962). In United States v. Jones, 512 F.2d 347, 349 (9th Cir. 1975), the court repeated the farce and mockery standard, but noted that the representation would have been adequate even if measured against the stricter standard applied by the District of Columbia Circuit. *Id.* at 349 n.2. See text & notes 39-47 *infra*.

17. Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965); Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945); *accord*, Rice v. Davis, 366 S.W.2d 153, 156-57 (Ky. 1963); People v. Tomaselli, 7 N.Y.2d 350, 356, 165 N.E.2d 551, 555, 197 N.Y.S.2d 697, 702 (1960). *See also* Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974) (en banc), *cert. denied*, 422 U.S. 1011 (1975), discussed in text accompanying notes 62-68 *infra*.

This verbalization may, at least in some courts, owe its rationale to the premise that such state action failure on the part of state officers is needed to establish a due process violation deserving of post-conviction relief. *See* People v. Tomaselli, 7 N.Y. 2d 350, 354, 165 N.E.2d 551, 554, 197 N.Y.S.2d 697, 701 (1960). *See also In re* Hodge, 262 F.2d 778, 780 (9th Cir. 1958); United States *ex rel.* Darcy v. Handy, 203 F.2d 407, 427 (3d Cir. 1953); Hudspeth v. McDonald, 120 F.2d 962, 968 (10th Cir. 1941) ("There is a vast difference between lacking the effective assistance of competent counsel and being denied the right to have the effective assistance of competent counsel."); United States *ex rel.* Wilkins v. Banmiller, 205 F. Supp. 123, 127-28 (E.D. Pa. 1962), *aff'd*, 325 F.2d 514 (3d Cir. 1963), *cert. denied*, 379 U.S. 847 (1964). *But see.* Brubaker v. Dickson, 310 F.2d 30, 32 n.3 (9th Cir. 1962) (rejecting "any such limited view of state responsibility for the fairness of the process by which the state deprives persons of life or liberty"). Moreover, the verbalization, if purposefully designed, serves to narrowly restrain the collateral attack review of counsel's performance. *See* Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

In some of the earliest ineffectiveness cases involving visible factors affecting adequacy, special weight was put on the trial court's powers of observation. The appellate courts trusted the vigilance of trial courts to observe, prevent and/or report those prejudicial influences on the

assistance."[18] Some attempts to define a standard with more precision have resulted in complete tautology, as in this example: accused has received incompetent counsel when, under all the circumstances of the particular case, accused has not been afforded genuine and effective representation.[19] An array of additional characterizations in numerous other opinions has not been instructive except to convey the basically abysmal level of representation necessary to maintain an ineffectiveness claim.[20] In many jurisdictions, little real difference exists, either in the conceptualization or in the application of the various general formulations.[21] Indeed, these formulations are frequently conjugated and cited interchangeably, breeding further confusion into whatever guidance the general wording affords.[22]

Tests of the mockery and farce genre evolved largely from a focus on due process, frequently in the posture of collateral attack. As this body of law developed in state courts, the decisions often relied not on state right to counsel provisions as the cornerstone of the right to effective assistance of counsel, but instead on the due process concept.[23] Under tests generally

defendant's case which might not appear on the record. Hanye v. State, 99 Ga. 212, 212, 25 S.E. 307, 308 (1896) (fatigue); Darbey v. State, 79 Ga. 63, 69, 3 S.E. 663, 666 (1887) (illness); Hudson v. State, 76 Ga. 727, 731 (1886) (intoxication); O'Brien v. Commonwealth, 115 Ky. 608, 621-22, 74 S.W. 666, 669 (1903) (intoxication); Territory v. Clark, 13 N.M. 59, 63, 79 P. 708, 709 (1905) (intoxication); State v. Bethune, 93 S.C. 195, 199, 75 S.E. 281, 282-83 (1912) (insanity). In none of these cases was a new trial granted.

The Supreme Court has also emphasized the role of the trial court in handling ineffectiveness. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970).

18. Williams v. United States, 443 F.2d 1151, 1152-53 (5th Cir. 1971), *quoting* MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961). *But see* Fitzgerald v. Estelle, 505 F.2d 1334, 1335-37 (5th Cir. 1974) (en banc), *cert. denied*, 422 U.S. 1011 (1975), discussed in text accompanying notes 62-68 *infra*. The language from *MacKenna* has also been used by the Ninth Circuit. *See* Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962).

19. Slater v. Warden, 241 Md. 668, 673, 217 A.2d 344, 346 (1966). *See also* Green v. Warden, 3 Md. App. 266, 269, 238 A.2d 920, 922 (1968). This test, referred to as "the Maryland Rule," was also adopted by Delaware. Harris v. State, 293 A.2d 291, 293 (Del. Super. Ct. 1972), *aff'd*, 305 A.2d 318 (Del. 1973).

20. *E.g.*, United States *ex rel.* Maselli v. Reincke, 383 F.2d 129, 132 (2d Cir. 1967) ("so 'horribly inept' as to amount to a 'breach of his legal duty faithfully to represent his client's interests' "); Dillane v. United States, 350 F.2d 732, 733 (D.C. Cir. 1965) ("extraordinary inattentiveness to a client's interests"); Hickock v. Crouse, 334 F.2d 95, 100-01 (10th Cir. 1964), *cert. denied*, 379 U.S. 982 (1965) ("good-faith representation, with all the skill that counsel possess"); Edgerton v. North Carolina, 315 F.2d 676, 678 (4th Cir. 1963) ("not afforded in any substantial sense professional advice and guidance"); Cofield v. United States, 263 F.2d 686, 688 (9th Cir. 1959), *sentence vacated*, 360 U.S. 472 (1959) (effective assistance "contemplates the conscientious service of competent counsel," not "mere perfunctory appearance"); Maye v. Pescor, 162 F.2d 641, 643 (8th Cir. 1947) ("an extreme case must be disclosed"); State v. Osgood, 266 Minn. 315, 325 n.2, 123 N.W.2d 593, 600 n.2 (1963) (consultations must be "sufficiently adequate to inform the accused of all of his legal rights under the law and facts involved"). *See also* Chambers v. Maroney, 399 U.S. 42, 60 (1970) (Harlan, J., dissenting) (whether, in the total picture, defendant was "deprived of rudimentary legal assistance").

21. *See* Goodwin v. Swenson, 287 F. Supp. 166, 183, 185 (W.D. Mo. 1968).

22. *See* United States *ex rel.* Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir. 1970), *cert. denied*, 402 U.S. 909 (1971); Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965) (conjugating the "rendering reasonably effective assistance" test with the farce, sham, perfunctory, bad faith performance, or pretense test).

23. *See, e.g.*, People v. De Simone, 9 Ill. 2d 522, 524, 138 N.E.2d 556, 557 (1956) (citing both federal and state due process provisions); Commonwealth v. O'Keefe, 298 Pa. 169, 171-73, 148 A. 73, 74 (1929) (same). Some state cases, among them some early counsel deficiency cases, did make reference to state constitutional provisions. *See, e.g.*, Sanchez v. State, 199 Ind. 235, 242, 157 N.E. 1, 4 (1927) (citing state constitutional provision containing various rights, but not

used in due process cases, it was traditional to ask whether a particular action rendered the trial a "sham or pretense";[24] therefore, it was foreseeable that these tests would be transferred over to claims of ineffectiveness raised by state prisoners. Even in the federal judicial system, however, the courts originally looked to the fifth amendment's due process requirement in formulating a standard by which to measure a federal prisoner's claim of ineffective counsel.[25] The use of the mockery and farce test by the federal courts was thus rooted in due process despite the fact that the sixth amendment governed. The reasons for the use of such tests in measuring even federal trial attorney competence are therefore instructive of some additional reasons shaping the mockery-type tests. First, the early notion was that the trial court had a limited responsibility in regard to counsel; the court's responsibility to honor the sixth amendment right to counsel was satisfied once reputable counsel had been appointed.[26] Strong concepts of agency were at play. The early opinions often involved retained counsel, and the courts viewed the mistakes of counsel as errors of an agent committed on behalf of the risk-bearing principal, the defendant.[27] Another reason for early use of the mockery test may have been attributable in part to the fact that it was articulated at a time when the claim frequently arose in the context of collateral attack via a writ of habeas corpus. Part of the early habeas corpus lore required that a claim of error could not result in upsetting a conviction unless the defect was so egregious that it conceptually had caused the trial court to "lose jurisdiction."[28] The mockery and farce test was consistent with that concept.

It was not until *Gideon* that the sixth amendment right to counsel, as a right beyond a general due process right, was made broadly applicable to the states. In recent years, the sixth amendment has come more forcefully to the fore on its own virtues, and it has a meaning more specific than the general

---

clearly stating which right was abused); Reliford v. State, 140 Ga. 777, 778, 79 S.E. 1128, 1129 (1913) (relying on state constitutional right to counsel). Occasionally, a case will refer to no constitutional or statutory provision at all. *See* Shaffer v. Territory, 14 Ariz. 329, 333, 127 P. 746, 748 (1912) ("a substantial right").

24. *See* Palko v. Connecticut, 302 U.S. 319 (1937):

> Fundamental too in the concept of due process, and so in that liberty, is the thought that condemnation shall be rendered only after trial. *Scott v. McNeal*, 154 U.S. 34 [1894]; *Blackmer v. United States*, 284 U.S. 421 [1932]. The hearing, moreover, must be a real one, not a sham or pretense. *Moore v. Dempsey*, 261 U.S. 86 [1923]; *Mooney v. Holohan*, 294 U.S. 103 [1935]. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. *Powell v. Alabama* . . . [287 U.S. 45 (1932)].

*Id.* at 327. The *Powell* case, referred to in this due process context in *Palko*, was a major case in the growth of the ineffective assistance of counsel claim.

25. Jones v. Huff, 152 F.2d 14, 15 (D.C. Cir. 1945); Diggs v. Welch, 148 F.2d 667, 668 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

26. Diggs v. Welch, 148 F.2d 667, 668 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

27. *See, e.g.*, People v. Stevens, 5 Cal. 2d 92, 98-99, 53 P.2d 133, 136 (1935); State v. Keller, 57 N.D. 645, 648, 223 N.W. 698, 699 (1929); State v. Dangelo, 182 Iowa 1253, 1256, 166 N.W. 587, 588 (1918).

28. On the scope of early habeas corpus, see Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 244-45, 262 (1965); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 465-66 (1960); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1042-62 (1970).

ambit of due process. Ineffectiveness claims are now tested against the sixth amendment rather than general due process norms, and some courts have given this as a reason to tighten counsel standards, moving away from the mockery and farce test.[29] At best, it is problematic whether this difference in constitutional foundation has caused a shift in treatment of the ineffective counsel claim, or whether it has been merely used by some courts as a convenient rationale on which to base an otherwise desired tightening of counsel performance. Notions of acceptable due process have themselves tightened considerably in recent times to the point where performances better only than farcical seem hard put to survive current due process scrutiny. Whatever the constitutional source of the ineffectiveness claim, it is clear that there has been a trend away from the mockery test despite the fact that a significant number of courts still purport to adhere to it.[30]

The Supreme Court itself has never relied on a mockery or farce test nor on one of similar ilk. The Court in *McMann v. Richardson*,[31] a 1970 case implicating the effective assistance of counsel on a guilty plea, recognized the validity of a claim of ineffectiveness but did not attempt to define the catch phrase, "the range of competence demanded of attorneys in criminal cases."[32] No Supreme Court cases have undertaken to define more precisely the acceptable range of competence demanded. *McMann* is important on several counts, some of which will be discussed later[33] and not the least of which is that it gave a clear Supreme Court boost to the ineffectiveness claim. In doing so, the Court's language stirred further discomfort with the mockery and farce test. By the time of *McMann*, some courts had already started to refine the mockery and farce test. For example, California attempted to refine its standards slightly, stating that if counsel's failure to investigate all defenses of fact and law amounts to a withdrawal of a crucial defense from the case, then effective counsel has been denied.[34] Despite the reluctance of some California courts to use this stricter standard,

29. *See* Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970) (dictum).

30. *See* cases cited note 16 *supra*.

31. 397 U.S. 759 (1970).

32. *Id.* at 771. Indeed, the Supreme Court in *McMann* declined to go beyond general observations and to define ineffectiveness more explicitly:

> Beyond this we think the matter . . . should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

*Id. McMann's* general formulation has been adhered to by the Supreme Court. *See* Tollett v. Henderson, 411 U.S. 258, 267 (1973).

33. See text & notes 188-90 *infra*.

34. People v. Hill, 70 Cal. 2d 678, 689, 452 P.2d 329, 334, 76 Cal. Rptr. 225, 230 (1969), *cert. denied*, 406 U.S. 971 (1972); People v. McDowell, 69 Cal. 2d 737, 746, 447 P.2d 97, 103, 73 Cal. Rptr. 1, 7 (1968); People v. Ibarra, 60 Cal. 2d 460, 464, 386 P.2d 487, 490, 34 Cal. Rptr. 863, 866 (1963); *see In re* Smith, 3 Cal. 3d 192, 202, 474 P.2d 969, 975, 90 Cal. Rptr. 1, 7 (1970). *See also* Bruce v. United States, 379 F.2d 113, 116-17 (D.C. Cir. 1967) ("gross incompetence of counsel" which has "blotted out the essence of a substantial defense").

recent cases in that state have indicated a willingness to measure counsel's competence against stricter standards of performance.[35] Pennsylvania began to ask in 1967 whether the course chosen by counsel had some reasonable basis designed to effectuate the client's interest,[36] and an Indiana case called for reasonable skill and diligence.[37] Another example of the pre-*McMann* attempt to soften the mockery and farce test can be seen in the development of the law in the United States Court of Appeals for the District of Columbia Circuit.

Notably, the District of Columbia Circuit's early cases were responsible for propagating much of the mockery and farce language adopted by other jurisdictions.[38] In 1967, however, writing for a panel of the District of Columbia Circuit in *Bruce v. United States*,[39] Judge Leventhal wrote:

> In earlier cases it was said that a claim based on counsel's incompetence cannot prevail unless the trial has been rendered a mockery and a farce. These words are not to be taken literally, but rather as a vivid description of the principle that the accused has a heavy burden in showing the requisite unfairness. Although the cases are rare and extraordinary, it appears that an accused may obtain relief under 28 U.S.C. § 2255 if he shows that there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense either in the District Court or on appeal.[40]

Moreover, the *Bruce* court recognized that "it would not be fruitful to attempt further delineation of the applicable standard by reference to generalities."[41]

---

35. The "withdrawal of a crucial defense" test, articulated in People v. Ibarra, 60 Cal. 2d 460, 464, 386 P.2d 487, 490, 34 Cal. Rptr. 863, 866 (1963), is still regularly applied. *See, e.g.*, People v. Lang, 11 Cal. 3d 134, 142, 520 P.2d 393, 398, 113 Cal. Rptr. 9, 14 (1974); People v. Benjamin, 52 Cal. App. 3d 63, 85, 124 Cal. Rptr. 799, 813-14 (1975); People v. Beal, 44 Cal. App. 3d 216, 219 n.1, 118 Cal. Rptr. 272, 273 n.1 (1974). In addition, the cases have inquired whether counsel did not effectively supply to the accused those skills and knowledge which can reasonably be expected from any member of the bar. People v. Cook, 13 Cal. 3d 663, 672-73, 532 P.2d 148, 154, 119 Cal. Rptr. 500, 506, *cert. denied*, 423 U.S. 870 (1975). *See also* People v. Camden, 16 Cal. 3d 808, 815, 548 P.2d 1110, 1114, 129 Cal. Rptr. 438, 442 (1976); People v. Steger, 16 Cal. 3d 539, 551, 546 P.2d 665, 673, 128 Cal. Rptr. 161, 169 (1976). The "farce, mockery or sham" language mentioned in *Ibarra* still appears in California cases. *See, e.g.*, People v. Romo, 14 Cal. 3d 189, 197, 534 P.2d 1015, 1020, 121 Cal. Rptr. 111, 116, (1975); People v. Strickland, 11 Cal. 3d 946, 956, 523 P.2d 672, 678, 114 Cal. Rptr. 632, 638 (1974).

36. Commonwealth *ex rel.* Washington v. Maroney, 427 Pa. 599, 608-09, 235 A.2d 349, 355 (1967).

37. Bays v. State, 240 Ind. 37, 50, 159 N.E.2d 393, 399 (1959) (direct appeal) (defendant must also show that by reason of counsel's error, he was constitutionally denied a fair trial). *See also* Lumbard, *The Adequacy of Lawyers Now in Criminal Practice*, 47 J. AM. JUR. SOC'Y 176, 178 (1964) (appointed counsel should devote "the time and attention which would be devoted to the case by the average criminal court lawyer who received a reasonable minimum fee"); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434, 1435 (1965) (suggesting the standard of a lawyer with "ordinary training and skill, conscientiously protecting his client's interests").

38. *See, e.g.*, Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); Edwards v. United States, 256 F.2d 707, 708 (D.C. Cir.), *cert. denied*, 358 U.S. 847 (1958); Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

39. 379 F.2d 113 (D.C. Cir. 1967).

40. *Id.* at 116-17 (footnotes omitted).

41. *Id.* at 117.

*Bruce*'s softening of the farce and mockery standard was emphasized three years later by the same court in *Scott v. United States*.[42] The *Scott* court, citing *Bruce* and deprecating a lower court's reference to the mockery standard, stated:

> That standard is no longer valid as such but exists in the law only as a metaphor that the defendant has a heavy burden to show requisite unfairness. . . . The 'farce and mockery' standard derives from some older doctrine on the content of the due process clause of the Fifth Amendment. What is involved here is the Sixth Amendment.[43]

Pointing out that the sixth amendment has overlapping but more stringent standards than the due process clause, the *Scott* court concluded that "the appropriate standard for effective assistance of counsel, set forth in *Bruce* . . . , is whether gross incompetence blotted out the essence of a substantial defense."[44] The *Scott* court suggested that future use of farce and mockery language was "undesirable" since "its retention even as a figure of speech may seem to confuse rather than clarify."[45]

In a later District of Columbia Circuit case, *United States v. DeCoster*,[46] a different panel in the circuit stated its belief that the *Bruce* standard might be still too restrictive, at least if the claim of ineffectiveness is raised on direct appeal rather than collateral attack. Instead of the "gross incompetence" language of *Bruce*, the *DeCoster* court asserted that "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."[47]

As noted, several other courts have moved toward a reasonable competence or normal competence standard.[48] As noted, too, the Supreme Court has not particularized any standard.[49] What little help regarding an actual standard can be gleaned from the Supreme Court's opinion in *McMann v. Richardson* comes from *McMann's* statement that in order for the defendant to invalidate a guilty plea on the basis of coercion flowing from constitutionally inadmissible evidence, the defendant "must demonstrate gross error on the part of counsel" or "serious derelictions."[50] This stan-

---

42. 427 F.2d 609 (D.C. Cir. 1970).
43. *Id.* at 610.
44. *Id.*
45. *Id.*
46. 487 F.2d 1197 (D.C. Cir. 1973).
47. *Id.* at 1202 (footnote omitted) (emphasis in original). *See also* Angarano v. United States, 312 A.2d 295, 299 (D.C. 1973) (suggesting that this test still would require an ultimate evaluation of whether a defense of substance was excluded by gross ineptitude).
48. *See* text & notes 36-37 *supra*.
49. *See* text & notes 31-32 *supra*.
50. 397 U.S. at 772, 774. The Court was considering what habeas corpus petitioners needed to show in order to establish that their New York pleas (entered before Jackson v. Denno, 378 U.S. 368 (1964), which invalidated New York procedure for determining involuntariness of confession) were not knowing and intelligent acts. In its opinion, the Court held that a state guilty plea was not subject to collateral attack in a federal court on the grounds that the

dard of gross error, if it is a standard, is not far removed from that articulated in *Bruce*,[51] and it may ultimately become a favored test, amorphous as it is.[52] Whether the standard for determining an unacceptable performance in a particular case ultimately is stated in terms of reasonable competence or some form of gross incompetence, it seems highly unlikely that the mockery and farce standard will be used indefinitely, at least in a literal sense. One could safely assume that no court would announce as its standard for admission to the bar that candidates who perform slightly above a mockery and farce level are acceptable. No law school would own up to such a standard for award of credits or degrees. Whatever the underlying reasons for maintenance of the mockery test, the courts cannot long continue its use in cases involving the consequences of criminal sanction.

The proliferation of ineffective assistance standards in the absence of a definitive Supreme Court resolution of a federal standard provokes more than abstract debate about the most appropriate standard; it could also lead to concrete frictions. For example, the disparity in standards creates the possibility that state courts and federal courts having jurisdiction within the same geographical area may have different interpretations of federal constitutional levels of counsel effectiveness. This difference is particularly significant when a petitioner convicted by a state court seeks habeas corpus relief in a federal court that demands a higher standard of counsel effectiveness than the state court requires.[53] In some cases, a federal court may decide that the exhaustion of state remedies requirement of habeas corpus[54] has been satisfied if a clearly established state standard of ineffectiveness would render petitioner's search for relief through state channels futile.[55]

Given the proliferation of standards, the question remains whether any of the standards are, in practice, helpful. None of these standards is self-

---

plea was motivated by a coerced confession unless the defendant was incompetently advised by his attorney. 397 U.S. at 768-72. It was in this context that the Court referred to gross counsel error in regard to entering the plea instead of going to trial and contesting the state procedure for assessing admissibility of confessions. *Id.* at 772.

51. 379 F.2d at 116-17. The language in *Bruce* of "blotting out the essence of a substantial defense" was made in the context of a trial (whereas the *McMann* question was one of advice on the law at a guilty plea) and, in any event, is really a reflection of the necessary prejudicial effect that must result from the ineffectiveness. See text & note 149 *infra*.

52. The gross error test may be frequently used to determine counsel effectiveness. *See* Commonwealth v. Marsh, 440 Pa. 590, 593, 271 A.2d 481, 483 (1970). *See also* Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 23 CRIM. L. REP. (BNA) 4042 (U.S. May 1, 1978) (White & Rehnquist, JJ., dissenting).

53. *See* Harris v. Towers, 405 F. Supp. 497, 502-03 (D. Del. 1974) (habeas corpus) (applying the Third Circuit's standard of normal competence to a Delaware state conviction, although Delaware used a less stringent standard). See text & note 19 *supra*.

54. *See* 28 U.S.C. § 2254(b) (1970).

55. A number of cases have held that state avenues for post-conviction relief need not be pursued where the state has recently made an authorative ruling which clearly would reject the federal habeas claim. *See* cases cited in Johnson v. Robinson, 509 F.2d 395, 397 n.10 (D.C. Cir. 1974). *See also* United States *ex rel.* Reis v. Wainwright, 525 F.2d 1269, 1272 (5th Cir. 1976) (state conviction challenged on federal habeas corpus, involving an ineffective assistance claim and application of the rule of Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974), *cert. denied*, 422 U.S. 1011 (1975), discussed in text & notes 62-68 *infra*).

answering; all are vague to some appreciable degree and all are susceptible to greatly varying subjective impressions. There exist obvious difficulties in using any of these standards in the necessarily ad hoc task of measuring individual counsel performances. Recognizing this, some courts have attempted to particularize reasonably competent attorney performance in specific cases.[56] In a like vein, the District of Columbia Circuit panel in *DeCoster* pointed to the American Bar Association Standards for the Defense Function as relevant general lawyer guidelines and then attempted to specify some particular counsel duties.[57]

The courts continue to reach for appropriate standards. There is a transition from the older standards to articulation of stricter but equally vague standards of performance. However, as was alluded to earlier,[58] the standards articulated for measuring ineffective counsel may be necessarily and intentionally vague. This is probably one of those areas of the law, so rich in variables, in which the courts wish to avoid imposing rigid rules and probably could not devise a rigid list if they attempted to do so. The result leaves maneuvering room for the courts as they seek, in applying the standards, to assess each claim in the totality of the circumstances.

*Applying the Standards*

One question that might be asked is whether there is a real difference among the various standards and their application. Certainly there can be differences of result if literally applied—but ineffectiveness tests probably are not applied literally in most instances. At the same time, the form of a standard may have an important effect in formulating a tone or an attitude for the reviewing court and the trial court and conceivably for the bar itself.

Moreover, there likely will be intermediate differences—differences not of ultimate result, but of consequences before the ultimate decision is made respecting the attorney's effectiveness. Involved here are important procedural consequences attendant upon a choice of standard, at least between the mockery-type standard, on one hand, and the reasonable or gross competence tests, on the other. The most apparent of these procedural consequences is whether or not a court must provide an evidentiary hearing when a defendant claims ineffectiveness.[59] The more base the standard—the more a particular standard is oriented toward the mockery-type test—the easier it will be for a court to find that the pleading requires no evidentiary

56. *See* Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

57. *See* 487 F.2d at 1203-04 & 1203 n.25. The ABA standards themselves caution that they are not intended as criteria for the judicial evaluation of the effectiveness of counsel to determine the validity of a conviction; they may or may not be relevant in such judicial evaluation, depending on the circumstances. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION § 1.1(f) (Approved Draft, 1971); *see* 487 F.2d at 1203 nn. 23 & 25.

58. See text & note 9 *supra*.

59. *See* Mitchell v. United States, 259 F.2d 787, 793-94, *cert. denied*, 358 U.S. 850 (1958).

hearing since the allegations of ineffectiveness will have to be proportionately more extensive and pervasive.

The reasonableness tests, as well as the mockery tests, call for case-by-case determinations since precedents of broad general value are scarce in this area. Such case-by-case treatment is familiar to courts in analogous areas of tort law, but the substantive aspects of those cases will be of minimal help. Anyone who has spent library time trying to unearth decisive precedents for that unreasonably believing police officer who acts without probable cause, or for that precedent which would easily foretell whether a particular line-up was unnecessarily suggestive or a confession involuntarily obtained in the totality of the circumstances or a particular error harmless, is already in a position to know that there is no formula that will, or should, work mechanically in the ineffectiveness area. The best that can be done is to isolate relevant factors and apply them with an eye on the realities of defense work and on the vital constitutional right involved.

A second major question related to the application of standards is whether different standards ought to be applied to different classes of cases. An example of this question arises when counsel is retained rather than appointed. Here, too, the ineffectiveness law remains in a transitional state on a key issue, even though the issue is an old one.

By way of prelude on this issue, we can remind ourselves of two lines of cases which reflect the debate over the degree of state action necessary to support an ineffectiveness claim. First, there is a general and long-running debate in some courts about the extent to which ineffective assistance claims can be maintained at all if the attorney was retained, as distinguished from appointed.[60] Second, in appraising counsel adequacy, some courts have tried to define what constitutes unacceptable performance by reference to how obvious the inadequacy was to the trial court or other state officers; some cases have said that ineffective assistance is representation "so lacking in competence that it becomes the duty of the court or the prosecution to

60. *Compare* Fitzgerald v. Estelle, 505 F.2d 1334, 1336-38 (5th Cir. 1974) (en banc), *cert. denied*, 422 U.S. 1011 (1975); Plaskett v. Page, 439 F.2d 770, 771 (10th Cir. 1971); Franklin v. State, 251 Ark. 223, 227-28, 471 S.W.2d 760, 763 (1971); Harrell v. State, 139 Ga. App. 556, 559-60, 228 S.E.2d 723, 726 (1976); Suarez v. State, 338 So. 2d 546 (Fla. Ct. App. 1976); *and* State v. Witte, 280 Minn. 116, 119, 158 N.W.2d 266, 268 (1968), *with* Blanchard v. Brewer, 429 F.2d 89, 90 (8th Cir. 1970), *cert. denied*, 401 U.S. 1002 (1971); Maldonado v. State, 265 Ind. 492, 501-02, 355 N.E.2d 843, 850 (1976); *and* Moultrie v. State, 542 S.W.2d 835, 837 (Tenn. Crim. App. 1976). *See generally* Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 980-83 (1973); Craig, *The Right to Adequate Representation in the Criminal Process: Some Observations*, 22 SW. L.J. 260, 272 (1968); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 296-301 (1964); Note, *Incompetency of Counsel*, 25 BAYLOR L. REV. 299, 308-16 (1973) [hereinafter cited as *Incompetency of Counsel*]; *Note, Ineffective Assistance of Counsel and Post-Conviction Relief in Criminal Cases: Changing Standards and Practical Consequences*, 7 COLUM. HUMAN RIGHTS L. REV. 427, 436-39 (1975) [hereinafter cited as *Ineffective Assistance of Counsel*]; Note, *supra* note 37, at 1437-38; Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531, 1531-35 (1961) [hereinafter cited as *Effective Assistance of Counsel*].

observe it and correct it."[61] With these two lines of cases in mind, consider the decision of the United States Court of Appeals for the Fifth Circuit in *Fitzgerald v. Estelle*.[62] There the majority said that it will apply different standards for measuring effectiveness when counsel is retained rather than appointed.[63] In reaching its decision, the court relied on a constitutional dichotomy. The court concluded that sixth amendment standards require a greater degree of competence than the fundamental fairness standards of due process.[64] The former standards were then held to be applicable to state cases through the fourteenth amendment only when some form of state action is present, while the latter standards are applicable in all cases, regardless of the degree of state involvement (appointed or retained counsel).[65] *Fitzgerald* held that if counsel is retained, only ineffectiveness which is known to, or should have been known to the trial judge or state officials, or which renders the trial fundamentally unfair, invalidates a state conviction.[66] That is, whenever any attorney's action deprives a state defendant of fundamental fairness at trial, the claim can be sustained. However, if counsel is retained and a claim is made of ineffectiveness which appears under sixth amendment scrutiny but does not deprive the defendant of fundamental fairness, the ineffectiveness must be such that the judge or prosecutor should have known of it and remedied it. This is a rather unique view and is open to criticism,[67] but it does exemplify how a court may choose to apply to different classes of cases different standards for testing ineffectiveness.[68]

There is little reason to set forth here a litany of how the courts have applied the various standards to particular factual settings. The law journals are filled with such catalogues.[69] But it is deserving of note that the types of claims may be loosely grouped into two categories, one of which presents the courts with a much more difficult task of application.

61. See text & note 17 *supra*.
62. 505 F.2d 1334 (5th Cir. 1974) (en banc), *cert. denied*, 422 U.S. 1011 (1975).
63. *Id.* at 1336-37.
64. *Id.*
65. *Id.* at 1337.
66. *Id.* at 1338.
67. *See* 89 HARV. L. REV. 593 (1976). The Fifth Circuit's position is opposite that of the Third Circuit, which rejects distinctions between state fourteenth and sixth amendment standards or between retained and appointed counsel. Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (en banc). The question of dual constitutional standards is discussed in Bines, *supra* note 60, at 934-36 & 936 n.47.
68. *See also* United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973) (possibility of different standards for claims raised on direct appeal compared with those raised on collateral attack).
69. The literature on various aspects of ineffective assistance of counsel continues to increase, and it provides further exposition on many of the topics touched upon in this Article. *See, e.g.*, Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975); Bazelon, *supra* note 16; Campbell, *Criminal Procedure*, 63 KY. L.J. 701 (1975); Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 MO. L. REV. 483 (1976); Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache*, 5 HOFSTRA L. REV. 315, 324-30 (1977); Strazzella, *Ineffective Identification*

The first category involves such claims as impermissible external pressures exerted on counsel,[70] conflicts of interest,[71] counsel's personal ethical inhibition against advocating a criminal case,[72] presumed counsel incapacity due to intoxication[73] or mental illness,[74] and egregious professional incompatibility between counsel and client.[75] Professor Waltz has aptly described such claims as those involving "extrinsic" factors interfering with counsel's adequacy.[76] These claims appear more easily confronted by the courts than other claims. Such claims are not necessarily easier to dispose of, but on a spectrum of ineffectiveness claims, they are usually resolved more manageably. Claims of this nature may be referred to as recurring claims indirectly involving the quality of counsel's representation,

---

*Counsel: Cognizability Under the Exclusionary Rule*, 48 TEMP. L.Q. 241, 243 nn. 16 & 17 (1975); Note, *Right to Effective Counsel: A Judicial Heuristic*, 2 AM. J. CRIM. L. 277 (1973); *Incompetency of Counsel, supra* note 60; *Ineffective Assistance of Counsel, supra* note 60; Note, *Ineffective Assistance of Counsel and the Harmless Error Rule: the Eighth Circuit Abandons Chapman*, 43 GEO. WASH. L. REV. 1384 (1975); Note, *Standards of Attorney Competency in the Fifth Circuit*, 54 TEX. L. REV. 1081 (1976); Note, *Effective Assistance of Counsel: A Constitutional Right in Transition*, 10 VAL. L. REV. 509 (1976); Note, *The Emerging Right to Effective Assistance of Counsel*, 14 WASHBURN L.J. 541 (1975); Note, *Effective Assistance of Counsel and the Right to a Fair Trial*, 22 WAYNE L. REV. 913 (1976); Comment, *Ineffective Assistance of Counsel: Who Bears the Burden of Proof?*, 29 BAYLOR L. REV. 29 (1977); Comment, *The Right to Effective Counsel in Criminal Trials: Judicial Standards and the California Bar Association Response*, 5 GOLDEN GATE L. REV. 499 (1975); Comment, *Kentucky's Standard for Ineffective Counsel: A Farce and a Mockery?*, 63 KY. L.J. 803 (1976); Comment, *Liberal Review of Defense Counsel's Performance: The Normal Competency Test*, 1976 U. ILL. L. FORUM 407; Comment, *Inadequate Representation of Counsel in Criminal Cases: The Need for a New Approach*, 9 U.S.F.L. REV. 166 (1974); 45 U. CINN. L. REV. 514 (1976).

70. Roper v. Territory, 7 N.M. 255, 264, 33 P. 1014, 1016 (1893); *see* Moore v. Dempsey, 261 U.S. 86 (1923) (mob atmosphere influenced entire trial, including attorney's representation); *cf.* United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71 (5th Cir.), *cert. denied*, 361 U.S. 850 (1959) (white southern attorneys failed to raise exclusion of black potential jurors), discussed in Waltz, *supra* note 60, at 311-13. *See also* Note, *The Right to Effective Counsel in Criminal Cases*, 18 VAND. L. REV. 1920, 1923-25, 1927 (1965); Comment, *Effective Representation—An Evasive Substantive Notion Masquerading as Procedure*, 39 WASH. L. REV. 819, 827-28 (1964).

71. *See, e.g.*, Holloway v. Arkansas, — U.S. —, 98 S. Ct. 1173 (1978); Dukes v. Warden, 406 U.S. 250 (1972); Glasser v. United States, 315 U.S. 60, 67–76 (1942); Peek v. United States, 321 F.2d 934, 944 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964); People v. Chacon, 69 Cal. 2d 765, 774-77, 447 P.2d 106, 113, 73 Cal. Rptr. 10, 15-17 (1968). *See also* Note, *Criminal Co-Defendants and the Sixth Amendment: The Case for Separate Counsel*, 58 GEO. L.J. 369 (1969); Note, *Incompetency of Counsel as a Ground for Attacking Criminal Convictions in California and Federal Courts*, 4 U.C.L.A. L. REV. 400, 409 (1957); *Effective Assistance of Counsel, supra* note 60, at 1546-48.

72. *See, e.g.*, Ellis v. United States, 356 U.S. 674 (1957) (representation in role of advocate required); Johns v. Smyth, 176 F. Supp. 949, 952 (E.D. Va. 1959); ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON NO. 2, EC 27-29 (1976); Thode, *The Ethical Standard For the Advocate*, 39 TEX. L. REV. 575, 583-84 (1961). The ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION § 1.1, Comment b (Approved Draft, 1971), states:

> But it is part of counsel's obligation of fidelity to his client that in his role as advocate, his conduct of the case not be governed by his personal views of right or justice but by the task he has assumed of furthering his client's interest to the fullest extent that the law and the standards of professional conduct permit.

73. *See, e.g.*, Hudson v. State, 76 Ga. 727, 731 (1886); O'Brien v. Commonwealth, 115 Ky. 608, 620-22, 74 S.W. 666, 669 (1903); Territory v. Clark, 13 N.M. 59, 63, 79 P. 708, 709 (1905). These are early cases and it is difficult to believe that courts today would expressly tolerate the levels of intoxication alleged.

74. *See* State v. Bethune, 93 S.C. 195, 199, 75 S.E. 281, 282-83 (1912).

75. *Cf.* Dyer v. United States, 379 F.2d 89 (D.C. Cir. 1967) (uncooperative client resulting in attorney's unpreparedness; court cites no cases in granting relief).

76. Waltz, *supra* note 60, at 326-41.

characterized by some intervening interest coming between defense counsel and the client's interest. As they confront the courts, claims of this nature generally require less quantification of the performance rendered by the defense attorney, and prejudice is clear or presumed. The claims deal largely with some discernible fact that involves no real possibility of a conscious exercise of attorney judgment that might be labeled a tactical decision. These claims are also generally devoid of the court-feared possibility that the defendant and the defense attorney are colluding to raise such a claim in order to overturn the defendant's conviction,[77] or that the defendant is simply second-guessing counsel's decisions following a guilty verdict. Moreover, these claims entail minimal risk of unduly stigmatizing a good faith effort by counsel. These significant reasons for the courts' greater facility in dealing with recurring claims indirectly involving the quality of counsel's representation merit a brief highlighting.

First, the conclusion of ineffectiveness or effectiveness is easily drawn once a certain and definable antecedent fact is either established or not proved. There is also a professional consensus that the antecedent condition or interest, once shown, creates ineffectiveness.[78] What remains for decision is a factual determination not unlike those frequently confronted by the courts in a host of other contexts: Was there a coercive atmosphere inhibiting counsel's representations? Did a conflict of interest exist in counsel's representation of multiple defendants? Did counsel and client reach a noncommunicative impasse in their relationship? Did counsel act in accordance with a belief that he should not advocate acquittal in view of a personal knowledge or belief in his client's guilt? The court's task is generally more factual, more concrete, and less slippery than in the absence of an ascertainable condition, interest, or conflict. The task involves little in the way of retrospectively sorting out deliberate decisions from negligence, nor does it involve second-guessing counsel's judgment or tactics. Once there is an established set of facts, application of the standard is not overly difficult.

Second, the fears of courts often expressed in effectiveness cases are all less palpable here. The possibility of the defense deliberately creating a claim of ineffectiveness,[79] the ease of assertion by a desperate individual convicted and jailed,[80] the lawyer's difficulty of defending against such a claim, and the potentiality of rehashing an entire case under the banner of

77. Cross v. United States, 392 F.2d 360, 367 (8th Cir. 1968); United States *ex rel.* Maselli v. Reincke, 383 F.2d 129, 133 (2d Cir. 1967); People v. Mitchell, 411 Ill. 407, 104 N.E.2d 285, *cert. denied*, 343 U.S. 969 (1952); State v. Dreher, 137 Mo. 11, 23, 38 S.W. 567, 570 (1897). *But see* Note, *supra* note 37, at 1438 n.23 ("[I]t is unlikely that most lawyers would adopt such a strategy when its success may involve their being declared incompetent by a reviewing court.").

78. For example, the profession has formulated widely accepted standards concerning conflicts of interest. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON NO. 5 (1976).

79. See text & note 77 *supra*.

80. Diggs v. Welch, 148 F.2d 667, 669-70 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

ineffectiveness[81] all represent concerns not present in situations involving intervening interests.

Finally, the underlying factual condition is of a type that affronts the integrity of the court. The advocacy denied is of such recognized traditional importance in the adversary system that the court easily accepts the necessity of dealing with such claims in order to protect its own integrity.

In a second category of cases the ineffectiveness question is much more ethereal. Professor Waltz characterizes these cases as those involving claims of "intrinsic" ineffectiveness.[82] In this category are the cases in which there is no easy fact antecedent which, if established, would lead the profession to a consensus belief of ineffectiveness. Basically, the claim is that the lawyer did not do enough because of his or her own shortcomings.[83] The assistance complained of may or may not be adequate, yet the court cannot assuage itself by discovering a simple factual predicate or condition on which to hang its judgment. Instead, the court is involved in sorting out counsel's negligence from counsel's considered decisions, while confronting the fears expressed above. The type of ineffective assistance directly involving the quality of counsel's representation may just as seriously jeopardize the rights of a criminal defendant, and if it goes unremedied, it may just as gravely affront the integrity of the process as the more easily dealt with indirect attack on quality of representation. The question presented to the court is whether the quality of performance actually rendered fails to attain a standard of adequacy or effectiveness. The answer requires the ascertainment of the service actually rendered by counsel, which is often obscured by unrecorded lawyer activity or inactivity and attorney-client dealings, a determination of the reasons for the actions or omissions, and possible measurement of the type of representation feasible and necessary in the particular case.[84] These amorphous ingredients must be quantified, blended, and poured into a measuring cup defined in vague terms. The process would hardly delight a mathematician; yet the courts must deal with the serious

81. *Id.* at 670.
82. Waltz, *supra* note 60, at 301-26.
83. *See* Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).
84. Consider also, for example, some particular difficulties in the application of either the Supreme Court's language in *McMann*, stating that the attorney must perform within the range of competence demanded of attorneys in criminal cases, 397 U.S. at 771, or any negligence type of standard. *See* Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (en banc) (customary skill and knowledge reasonably prevailing at the time and place). Such tests require a comparison of the attorney's performance against the norm of some community of lawyers. Against what community of lawyers is the attorney to be judged? The profession nationally, or locally? And, if locally, how locally? Within the state? Within the county? Within the regular criminal bar of the court involved? *See* Harris v. Towers, 405 F. Supp. 497, 502-03 & 503 n.6 (D. Del. 1974). Such issues arise in medical malpractice cases, but the issue is complicated in ineffectiveness cases by constitutional considerations. For a discussion of the debate on community standards in obscenity cases, which involves constitutional considerations, see Miller v. California, 413 U.S. 15, 24 (1973).

problems raised in direct as well as indirect challenges to the quality of counsel's representation.

## TARGETS AND TIMING

Numerous pressing aspects of ineffectiveness claims deal not with the larger questions of appropriate standards, but rather with varied procedural aspects of the claim. Here, too, there is a transition in law and an evolution of procedural devices and requirements.

At one time, claims of ineffective assistance were frequently synonymous with an assertion on collateral attack that trial counsel had performed inadequately. This is no longer the case. Claims that trial counsel performed inadequately, either at trial or on a plea of guilty, still lead the scoreboard of ineffectiveness claims, but they have been joined by other possibilities in the post-*Gideon* expansion of the right to counsel. For example, ineffective sentencing advocacy has been noted,[85] and it now seems that a claim of ineffective performance by counsel on an appeal of right is viable.[86] Claims have even been broached that ineffective line-up counsel call for relief, although the viability of such claims ought to be questioned,[87] and representation by preliminary-hearing counsel has been contested.[88] Each of these claims presents varied procedural problems. Alleged trial counsel ineffectiveness presents one good example of these procedural problems.

### *Trial Counsel*

At the trial court level, the underlying factual allegation may range through claims such as failure to properly investigate or otherwise prepare, late appointment depriving the attorney of adequate time to prepare, failure to interview or call or cross-examine witnesses, failure to make a variety of motions, failure to object to a variety of evidence or to raise certain defenses, and failure to make appropriate statements to the jury. The claim that trial counsel was ineffective can arise in either of two principal procedural settings: on direct appeal or on collateral attack.

In most jurisdictions, the claim of ineffective trial counsel is one which can possibly be litigated in the first instance on direct appeal of the trial court judgment.[89] Indeed, if it has not been raised initially on direct appeal, some jurisdictions apply a forfeiture rule, holding that such a claim cannot be asserted on a subsequent collateral attack, unless the defendant can show

85. *See* text & note 137 *infra*.
86. *See* text & notes 102-36 *infra*.
87. *See* text & note 139 *infra*.
88. *See* text & note 140 *infra*.
89. *See* State v. Farni, 112 Ariz. 132, 133, 539 P.2d 889, 890 (1975); People v. Spicer, 42 Ill. App. 3d 246, 252, 355 N.E.2d 711, 715 (1976). *See also* United States v. Agurs, 427 U.S. 97, 102 n.5 (1976) (disposing of ineffectiveness point while dealing with related appeal following new trial motion).

some justification for not having raised the claim initially on appeal.[90] An actual or potential conflict of interest on the part of appellate counsel may be such a valid excuse for not having raised the claim initially on direct appeal. The attorney on appeal is often the trial attorney. This is true not only in retained cases, but in appointed cases, with many jurisdictions making it standard practice to continue with the same attorney on direct appeal. When the trial and appellate attorney are the same, the conflict problem arises. Occasionally, an appellate attorney will claim that he or she was ineffective at trial.[91] However, this is not only unusual, but also sometimes raises court suspicion of collusion, and surely raises problems of conflict of interest and less than zealous advocacy.[92] Related conflict questions arise when a defendant's appellate public defender is from the same office as his trial public defender. There is, understandably, a great hesitancy on the part of appellate counsel to assess or litigate the trial ineffectiveness claim in such a situation, and a collateral attack court may refuse to apply the forfeiture-of-claim principle and allow the claim to be raised for the first time on collateral attack.[93]

To short-circuit the conflict problem, it might be expected that an appellate attorney who finds himself or herself in a conflict situation will seek to withdraw from the case on appeal in order to avoid the conflict rather than ignore the potential ineffectiveness claim altogether. The withdrawal course of action raises its own procedural difficulties, however. What showing is necessary before counsel will be allowed to withdraw? That is, what degree of particularity in pleading will be imposed? The issue has

90. *See* York v. State, 208 Kan. 946, 948, 495 P.2d 87, 89 (1972); Johnson v. Warden, 89 Nev. 476, 477, 515 P.2d 63, 63-64 (1973); Commonwealth v. Dancer, 460 Pa. 95, 99-100, 331 A.2d 435, 437 (1975) (claim can only be raised on collateral attack when: petitioner was represented by same counsel on appeal as at trial; grounds on which the claim is made do not appear in trial record; petitioner can prove other extraordinary circumstances; or petitioner rebuts the presumption of a knowing and understanding failure to raise ineffectiveness of trial counsel on direct appeal). *See also* Commonwealth v. Hubbard, 472 Pa. 259, 276 n.6, 372 A.2d 687, 695 n.6 (1977) (applying rule to failure of new counsel on post-verdict motion to raise alleged ineffectiveness).

91. While uncommon, it is not unheard of for counsel to argue on appeal that his or her own representation at trial was lacking for one reason or another. *See* Carter v. United States, 281 F.2d 58 (D.C. Cir. 1960) (counsel unsuccessfully suggested ineffectiveness due to own failure to cross-examine one witness). *See also* United States v. Agurs, 427 U.S. 97, 102 n.5 (1976) (trial counsel requested leave to withdraw so substitute counsel could argue ineffectiveness on new trial motion); Johnson v. United States, 328 F.2d 605, 605 (5th Cir. 1964) (trial counsel filed motion for new trial; charged self with lack of experience requisite for fair trial and lack of time and inclination to properly investigate and prepare); People v. Blevins, 251 Ill. 381, 388-90, 96 N.E. 214, 217-18 (1911) (trial counsel filed pretrial motion asserting own inexperience in face of overwhelming and intimidating array of experienced private counsel assisting prosecutor; asked court to limit state attorneys).

92. *See* Angarano v. United States, 329 A.2d 453, 458 (D.C. Ct. App. 1974); Shelton v. United States, 323 A.2d 717 (D.C. Ct. App. 1974).

93. *See* McClain v. People, 15 Ill. App. 3d 929, 933, 305 N.E.2d 423, 426 (1973). Because of the inherent conflict of interest which arises when a defendant is represented by a public defender and an appeal is taken by a different public defender from the same office, the fact that the effectiveness issue was not raised on appeal will not preclude raising the claim on collateral attack. *Id.* at 933-34, 305 N.E.2d at 426.

evoked debate both in this context[94] and similar pleading contexts when trial counsel seeks to withdraw because of attorney-client problems.[95] Must the defense attorney give the particulars of why he or she believes a fellow public defender might have been ineffective, or can there be a relatively bald assertion of possible ineffectiveness coupled with the withdrawal motion, leaving the particulars to be transmitted to the subsequent attorney for objective appraisal?

Several other types of problems also arise when claims of ineffective assistance of trial counsel are asserted on direct appeal. Motives for counsel's trial action, or inaction, and numerous other facts often do not appear in the trial record available on appeal so that the claim, if raised on direct appeal, may necessitate an evidentiary-type hearing.

In recognition of the limitations of direct appeal as a vehicle for litigating counsel's ineffectiveness, some jurisdictions have given the defendant an option, allowing the claim to be raised initially either on direct appeal or on collateral attack.[96] A minority of jurisdictions now seem to refuse to entertain the claim at all on direct appeal. This refusal flows from the belief that the claim is more properly a matter for post-conviction relief, given the evidence-taking ability of post-conviction proceedings and the consequently more complete record.[97] However, collateral attack does have some disadvantages, including the lack of a time constraint on when the

94. *See* Angarano v. United States, 329 A.2d 453 (D.C. Ct. App. 1974) (opinions on petition for rehearing). Recently, in Holloway v. Arkansas, — U.S. —, 98 S. Ct. 1173 (1978), the Supreme Court placed heavy reliance on counsel's representations of conflict of interest, made in timely pretrial motions seeking appointment of separate trial counsel for multiple defendants. At the same time, the majority acknowledged the courts' authority to explore appropriately the adequacy of the basis for counsel's representations. *Id.* at 1179-80.

95. Trial court motions to withdraw, presented by counsel who believes some recognizable factor is making the attorney ineffective, also present the question of how specific the grounds for the request must be. Here, however, the problem may be accentuated if it involves disturbing the attorney-client relationship in a way that might, in some cases, indicate to the trial tribunal the guilt of the defendant. *See* Thorton v. United States, 357 A.2d 429, 432-34 (D.C. Ct. App. 1976); Carter v. Bordenkircher, 226 S.E.2d 711, 713-14 (W. Va. 1976). This problem is especially acute if the case is tried without a jury. *Cf.* Levin & Cohen, *The Exclusionary Rule in Nonjury Cases*, 119 U. PA. L. REV. 905 (1971) (discussing difficulties of judge adjudicating guilt when otherwise inadmissible evidence is known). *See also* Holloway v. Arkansas, — U.S. —, 98 S. Ct. 1173, 1180 n.11 (1978).

96. Mikulovsky v. Shubert, 416 F. Supp. 55, 59 (E.D. Wis. 1976) (claim of ineffective trial counsel can be raised under state law on collateral attack regardless of whether defendant has sought direct appellate review); Peterson v. State, 237 So. 2d 223 (Fla. Dist. Ct. App. 1970) (court indicates that even though claim of ineffective trial counsel could have been, but was not, raised on direct appeal, it is a proper motion for collateral attack). In State v. Knaffla, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976), the court concluded that although the claim may be raised in the first instance on either direct appeal or collateral attack, if the defendant does elect to take an initial appeal but fails to raise the claim at that time, a forfeiture doctrine will apply in a subsequent collateral attack. *See also* State v. Watson, 114 Ariz. 1, 15, 559 P.2d 121, 135 (1976), *cert. denied*, 430 U.S. 986 (1977) (effectiveness not found in direct appeal record may be shown by post-conviction motion).

97. In State v. McClain, 541 S.W.2d 351 (Mo. Ct. App. 1976), the court refused to entertain a claim of ineffective trial counsel on appeal; no motion for a new trial had been filed prior to the appeal. *Id.* at 357. The rationale was based on the fact that a post-conviction court would have a more complete record upon which to decide the claim. *Id. See also* Covington v. State, 34 Md. App. 454, 465-66, 367 A.2d 974, 980 (Ct. Spec. App. 1977).

prisoner may file the claim. The motives of the defendant who may be pressed for a viable claim are more suspect as time goes on, and the ability of the parties and the court to later reconstruct anything like a reasonable facsimile of what actually happened dissipates. A rational case can be made for saying that many of the standards for testing ineffectiveness have been devised in response to these procedural problems, as well as in response to broad philosophies on how final criminal trials should be and how attacks on the bar are tolerated by the courts.[98] While most claims of trial counsel ineffectiveness arise on collateral attack or direct appeal, issues of ineffectiveness might possibly arise on the initiation of the trial judge. Are there ever occasions when a court sua sponte should take note of plain ineffectiveness and relieve counsel? Even aside from obvious cases such as intoxication, an affirmative response seems clear. In fact, as mentioned earlier, some courts have made the test of inadequacy whether the deficiency was apparent to the court or the prosecution.[99] The plain import of these opinions is that a duty is imposed on the trial court to act sua sponte sometimes, and a similar duty is imposed on the prosecutor. What is not so plain is how, in a particular case, the court and the prosecutor are to meet this responsibility without infringing on the defense attorney-client relationship.

*Plea of Guilty*

Counsel's representation on a plea of guilty will occasion frequent attack. In fact, the Supreme Court conclusion in the *McMann* line of cases,[100] that certain guilty pleas can only be successfully contested with a showing of ineffectiveness of plea counsel, heightens the likelihood of ineffectiveness claims being leveled against counsel performance at the plea stage. Attorneys' trial decisions often present a more attractive target for ineffective assertions, but the claims of ineffectiveness on pleas present many procedural problems similar to those discussed above. The most widespread problem that arises when plea counsel is challenged is that nearly every relevant fact will be not-of-record at the time the claim is made, and a hearing is likely to be required.[101]

98. *See generally* Bines, *supra* note 60, at 939-46. Bines suggests that considerations arising from habeas corpus and similar post-conviction remedies have influenced proponents of both a more lenient, mockery and farce type standard of effectiveness and of a stricter, normal competency type standard. He further argues that the standard should be derived from substantive constitutional norms and that the procedural aspects of raising an ineffectiveness claim need not influence the standard.

99. *See* Fitzgerald v. Estelle, 505 F.2d 1334, 1337 (5th Cir. 1974) (en banc), *cert. denied*, 422 U.S. 1011 (1975); text & note 17 *supra*.

100. McMann v. Richardson, 397 U.S. 759 (1970); *see* Tollett v. Henderson, 411 U.S. 258 (1973); Parker v. North Carolina, 397 U.S. 790 (1970); Brady v. United States, 397 U.S. 742 (1970).

101. Counsel and the court may be able themselves to put on record at the time of the plea some of the advice which would seem to preclude a successful claim of ineffective counsel, and it is interesting that, in the plea area, it is more possible than in others to devise a concrete list of what counsel ideally should do. *See generally* Bazelon, *The Defective Assistance of Counsel*, 42 U. CINN. L. REV. 1, 34-37 (1973); Bines *supra* note 60, at 983-86; *Ineffective Assistance of Counsel*, *supra* note 60, at 434; Note, *supra* note 37, at 1440-42.

*Appellate Performance*

Counsel's performance on appeal also presents a target for attack. Issues concerning counsel's failure to advise a defendant of a right to appeal or failure to perfect a timely appeal are reasonably frequent and are manageably dealt with by the courts.[102] Aside from such issues, however, once an appeal has been perfected, the quality of representation on appeal can itself become an issue, although a less frequently litigated issue than trial counsel's performance. Here again, the law is in a formative stage.[103]

There are some factors which inhibit frequent claims against appellate counsel. Who is to point out to the defendant-appellant, for later erection of the claim, the deficiencies in appellate representation? Fault-finding here is made difficult in view of the complexity of law involved in appellate representation. Appellate law defects are typically more obscure than many of the fact oriented claims, visible to laymen, arising from trial representation. At the same time, a claim of appellate ineffectiveness can have an attraction to a petitioner who is eager to avoid a finality-based rule that may foreclose collateral attack litigation of mere error or nonconstitutional claims which have been raised on a direct appeal.[104] Successful assertion of the appellate counsel claim will avoid the foreclosure that results from failure to raise errors on direct appeal. It may also provide a vehicle for court reexamination of a considered and rejected claim which earlier was inadequately exposed by counsel.[105]

Issues concerning the quality of appellate representation can arise in two principal ways, which may be viewed either as two different classes of

102. *See, e.g.*, Boyd v. Cowan, 494 F.2d 338 (6th Cir. 1974); Chapman v. United States, 469 F.2d 634, 636 (5th Cir. 1972); McAuliffe v. Rutledge, 231 Ga. 745, 204 S.E.2d 141 (1974); Perkins v. Commonwealth, 516 S.W.2d 873 (Ky. 1974), *cert. denied*, 421 U.S. 971 (1975); Shipman v. Gladden, 253 Or. 192, 453 P.2d 921 (1969); Carter v. Bordenkircher, 226 S.E.2d 711 (W. Va. 1976); *cf.* Entsminger v. Iowa, 386 U.S. 748, 751-52 (1967) (procedure, including appellate counsel's failure to file record needed to insure the plenary appeal requested by defendant, denied defendant adequate and effective appeal). See text & notes 70-81 *supra*.

103. On appellate ineffectiveness generally, see Finer, *Ineffective Counsel*, 58 CORNELL L. REV. 1077, 1111 (1973); Marer, *Effective Criminal Appellate Advocacy: Seeking Reversal by Concurrent Collateral and Direct Attacks in the Appellate Courts*, 27 HASTINGS L.J. 333 (1975); Note, *supra* note 37, at 1446-47.

104. *Cf.* Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958) (trial errors), which states:

> It is well established that the acts of counsel specified by Mitchell [failure of counsel to move for acquittal, to cross-examine, to object to hearsay, to object to erroneous jury charge] do not, in and of themselves, entitle him to relief under [28 U.S.C.] Section 2255. A judgment of conviction cannot successfully be attacked collaterally on such grounds, and a motion under Section 2255 is a collateral attack. Therefore, in order to get standing upon such a motion, Mitchell has bundled the alleged failures together and contends that, taken together and in sum total, they constitute ineffective assistance of counsel, violative of the Sixth Amendment and therefore raisable under a collateral motion.

*Id.* at 789. For another instance of a court recognizing an ineffective assistance claim as a device to raise another issue (incompetency of defendant to participate in proceedings) resolved against the petitioner, see Taylor v. United States, 330 F.2d 157, 158 (8th Cir. 1964).

105. *See* People v. Frank, 48 Ill. 2d 500, 503-04, 272 N.E.2d 25, 27-28 (1971); Commonwealth v. Sullivan, 472 Pa. 129, 371 A.2d 468 (1977).

ineffectiveness or simply as different degrees of ineffectiveness. The first group of these cases involves a decision on the part of counsel not to advance any claim on behalf of the appellant. The second cluster of cases involves those in which counsel advances some appeal but does so in an unacceptable manner. Appellate representation requires advocacy. Some judicial steps have been taken to ensure at least an advocate's canvas of appellate issues on the direct appeal. In line with this concept that appellate counsel must fill the role of an advocate, not simply of amicus curiae, *Anders v. California*[106] mandates that an attorney wishing to withdraw from a case because it is without merit must first file a brief referring to any matter which might arguably support the appeal.[107] This mandate requires the setting of more detailed guidelines for counsel's withdrawal from the case on the basis of an assessment of the strength of the appeal.[108] If counsel remains on the case, the issue becomes the actual quality of advocacy required.

Establishing a constitutional right to effective appellate counsel[109] is complicated because of the often stated notion that there is no constitutional right to appeal.[110] In the face of such precedent, it has fallen to the Supreme Court to premise its appellate counsel rulings upon constitutional underpinnings other than the sixth amendment.[111] The use of doctrines such as equal protection and due process to arrive indirectly at appellate counsel results, and the existence in fact of state statutory or state constitutional appeal rights, has made it unnecessary for the Supreme Court to seriously reexamine the ancient rubric that there is no constitutional right to appeal. However, those who have witnessed the development of the due process clause and the sixth amendment are entitled to wonder whether the Supreme Court, if directly confronted with the question, would maintain that these constitutional provisions do not support a present day basic constitutional right to appeal and to appellate counsel on that basic appeal. If the sixth amendment were applied directly, the competency requirement would fol-

106. 386 U.S. 738 (1967).
107. *Id.* at 744.
108. *See, e.g.*, Suggs v. United States, 391 F.2d 971, 973-74 (D.C. Cir. 1968); People v. Feggans, 67 Cal. 2d 444, 447-48, 432 P.2d 21, 23, 62 Cal. Rptr. 419, 421 (1967); Bethay v. State, 237 Ga. 625, 625-26, 229 S.E.2d 406, 407 (1976); Reid v. State, 235 Ga. 378, 379-81, 219 S.E.2d 740, 741-43 (1975); Commonwealth v. Johnson, 242 Pa. Super. Ct. 188, 190-92, 363 A.2d 1223, 1225 (1976).
109. What is referred to here is a federal constitutional right to effective assistance of counsel. It is possible, of course, that the right to effective appellate assistance might be grounded on a particular state constitutional provision which might address the issue of competence, *see* MICH. CONST. art. 1, § 20 ("reasonable assistance" to perfect and prosecute appeal), or on statutory language, *see* former KAN. STAT. § 62-1304 (Supp. 1953) (judge shall appoint "competent counsel" for certain appeals).
110. McKane v. Durston, 153 U.S. 684, 687 (1894); *see* Ross v. Moffitt, 417 U.S. 600, 606 (1974).
111. *See* Anders v. California, 386 U.S. 738, 742-44 (1967) (also citing Gideon v. Wainwright, 372 U.S. 335 (1963)); Douglas v. California, 372 U.S. 353, 355-58 (1963) (language involving due process and equal protection notions).

low easily. Where counsel is required to perform a critical function on appeal, only those performances that effectuate the right to counsel are acceptable.

Even without a direct statement of a constitutional basis for the right to appeal, the right to effective assistance on direct appeal of right seems supportable by the due process or equal protection doctrines once counsel is required.[112] Indeed, there is dictum in *Anders* to indicate that the Supreme Court took this much for granted. After describing the type of procedure with which appellate counsel must comply before counsel can be allowed to withdraw from an appeal that counsel believes to be without merit,[113] the Supreme 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."[114]

Aside from the language in *Anders*, the quality of representation rendered by appellate counsel has occasioned little comment by the Supreme Court of the United States, although several years ago a California case, presenting other issues to the Court, provoked questioning on the ineffective counsel issue from several justices at oral argument.[115] Instances of judicial recognition of the claim of ineffective appellate counsel's representation are not abundant, but the trend toward recognition is identifiable. California has provided the seminal cases,[116] and the claim of ineffective appellate counsel has found recognition, either expressly or by assumption, in both federal courts[117] and several state courts.[118]

112. *See* Ross v. Moffitt, 417 U.S. 600, 612 (1974) (fourteenth amendment requires that "indigents have an adequate opportunity to present their claims fairly" in the context of the adversary appellate system; state cannot "extend to such indigent defendants merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal' "); Entsminger v. Iowa, 386 U.S. 748 (1967) (defendant deprived of complete and effective appellate review where appointed appellate counsel failed to file certain parts of record, with consequence that limited review given, rather than plenary appeal desired by defendant).

113. 386 U.S. at 744.

114. *Id.* at 745.

115. Banks v. California, No. 670, 5 CRIM. L. REP. (BNA) 4035, 4036-37 (oral argument before Supreme Court, Apr. 23, 1969). Certiorari was, however, dismissed for want of jurisdiction. Banks v. California, 395 U.S. 708 (1969). After disposition by the Supreme Court, the case reemerged in the Supreme Court of California as *In re* Banks, 4 Cal. 3d 337, 482 P.2d 215, 93 Cal. Rptr. 591 (1971).

116. *See In re* Banks, 4 Cal. 3d 337, 482 P.2d 215, 93 Cal. Rptr. 591 (1971); *In re* Smith, 3 Cal. 3d 192, 474 P.2d 969, 90 Cal. Rptr. 1 (1970). *See also* People v. Lang, 11 Cal. 3d 134, 520 P.2d 393, 113 Cal. Rptr. 9 (1974); People v. Rhoden, 6 Cal. 3d 519, 492 P.2d 1143, 99 Cal. Rptr. 751 (1972).

117. *See, e.g.*, United States v. Carlson, 561 F.2d 105, 109 (1st Cir. 1977), *cert. denied*, 98 S. Ct. 529 (1978); Beasley v. United States, 491 F.2d 687, 689-90 (6th Cir. 1974); Hooks v. Roberts, 480 F.2d 1196, 1197 (5th Cir. 1973), *cert. denied*, 414 U.S. 1163 (1974); Cardarella v. United States, 375 F.2d 222, 230 (8th Cir.), *cert. denied*, 398 U.S. 884 (1967); United States *ex rel.* Johnson v. Vincent, 370 F. Supp. 384-88 (S.D.N.Y.), *rev'd on other grounds*, 507 F.2d 1309 (2d Cir. 1974), *cert. denied*, 420 U.S. 994 (1975); Monsour v. Cady, 342 F. Supp. 353, 360 (E.D. Wis. 1972); Rawlins v. Craven, 329 F. Supp. 40, 42 (C.D. Cal. 1971). *See also* Ennis v. LeFerre, 560 F.2d 1072, 1076-77 (2d Cir. 1977) (separate opinions).

118. *See, e.g.*, People v. Lang, 11 Cal. 3d 134, 520 P.2d 393, 113 Cal. Rptr. 9 (1974); Kimball v. Sadaoka, 56 Haw. 675, 676, 548 P.2d 268, 269-70 (1976); People v. Frank, 48 Ill. 2d 500, 505,

Little has been done to define the minimum standard of quality of representation required of appellate counsel. What has been done in this vein is often a by-product of the courts' attempts to comport with *Anders*, although some courts have made more direct beginnings. Obviously, the tasks of formulating standards here, and of applying them, are not easy ones because, as with all ineffectiveness cases, these cases "must be decided on their own facts," and the determination of each will depend on counsel's failings "in the context of the particular circumstances at hand."[119] To the extent they mention a standard, many of the cases carry over to appellate counsel the jurisdiction's test formulated in cases measuring trial counsel ineffectiveness.[120] California seems to use as a litmus whether "appellate counsel failed to raise crucial assignments of error which arguably might have resulted in reversal."[121] Pennsylvania applies a trial level test of whether counsel's actions had a reasonable basis designed to effectuate the client's interests in light of all the alternatives.[122] In several jurisdictions, courts have avoided articulating a precise standard by which to judge a claim of ineffective appellate counsel. Rather, they have approached the ineffectiveness issue by evaluating the underlying merits of the alleged errors which counsel did not raise on appeal. A finding that the underlying claims are without merit defeats the ineffective assistance claim.[123]

The choice of a test to be used in assessing appellate counsel adequacy will have significant procedural and practical ramifications. The test will, for example, affect the specificity of required allegations of incompetence or the number of hearings required.

There is perhaps a special reluctance on the part of appellate courts to either recognize the appellate counsel claim or to define the standard for measuring the claim where recognized. The reason for this attitude may well be lodged in the appellate judges' own felt ability, and that of their law clerks, to review the record and survey the law themselves, if not with the

---

272 N.E.2d 25, 27 (1971); People v. Bailey, 42 Ill. App. 3d 638, 640-42, 356 N.E.2d 410, 412-13 (1976); State v. Parsley, 265 Ind. 297, 300, 354 N.E.2d 185, 187 (1976); Boyer v. State, 527 S.W.2d 432, 437 (Mo. Ct. App. 1975); Rook v. Cupp. 18 Or. App. 608, 526 P.2d 605 (1974); Commonwealth v. Sullivan, 472 Pa. 129, 145, 371 A.2d 468, 476 (1977); State v. Williams, 266 S.C. 325, 337, 223 S.E.2d 38, 43-44 (1976); Grant v. State, 542 S.W.2d 626, 627 (Tenn. Crim. App. 1975); *In re* King, 133 Vt. 245, 251, 336 A.2d 195, 199 (1975).

119. *In re* Smith, 3 Cal. 3d 192, 203, 474 P.2d 969, 975, 90 Cal. Rptr. 1, 7 (1970).

120. *See, e.g.*, Harshaw v. United States, 542 F.2d 455 (8th Cir. 1976); United States *ex rel.* Cole v. LaVallee, 376 F. Supp. 6, 12 (S.D.N.Y. 1974); Woodring v. United States, 360 F. Supp. 240, 242 (C.D. Cal. 1973); Monsour v. Cady, 342 F. Supp. 353, 360 (E.D. Wis. 1972), *aff'd*, 478 F.2d 1405 (7th Cir.), *cert. denied*, 414 U.S. 1010 (1973); Rawlins v. Craven, 329 F. Supp. 40, 42 (C.D. Cal. 1971); Rook v. Cupp, 18 Or. App. 608, 613 n.2, 526 P.2d 605, 607 n.2 (1974).

121. *See* People v. Lang, 11 Cal. 3d 134, 142, 520 P.2d 393, 398, 113 Cal. Rptr. 9, 14 (1974).

122. *See* Commonwealth v. Sullivan, 472 Pa. 129, 142, 371 A.2d 468, 474 (1977).

123. *See, e.g.*, Hooks v. Roberts, 480 F.2d 1196, 1197 (5th Cir. 1973), *cert. denied*, 414 U.S. 1163 (1974); State v. Parsley, 265 Ind. 297, 300-01, 354 N.E.2d 185, 187 (1976); Grant v. State, 542 S.W.2d 626, 627 (Tenn. Crim. App. 1975). *But see* People v. Frank, 48 Ill. 2d 500, 505, 272 N.E.2d 25, 28 (1971) (inquiring only whether issue was so patently meritorious that failure to raise it on appeal was ineffective assistance).

benefit of argument by counsel, at least with a potentially equal knowledge of the law and of the operative recorded facts to which appeals are confined. Whether derived from experience or otherwise, this view minimizes the role of advocate said to be essential in *Anders*. Further aggravating the problem is the fact that most courts simply do not normally read the whole record when available or read only such portions of records as counsel has prepared and filed with the appellate court.

The remedy for ineffective counsel found to exist at the appellate level should depend on the kind of ineffectiveness claim raised. If the successful claim is one of general, overall ineffectiveness that pervaded the entire appeal, the appropriate remedy would be to grant the defendant a new appeal. However, if the successful claim is of a more specific and limited nature, such as failure of appellate counsel to raise a particular issue on appeal, or the failure to adequately present a particular claim, the court may choose to tailor a different remedy. In such instances, where the alleged error on the part of counsel may not have pervaded the entire appeal, the appropriate remedy would be for the appellate court to arrange for the merits of the particular appellate argument to be argued anew.

A number of brief observations might be made here. First, whether or not pervasive ineffectiveness or particularized ineffectiveness is found will often be governed by the standard used to determine ineffectiveness. For example, if applied literally, a mockery and farce standard, by definition, will normally lead to a conclusion of overall ineffectiveness, while a withdrawal-of-a-crucial-defense standard may lead typically to the more limited ineffectiveness finding, prompting reinstatement of that particular argument. Second, the remedies of allowing the defendant-appellant to argue belatedly a particular claim not previously raised, or to reargue a claim inadequately presented initially, are means of avoiding normal rules of forfeiture and res judicata. The removal-of-forfeiture concept arises as well in ineffectiveness cases other than those at the appellate level; more is said of this concept later.[124] In the appellate situation, the avoidance of res judicata allows the appellant to reopen an issue determined adversely to the defendant by the appellate court on the initial appeal or to belatedly assert an issue that should have been put forward on the direct appeal. Third, there are real differences to a defendant-appellant between the two remedies. If the entire appeal is reopened, the appellant may not only be able to reargue old claims raised earlier, but may also raise new claims not previously asserted. These consequences may be significant in the event that the appellate court's perspective on the law has changed between original appeal and the reopened appeal.[125]

124. See text & notes 145-54 *infra*.

125. Such changes might result from a shift in the makeup of the court. Consider also the possibility that the law may have shifted generally between the time of the initial appeal and the

These remedial questions necessarily involve the relationship of prejudice to a claim of ineffective assistance. However viewed conceptually, in one way or another prejudice seems to be an integral part of a claim of ineffectiveness leading to a new appeal, or any other remedy significant to the defendant.[126] Where the defendant premises a claim of ineffectiveness on counsel's failure to raise an issue, usually the cases have contemporaneously looked at counsel's performance and the question of ultimate prejudice. The process requires decision on the merits of the unraised claim in assessing the ineffectiveness issue. Only when the unraised claim is considered to have merit as reversible error has the defendant been considered prejudiced by counsel's failure to raise the claim on appeal, and only then have these courts concluded that there has been ineffective assistance of appellate counsel.[127] Because of their treatment of the prejudice ingredient, the cases on appellate ineffectiveness have only rarely used the two-step procedure of first finding, in the abstract, an inadequate counsel performance for failure to raise an arguable issue, and then setting the underlying issue for further argument and later decision. An exception is California. The two-step procedure has been utilized in the California courts, which require appellate counsel to raise not merely every meritorious issue but every issue which arguably might result in reversal.[128] The practical procedural effect of this more stringent requirement is that a determination of counsel ineffectiveness can be made independent of, and prior to, an announced decision on the actual merits of the claim which counsel failed to raise.

There are instances in which a court might find it more practical to segregate the merits issue from the abstract claim of ineffectiveness. For example, suppose the claim of appellate ineffectiveness is leveled at counsel

---

reopened appeal, but the new rule has not been made generally retroactive. The defendant will surely assert the protection of the new rule. If the shift of law is being generally applied to cases still on direct appeal, *see* Linkletter v. Walker, 381 U.S. 618 (1965), is the defendant entitled to the benefit of the intervening new rule on his nunc pro tunc appeal?

If it is clear that a timely appeal would have been resolved before the change in law occurred, it would appear difficult to satisfactorily justify giving the nunc pro tunc defendant the happenstance benefit of the new rule, while timely appellants are deprived of it. For the debate and its result, as represented in the opinions of one jurisdiction, see Commonwealth v. Shadd, 454 Pa. 148, 309 A.2d 780 (1973); Commonwealth v. Heard, 451 Pa. 125, 301 A.2d 870 (1973); Commonwealth v. Linde, 448 Pa. 230, 293 A.2d 62 (1972); Commonwealth *ex rel.* Smith v. Myers, 438 Pa. 218, 261 A.2d 550 (1970); Commonwealth v. Faison, 437 Pa. 432, 264 A.2d 394 (1970); Commonwealth v. Little, 432 Pa. 256, 248 A.2d 32 (1968); Commonwealth v. Jefferson, 430 Pa. 532, 243 A. 2d 412 (1968); Commonwealth v. Williams, 232 Pa. Super. Ct. 339, 331 A.2d 875 (1974). *See also* Bradley v. School Bd. of Richmond, 416 U.S. 696, 710-22 (1974).

126. See text & notes 145-51 *infra*.

127. *See, e.g.*, Harshaw v. United States, 542 F.2d 455, 457 (8th Cir. 1976); Beasley v. United States, 491 F.2d 687, 690 (6th Cir. 1974); Cardarella v. United States, 375 F.2d 222, 230 (8th Cir.), *cert. denied*, 389 U.S. 882 (1967); Rook v. Cupp, 18 Or. App. 608, 613, 526 P.2d 605, 607 (1974); cases cited note 123 *supra*. In *Beasley*, the court found no prejudicially ineffective assistance of appellate counsel for failure to cite a pertinent case in the brief. 491 F.2d at 690. However, speaking of trial counsel, the court asserted that once a finding of ineffectiveness is made, the court will not apply a harmless error test to the sixth amendment violation. *Id.* at 696.

128. People v. Lang, 11 Cal. 3d 134, 139, 520 P.2d 393, 398, 113 Cal. Rptr. 9, 12 (1974).

who represented the defendant on appeal to a state court following a state conviction. Assume the counsel claim is cognizable as a federal issue but the underlying appeal issues involve state issues that are not federally cognizable. Assume also that the ineffective counsel claim is ultimately raised on a federal habeas corpus petition alleging the failure of appellate counsel to raise a crucial state law point on the state appeal. The federal court may have the power to litigate the counsel issue but it will not, of course, decide the merits of the underlying state claim.[129] Unless the state law is clear and is adverse to the defendant, the federal court will have to segregate the issues somewhat.[130] The federal court might, without reaching the merits of the underlying claim, find appellate counsel ineffective for failure to raise the claim, and grant relief, perhaps conditioned on a new state appeal on the state law questions. Another instance in which it would be practical to decide the ineffectiveness claim without reaching the merits of an unraised alleged error arises where the ineffectiveness claim is presented to a higher court as a constitutional counsel claim and the high court is simply not the appellate court which usually decides the underlying claim that is to be reheard. For example, a state's highest court might decide that an attorney has been ineffective on an appeal to the state's intermediate appellate court, and then have the intermediate court reconsider the underlying merits of the appeal.[131]

Aside from the remedy itself, other procedural problems remain with appellate ineffectiveness claims. For example, when a defendant contests appellate counsel's adequacy, in what level of court should a new appeal be sought in the first instance? Only rarely has an opinion expressly confronted this question.[132] It is proper that the appellate court before which the alleged deficiency occurred should be the court to measure the performance at some stage, but should the appellate court simply be a reviewing court or should it be the initial forum to receive the claim? Many state courts possess original habeas corpus jurisdiction, and a form of appellate level initiation has been used in California.[133] An appropriately fashioned motion for reconsideration of the appeal under relevant local court rules or practices might serve the

129. A state law claim is not litigable on federal habeas corpus except to the extent it raises a federal claim. *See, e.g.*, Chance v. Garrison, 537 F.2d 1212, 1214-15 (4th Cir. 1976); Grundler v. North Carolina, 283 F.2d 798, 801 (4th Cir. 1960); 28 U.S.C. § 2254(a) (1970); *id.* § 2241(c)(3) (1970).

130. If the state law is clearly adverse to the defendant, the court may simply find that there would have been no reason to raise the underlying claim.

131. *Cf.* Commonwealth v. Yocham, 473 Pa. 445, 375 A.2d 325 (1977) (post-conviction attack case in which appellate court took up claim that counsel was ineffective in not raising confession issue on direct appeal, and then remanded matter to post-conviction trial level court for further determination on merits of confession claim).

132. *See* Commonwealth v. Sullivan, 472 Pa. 129, 141-44, 371 A.2d 468, 473-75 (1977) (trial level court appropriate forum, under statute, for initially raising claim of appellate ineffectiveness).

133. *See In re* Banks, 4 Cal. 3d 337, 340, 482 P.2d 215, 217, 93 Cal. Rptr. 591, 593 (1971); *In re* Smith, 3 Cal. 3d 192, 195, 474 P.2d 969, 970, 90 Cal. Rptr. 1, 2 (1970).

same purpose as a habeas corpus petition filed in the appellate court.[134] Yet there are cases, possibly requiring testimony by counsel or other witnesses, in which factual issues will need resolution before the legal conclusion on effectiveness is drawn. In these cases, the appellate court would have to transmit the record to a trial judge for fact-finding functions, or conceivably appoint one of its members to take testimony and find the facts. Appellate courts no doubt will be resistant to such appellate level fact-finding, however. It is possible, of course, to have these cases initiated, as other collateral attacks are, in the trial courts and, on balance, the case for such procedure seems persuasive. Both reasons of judicial economy mentioned above and other practical reasons[135] make trial court consideration an attractive procedure. This appears to be what has happened in most cases.[136]

*Sentencing and Other Stages*

Counsel may also come under attack for performance at sentencing.[137] This issue is rarely litigated, primarily because the end desired by the defendant—reduction of sentence—can usually be effectuated through other differently titled relief vehicles, such as motions to reduce sentence. Therefore, absent time constraints on such alternative relief mechanisms, there is no need to resort to a claim of ineffective assistance. In any event, even where established, the claim would provide only the limited relief of resentencing and not a new trial.[138]

134. *See* People v. Rhoden, 6 Cal. 3d 519, 523, 492 P.2d 1143, 1145, 99 Cal. Rptr. 751, 753 (1972) (issue arose while supreme court considering a petition to recall its remittitur).

135. One such practical reason is the fact that the appellate counsel claim may well be only one of the issues raised and the collateral attack could become segmented otherwise.

136. *See, e.g.*, Beasley v. United States, 491 F.2d 687, 689 (6th Cir. 1974); Woodring v. United States, 360 F. Supp. 240, 241 (C.D. Cal. 1973); People v. Frank, 48 Ill. 2d 500, 503, 272 N.E.2d 25, 27 (1971). Federal habeas corpus contesting state appellate representation will, of course, be appropriately filed in district court. *See* Hooks v. Roberts, 480 F.2d 1196, 1196-97 (5th Cir. 1973), *cert. denied*, 414 U.S. 1163 (1974); United States *ex rel.* Johnson v. Vincent, 370 F. Supp. 379, 381 (S.D.N.Y. 1974); Monsour v. Cady, 342 F. Supp. 353, 353 (E.D. Wis. 1972), *aff'd*, 478 F.2d 1405 (7th Cir.), *cert. denied*, 414 U.S. 1010 (1973); Rawlins v. Craven, 329 F. Supp. 40, 41 (C.D. Cal. 1971). Presumably, the appellate counsel claim would require exhaustion of state court remedies first. *See* United States *ex rel.* Cole v. LaVallee, 376 F. Supp. 6, 8 (S.D.N.Y. 1974); 28 U.S.C. § 2254(b)(1970).

137. *See, e.g.*, United States v. Pinkney, 543 F.2d 908, 913-14 (D.C. Cir. 1976); United States v. Lucas, 513 F.2d 509, 511-12 (D.C. Cir. 1975); United States v. Burkley, 511 F.2d 47, 51 (4th Cir. 1975); United States v. Johnson, 475 F.2d 1297, 1300 (D.C. Cir. 1973); Gadsen v. United States, 223 F.2d 627, 630 (D.C. Cir. 1955); Wilfong v. Johnston, 156 F.2d 507, 509 (9th Cir. 1946) (mere presence of associate of trial attorney does not satisfy sixth amendment); State v. Watson, 114 Ariz. 1, 14, 559 P.2d 121, 134 (1976), *cert. denied*, 430 U.S. 986 (1977) (any error in regard to claim of inadequacy on sentencing could be cured on resentencing which was being ordered on other grounds); People v. Brown, 40 Ill. App. 3d 562, 563-64, 352 N.E.2d 15, 17 (1976). *See also* Gardner v. Florida, 430 U.S. 349, 358 (1977) (defendant's "right to effective assistance" at sentencing) (opinion of Stevens, J.); McConnell v. Rhay, 393 U.S. 2, 4 (1968) ("Right to counsel at sentencing . . . must be treated like right at other stages of adjudication.").

138. *See* United States v. Burkley, 511 F.2d 47, 51 (4th Cir. 1975); People v. Brown, 40 Ill. App. 3d 562, 564, 352 N.E.2d 15, 18 (1976); Gardner v. Florida, 430 U.S. 349, 362, 364-65 (1977) (death sentence vacated and remanded where sentence based on confidential information not disclosed to, and thus not contested by, defense counsel).

Ineffectiveness attacks have been made against attorneys at other stages, such as identification,[139] preliminary hearing,[140] and at least one state court has implied that the admissibility of a statement made with counsel present might be contestable by showing that counsel was ineffective.[141] The ineffectiveness law ought not be extended to such stages without prior careful analysis to determine whether the purposes of the claim and of the right to counsel at that stage call for such extension.[142]

In any event, there is a transition of the ineffectiveness claim from its use to contest trial counsel's performance via collateral attack, to a broadened use of the claim to contest, through various devices, counsel's performance at a variety of crucial stages. The procedural law surrounding the expanded uses of the claim is far from settled.

## REFOCUSING ON THE USES AND ANALYSIS OF INEFFECTIVENESS CLAIMS

### *Forfeiture, Prejudice, and Remedies*

Another area in which the claim of ineffective assistance of counsel is undergoing a pronounced conceptual transition involves the particular use to which the claim is put by the defendant and, conjunctively, the mechanics by which the courts are analyzing the claim and its effect on a defendant's conviction.

Obviously, in asserting an ineffectiveness claim, a defendant's ultimate interest is in overturning the conviction. At one time, a judicial finding of ineffectiveness led directly to this result. The mockery-of-justice and denial-of-fair-trial type tests lend themselves directly to this consequence, at least if applied literally. While in many cases the courts have often looked for a series of accumulated counsel defaults,[143] the shifts in standards and in the actions which are the targets of ineffectiveness claims have refocused the attack on more isolated instances of counsel deficiency. The deficiencies alleged often involve the failure to take a particular action—increasingly, a failure to invoke a constitutional right.[144] The defendant uses this adjustment

139. *See* Strazzella, *supra* note 69, at 244 & n.19.

140. *See* Riley v. Wilson, 430 F.2d 1134, 1136 (9th Cir. 1970), *cert. denied*, 401 U.S. 922 (1971). *See also* Coleman v. Alabama, 399 U.S. 1, 7-9 (1970); United States v. King, 482 F.2d 768, 775 (D.C. Cir. 1973) (magistrate's refusal to allow a witness to testify as denial of effective assistance); Coleman v. Burnett, 477 F.2d 1187, 1200 (D.C. Cir. 1973) (magistrate's refusal to subpoena witness as denial of effective assistance). The difficulties of establishing timeliness, or finding prejudice from defaults at this stage, among other problems, are likely to keep even the assertion of such claims to a minimum.

141. Commonwealth v. Cunningham, 471 Pa. 577, 587 n.4, 370 A.2d 1172, 1177 n.4 (1977) (court found that attorney's presence attenuates the taint unless attorney is ineffective).

142. *See* Strazzella, *supra* note 69, at 245, 280.

143. "Generally, a single lapse of skill will not be held to have resulted in a denial of a fair trial." People v. Steger, 16 Cal. 3d 539, 551-52, 546 P.2d 665, 673, 128 Cal. Rptr. 161, 169 (1976).

144. *See, e.g.*, LiPuma v. Department of Corrections, 560 F.2d 84 (2d Cir.), *cert. denied*, 98 S. Ct. 189 (1977); Jiminez v. Estelle, 557 F.2d 506 (5th Cir. 1977); Boyer v. Patton, 436 F. Supp. 881, 887 (E.D. Pa. 1977); Commonwealth v. Gray, — Pa. —, —, 374 A.2d 1285, 1288-89 (1977); Commonwealth v. Burch, — Pa. Super. Ct. —, —, 374 A.2d 1291, 1293 (1977).

of focus as a device to make the ineffectiveness claim reach an underlying defense ordinarily forfeited by counsel's inactivity and then, through the merits of that claim, to attempt to gain a new trial. The refocusing also makes it conceptually possible, and practically necessary, for the courts to engage in a multi-step procedure in analyzing the ineffectiveness claim in order to see whether the claim merits relief.

As long as the focus is on the fairness of the trial as a whole—a focus that the mockery and fair trial type standards logically imply—a finding of such ineffectiveness inherently implies prejudice to the defendant and the need for relief in the form of a new trial. If the courts now are more willing to isolate a particular counsel inaction or deficiency at trial, such as failure to raise a confession claim, or at certain new targeted areas, such as appellate ineffectiveness, a two-step analytical process is possible. Counsel's action first may be examined separately and found to have fallen below acceptable standards in not advocating the underlying claim. Yet, the underlying claim may be examined and found to be without merit,[145] or the court may find the underlying claim had merit but the error was harmless in the circumstances of the whole proceeding.[146] In this way, a showing of ineffectiveness standing alone does not conclude the process.[147] The showing of ineffectiveness is instead seen as a threshold question which, if successfully overcome by the defendant, cancels out the failure to have raised the underlying claim earlier and brings the court to the merits of the underlying claim and the effect of any error. Of course, in the face of an assertion of ineffectiveness, the court may choose to short-circuit this conceptual two-step process by rearranging the order of consideration. Assuming there was ineffectiveness in not taking a certain action, the court may question whether counsel's ineffectiveness had a real effect on the proceedings.[148] In either event, what is happening is that the defendant is attempting to remove a foreclosure through use of the ineffectiveness device, and the court is then inquiring into resulting prejudice.

Although the separate inquiry into prejudice was not undertaken in many previous cases, and is still unclearly treated by the courts, prejudice is emerging as a distinct issue in more recent cases.[149] There are some in-

145. *See* Commonwealth v. Sullivan, 472 Pa. 129, 371 A.2d 468 (1977); Strazzella, *supra* note 69, at 278-79.

146. *See* Milton v. Wainwright, 407 U.S. 371 (1972); Chapman v. California, 386 U.S. 18 (1967).

147. *But see* Beasley v. United States, 491 F.2d 687, 690 (6th Cir. 1974) ("The Sixth Amendment claim must, of course, stand on its own merits. It should not be a mere disguise for questions disposed of on direct appeal."). *See also* Mitchell v. United States, 259 F.2d 787, 789 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

148. See text & notes 123, 127 *supra*.

149. *See* McQueen v. Swenson, 498 F.2d 207, 218-20 (8th Cir. 1974); Risher v. State, 523 P.2d 421, 424-25 (Alas. 1974). *But see* Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). *McQueen* involved counsel's failure to develop certain evidence. After determining that counsel was ineffective under a farce and mockery standard, the court held:

stances in which the nature of the ineffectiveness claim will make unnecessary the separate inquiry into actual prejudice, such as instances in which prejudice from counsel's particular deficiency is presumed conclusively.[150] Of further concern will be such ancillary questions as the placing of evidentiary burdens on the prejudice issue.[151] The relationship between forfeiture and the ineffectiveness claim has also found little clarity in the courts. Nevertheless, there is support for the requirement that, where an attorney's inaction is legitimately capable of forfeiting a right of a defendant, counsel must perform competently.[152]

The debate over which rights of a defendant can be lost by counsel's inactivity or decision, as distinguished from a considered personal decision

---

> [The defendant] must shoulder an initial burden of showing the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant . . . . Once this showing is made, a new trial is warranted unless the court is able to declare a belief that the omission of such evidence was harmless beyond a reasonable doubt.

498 F.2d at 220. The court noted, however, that if the defendant could show changed circumstances beyond his control which made it impossible to produce helpful admissible evidence that otherwise could have been produced earlier, the burden would shift to the state to show an absence of prejudice because of ineffective assistance. *Id.* In *Beasley*, where counsel failed to explore potentially exonerating avenues and engaged in numerous other criticized actions and failures, the court measured the adequacy by applying the test of whether counsel is reasonably likely to render, and was rendering reasonably effective assistance. 491 F.2d at 696. Upon finding ineffectiveness, the court held that the conviction could not stand, stating broadly: "Harmless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel." *Id. See also* Chambers v. Maroney, 399 U.S. 42, 53-54 (1970) (allegation of attorney unprepared with regard to issue of admission of evidence; Court refused to disturb judgment in context of lower court's finding of no prejudice). Some very early cases expressly used prejudice as part of their analysis. For example, in State v. Benge, 61 Iowa 658, 17 N.W. 100 (1883), the court, acknowledging the rule that incompetence does not ordinarily constitute grounds for a new trial, refused a new trial for lack of "a strong showing both of incompetency and prejudice." *Id.* at 662, 17 N.W. at 102. For prejudice, the court seemed to require "affirmative acts" on the part of the attorney "which appear to have been prejudicial." *Id.*

150. *See* Holloway v. Arkansas,— U.S. —, 98 S. Ct. 1173, 1180-81 (1978). The Court's opinion contains some broad language concerning the relationship of prejudice and the denial of the right to counsel, *id.* at 1181, but the language ought to be read in the context of the issue timely raised in that case: a pervasive conflict of interest in counsel's trial representation of multiple defendants. So read, the opinion is not necessarily inconsistent with the concept of focusing precisely on the type of underlying counsel default in assessing the possibility of prejudice and harmless error.

151. Some cases have placed the burden on the state to prove that counsel's failing was not prejudicial. *See* United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968). Other cases have looked to the particular claim and circumstances involved, generally placing the burden on the defendant to show prejudice before a remedy for ineffective assistance will be granted. *See, e.g.*, Thomas v. Wyrick, 535 F.2d 407, 414 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976); McQueen v. Swenson, 498 F.2d 207, 220 (5th Cir. 1974); United States *ex rel.* Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970).

152. *See, e.g.*, Tollett v. Henderson, 411 U.S. 258 (1973) (contention that indicting grand jury improperly selected, raised following guilty plea on advice of counsel, litigable if defendant demonstrates incompetence of counsel); McMann v. Richardson, 397 U.S. 759 (1970) (regarding advice of competent counsel on plea of guilty, which acts to waive some rights and forfeit other remedies); Henry v. Mississippi, 379 U.S. 443, 450 (1965) (foregoing objection to evidence "after consultation with competent counsel"); People v. Frank, 48 Ill. 2d 500, 503-04, 272 N.E.2d 25, 27 (1971) (alleged "waiver" stemming from incompetence of counsel ought not bar state collateral relief); Commonwealth v. Wideman, 453 Pa. 119, 123, 306 A.2d 894, 896 (1973) (trial counsel's failure to raise important defense issues was ineffective assistance which created extraordinary circumstances necessary to justify a procedural default ordinarily foreclosing collateral attack under state law); *cf.* Brubaker v. Dickson, 310 F.2d 30, 40 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963) (the question of whether defendant is bound by his trial counsel's consent to admission of confessions is inseparable from the question of whether he had effective assistance); People v. Ibarra, 60 Cal. 2d 460, 464, 386 P.2d 487, 490, 34 Cal. Rptr.

of the defendant, is one of the most confused and difficult issues in criminal procedure. The area has been made more obscure because courts have often erroneously referred to some forfeiture situations as "waiver" situations, thereby inviting reference to the waiver standards requiring the defendant's personal, knowing, and intelligent decision to waive a right.[153] A forfeiture properly refers to a forfeiture of remedies and is a facet of the procedural law of judgments; it is a principle concerned with the finality of judgments.[154] Many remedies may be forfeited without anyone's conscious decision. Some may be forfeited without the active participation of the defendant. It is a difficult task to sort out those situations in which counsel, acting, or failing to act, without the defendant's personal and understanding participation, may be taken to have forfeited a remedy for the defendant. Once this sorting is accomplished, however, and once it is acknowledged that counsel must act competently in order for the forfeiture to be effective, counsel's incompetence may be an important target for the defendant's attack. The use of ineffectiveness claims to neutralize possible forfeitures is likely to become an increased phenomenon in light of recent developments in forfeiture law as it relates to collateral attack. There is a growing potential that more defendants may be required to prove ineffectiveness as an essential link leading to relief on an underlying claim not timely or properly litigated earlier.

In the aftermath of *Fay v. Noia*,[155] the courts, through application of *Noia*'s waiver-sounding deliberate bypass test,[156] began to find that fewer and fewer remedies had been forfeited in the absence of evidence that the defendant personally participated with counsel. Professor Meador has recounted the theory that the Supreme Court's 1960's thrust in this direction, away from reliance on counsel's decisions as foreclosing later litigation, can

863, 866 (1963) (counsel's failure to object to introduction of evidence reduced trial to a farce and a sham); cases cited note 176 *infra*. *See also* Strazzella, *supra* note 69, at 228-29.

153. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Jiminez v. Estelle, 557 F.2d 506, 508-10 (5th Cir. 1977).

154. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES, Commentaries 2.1, 6.1 (Approved Draft, 1968). A true waiver, which is measured against the standard of a voluntary relinquishment of a right understood and intelligently given up, suggests an active choice on the part of the defendant. It is a corollary of the law creating the right waived. *Id.*

> [W]here a right was understood and intelligently relinquished, the right is never violated and a claim that the defendant had been unlawfully deprived of that right, no matter when made, is unmeritorius. . . . Denial of relief on the ground of valid waiver is a decision on the merits and is thus essentially different from denial of relief on the ground that the applicant at one time had, but no longer has, a meritorious claim . . . .

*Id.* Commentary 2.1.

155. 372 U.S. 391 (1963).

156. The Court stated that a federal court on habeas corpus may "deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." *Id.* at 438. The Court emphasized that a "considered choice" by the petitioner is critical and that a choice made solely by counsel may not bar relief. *Id.* at 439.

only be attributed to a lack of confidence in the adequacy of the bar.[157] Expansive deliberate bypass concepts obviate the need for litigating actual counsel ineffectiveness in order to reach the underlying claim. Currently, however, we are witnessing a Supreme Court constriction of the deliberate bypass concept.[158] It is a constriction which, in many cases, may make more important the assertion of an ineffectiveness claim before a defendant can remove the forfeiture and litigate the underlying claim. This constriction is developing at a time when other Supreme Court cases enhance the importance of ineffectiveness claims.

The tightening of the deliberate bypass concept was most recently accentuated in *Wainwright v. Sykes*.[159] In *Sykes*, a majority of the Supreme Court expressed general approval of the contemporaneous objection rule and disapproval of *Noia*'s more expansive deliberate bypass standards.[160] The Court went on to hold that a failure to make timely objection to a confession on *Miranda*[161] grounds bars relief on habeas corpus, unless a cause for the failure and resulting prejudice can be shown.[162] The exact meaning of cause and prejudice were left open in *Sykes*,[163] but one can easily argue that unremedied incompetence of counsel fits the definition of the cause that would relieve the forfeiture and allow collateral attack. The majority and separate opinions in *Sykes* are seeded with clues which would nourish this argument, and the case's rationale similarly encourages such a conclusion.

The *Sykes* majority opinion[164] noted the Court's earlier stated view that tactical decisions by trial counsel foregoing federal claims would be binding on the defendant unless "exceptional circumstances" were present.[165] Four

157. Meador, *The Impact of Federal Habeas Corpus in State Trial Procedures*, 52 VA. L. REV. 286, 290 (1966); Meador, Book Review, 66 MICH. L. REV. 197, 204 (1967).

158. *See* Francis v. Henderson, 425 U.S. 536 (1976) (failure to make timely objection to racial composition of grand jury not litigable on habeas corpus unless cause for the failure and resulting prejudice shown).

159. 433 U.S. 72 (1977) (failure to make timely *Miranda*-based objection to admission of confession).

160. *Id.* at 87-90.

161. Miranda v. Arizona, 384 U.S. 436 (1966) (statements obtained from criminal suspect during custodial interrogation not admissible unless suspect was warned prior to questioning that he has right to remain silent, that any statement made by him can be used as evidence against him, and that he has a right to presence of an attorney, retained or appointed; requirement of voluntary, knowing, intelligent waiver of such rights).

162. 433 U.S. at 90-91. From one perspective, this is, of course, an interpretation of the forfeiture doctrine, and it seems likely that some states will similarly restrict state collateral attacks.

163. 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.

*Id.* at 87.

164. The *Sykes* majority was composed of Chief Justice Burger, and Justices Stewart, Blackmun, Powell, Rehnquist, and Stevens.

165. 433 U.S. at 91 n.14, *quoting* Henry v. Mississippi, 379 U.S. 443, 451 (1965). *Henry*, in turn, had quoted Fay v. Noia, 372 U.S. 391, 439 (1963), on the effect of a defendant's action in understandingly and knowingly foregoing certain remedies "after consultation with *competent* counsel or otherwise." 379 U.S. at 450 (emphasis added).

Justices made express the circumstance that counsel has acted within the acceptable range of competency. Justice White, concurring,[166] asserted that a failure to object should be considered a deliberate bypass unless it arose from counsel error which demonstrated incompetence within the meaning of *McMann v. Richardson*.[167] In separate concurring opinions, both Chief Justice Burger and Justice Stevens discussed the practical need for the courts to allow trial counsel to plan strategy without constantly consulting the defendant,[168] but Justice Stevens additionally noted that such a grant of discretion was based upon an assumption of counsel competence.[169] Justice Brennan's dissenting opinion also alluded to the relationship of incompetence and forfeiture by counsel.[170] The majority, however, took particular notice that the defendant on appeal had "expressly waived 'any contention or allegation as regards ineffective assistance of counsel' at his trial."[171] The caveats regarding the assumption of counsel competence sown throughout the *Sykes* opinions are consistent with similar implications found in recent significant forfeiture-type cases decided by the Supreme Court.[172]

Beyond these hints in the *Sykes* opinions, the rationale underlying the case likewise supports the conclusion that ineffective assistance of counsel, unremedied in the state courts, ought to qualify as cause under the *Sykes* doctrine. According to the Court, the cause and prejudice exception is designed to afford an adequate guarantee that a federal habeas corpus court will not be prevented "from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."[173] If the underlying federal claim was not timely raised in the state courts because of ineffective assistance of counsel, binding the defendant to the timely objection rule would likely fall within the miscarriage concern, depending on what the Court means by a "miscarriage of justice." The miscarriage concept is obviously not self-defining. Possibly, the Court uses the term miscarriage in the sense that failure to litigate the claim may result in maintaining a conviction of an innocent defendant, a possibility consistent with the view

166. 433 U.S. at 98-99.
167. 397 U.S. 759 (1970).
168. 433 U.S. at 91-94 (Burger, C.J., concurring); *id.* at 94-97 (Stevens J., concurring).
169. *Id.* at 95-96 & 95 n.2.
170. *Id.* at 117-18 (Brennan, J., joined by Marshall, J., dissenting).
171. *Id.* at 75 n.4. Justice Brennan, dissenting, took issue with placing reliance on the stipulation in this case. He noted that oral argument had revealed that stipulation had been made because Sykes wanted to avoid a possible remittance of the ineffectiveness issue to the state courts under the exhaustion of remedies doctrine. *Id.* at 105 n.6 (Brennan, J., dissenting).
172. *See* Henry v. Mississippi, 379 U.S. 443, 450 (1965); Fay v. Noia, 372 U.S. 391, 439 (1963). In Davis v. United States, 411 U.S. 233 (1973), a case from which the *Sykes* decison grew, the Court again took pains to note that the "[p]etitioner was represented throughout the trial by competent, court-appointed counsel, whose advocacy prompted the Court of Appeals to compliment him." *Id.* at 234 n.1. *See also* Francis v. Henderson, 425 U.S. 536, 553 n.4 (1976) (Brennan, J., joined by Marshall, J., dissenting); Estelle v. Williams, 425 U.S. 501, 534 n.15 (1976) (Brennan, J., joined by Marshall, J., dissenting).
173. 433 U.S. at 91.

of some that the true purpose of federal habeas corpus is integrally connected with the innocence of the petitioner.[174] This view of miscarriage would put a premium on the type of underlying claim that might otherwise be forfeited, requiring a claim-by-claim inquiry into the claim's bearing on guilt or innocence. On the other hand, the miscarriage concept might only mean that the defendant had not been afforded an opportunity in state court to litigate any important federal claim which otherwise would go unexamined in the absence of federal habeas corpus scrutiny. The choice between these different views of the miscarriage rationale will ultimately have to abide clearer Supreme Court redefinition of the underlying general purpose of federal habeas corpus. Nevertheless, absent a pronounced shift to the innocence underpinning, which thus far has not prevailed, the miscarriage notion seems more reasonably read as affording a federal forum, on habeas corpus, to a state defendant who otherwise would not have had a fair chance to litigate a federal claim that possibly renders unconstitutional the petitioner's incarceration. In *Sykes*, the Court placed no special emphasis on the fact that the underlying violation, which the Court treated as a bare *Miranda* claim,[175] would not, of itself, cast doubt on the reliability of the guilt-finding determination. Finally, the miscarriage rationale language should be read in a way consistent with the majority and separate opinions' allusions to counsel competency, discussed above.

Consequently, when considered against the apparent rationale of the *Sykes* majority and separate opinions' assumptions of counsel competency, it appears that if the defendant shows ineffective assistance of counsel which would otherwise result in a forfeiture of a federal claim, the ineffectiveness will normally qualify as cause under *Sykes*, allowing the federal habeas corpus court to reach the merits of the underlying federal claim.[176] The word

174. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., joined by Burger, C.J., & Rehnquist, J., concurring). *See also* Stone v. Powell, 428 U.S. 465, 491 n.31 (1976).

175. The Court appears to have read Syke's claim as "a bare allegation of a *Miranda* violation, without accompanying assertions going to the actual voluntariness or reliability of the confession." 433 U.S. at 87 n.11. *See also id.* at 74-75. Syke's precise claim seems to have been that he was unable to understand, and therefore waive, the *Miranda* warning given him, *see id.* at 77, because of intoxication. *See* Wainwright v. Sykes, 528 F.2d 522, 523 (5th Cir. 1976).

176. In a recent case, the Supreme Court found it unnecessary to rule on the issue of whether ineffective assistance would qualify as "cause" within the meaning of *Sykes*. Browder v. Department of Corrections, — U.S. —, — n.1, 98 S. Ct. 556, 558 n.1 (1978). Cases in the lower federal courts are just beginning to develop. *See* White v. Estelle, 566 F.2d 500 (5th Cir. 1978) (case can be read as implying that ineffectiveness would satisfy *Sykes* test, although court ultimately decides case on another basis); Rinehart v. Brewer, 561 F.2d 126, 130 n.6 (8th Cir. 1977) (cause found in procedural context of several factors, including ineffective assistance); Jiminez v. Estelle, 557 F.2d 506 (5th Cir. 1977) (post-*Sykes* habeas corpus case applying cause and prejudice rule and remanding case to district court for determination of whether "cause" of failure of state prisoner's counsel to object to constitutionally suspect prior conviction was due to trial counsel incompetence and whether such cause satisfied the *Sykes* exception); Dumont v. Estelle, 513 F.2d 793, 797 (5th Cir. 1975) (a pre-*Sykes* case applying cause and prejudice rule and listing ineffective assistance of counsel as a cause). Other cases in analogous forfeiture contexts support inclusion of ineffective assistance as a cause negating forfeiture. *See* text & note 152 *supra*. *See also* Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262, 1276-89 (1966). It is not inconceivable that the raising of the ineffectiveness claim may itself be subjected to the cause

"normally" deserves emphasis. There may be subtler questions involved if the ineffective assistance issue is one that can be raised in the *state* courts to negate the forfeiture, but was not so used before federal habeas corpus relief is sought. It is only when the federal court determines, as a federal question, that the ineffectiveness issue is properly before it that ineffectiveness would be able to serve as cause. In any number of instances, the federal courts may find that failure to have raised the ineffectiveness claim in state courts will bar present federal relief.[177] Some of these instances will be exhaustion problems, simply delaying assertion of the claim in federal court until the ineffectiveness issue has been litigated in a state forum. Suppose, for example, that an attorney does not raise a confession issue at a state trial. If the defendant then seeks to litigate the confession question on federal habeas corpus by showing that attorney ineffectiveness was the cause for failure to timely object, it will be relevant to ask whether the state has a collateral attack mechanism of its own that will presently afford relief via the ineffective assistance route. If the state does have such a mechanism, the defendant will likely be remitted to it, at least initially, under the exhaustion doctrine.[178] In other instances, however, the failure to have timely raised the ineffective counsel issue in state courts might possibly be encompassed by an extension of the *Sykes* rationale. Suppose that state procedure requires that the ineffectiveness issue be raised at the first opportunity—on the direct appeal of the case, for example[179]—and mandates that the failure to have raised the ineffectiveness claim at that time forecloses present state review. It is conceivable that the Supreme Court might extend its cause rule to require that the defendant *also* show that the appellate attorney was ineffective for not raising the ineffectiveness issue at that time. The possible cause for foregoing the underlying claim—the trial ineffectiveness claim—might itself have to be shown to have been given up only by the ineffectiveness of appellate counsel before the federal court considers it.

If showing ineffective assistance of counsel is one way of earning the benefits of *Sykes'* cause exception, the predictable result of the tightening of deliberate bypass standards by expanding forfeiture rules is that ineffectiveness claims will occupy a more important place in criminal procedure, with many of the attendant problems unresolved.

---

standard, *i.e.*, where there has been a long period of time in which the counsel issue has not been raised, the defendant may be asked to show cause for failure to raise it earlier. *Cf.* Johnson v. Riddle, 562 F.2d 312, 314-15 (4th Cir. 1977) (ineffectiveness claim lost by 17-year lapse).

177. *Cf.* Ennis v. LeFevre, 560 F.2d 1072, 1076-77 (2d Cir. 1977) (separate opinions of Meskill & Gurfein, JJ.) (failure to present to state court claim of ineffective assistance of state appellate counsel requires dismissal of habeas petition for failure to exhaust state remedies).

178. 28 U.S.C. § 2254(b) (1970). Compare this with the apparent fears of petitioner Sykes in stipulating effectiveness. See discussion note 171 *supra*.

179. See text & note 90 *supra*.

Another major impetus thrusting the ineffectiveness claim further into the foreground may arise from the Supreme Court's decision in *Stone v. Powell*.[180] In *Stone*, the Court concluded that a state prisoner was not entitled to litigate a fourth amendment claim absent a showing of a failure of a state court opportunity for a full and fair litigation of the issue.[181] Following *Stone*, in federal habeas corpus litigation by state prisoners seeking to overturn their convictions on fourth amendment grounds, or on other grounds to which the *Stone* principle may be extended, the debate will return to whether there was opportunity afforded to litigate the claim rather than whether the defendant had taken some deliberate action. It seems predictable that inadequacy of counsel will be a frequently asserted claim in attempts to show that the defendant had no real opportunity to litigate the claim.[182] Whether ineffectiveness does in fact qualify as an exception under *Stone* is, however, a question with a more doubtful outcome than the similar question under *Sykes*. The question will turn on the meaning ultimately accorded to *Stone*'s escape-hatch idea that fourth amendment claims, or by extension, other comparable claims, may be cognizable on federal habeas

180. 428 U.S. 465 (1976).

181. *Id.* at 481-82.

182. Subsequent to the original delivery of this paper, a few cases have been decided consistent with the view that ineffective assistance of counsel might be used under *Stone* to show the absence of opportunity to fully and fairly litigate in the state courts. *See* O'Berry v. Wainwright, 546 F.2d 1204, 1218 (5th Cir.), *cert. denied*, 433 U.S. 911 (1977). *O'Berry* was a habeas corpus case concerning a state conviction search and seizure claim. O'Berry had not taken a direct state appeal, but had filed unsuccessful post-conviction motions attempting to raise the fourth amendment claim. *See id.* at 1207-08. He then filed a state habeas corpus petition raising the fourth amendment claim and a claim that he had been denied his right to appeal. *Id.* at 1208. On hearing of the appeal claim, O'Berry contended that his original attorney had frustrated his right to appeal, a claim which was upheld by the state trial level habeas corpus court; that court then ordered habeas review equivalent to the direct appeal missed. *Id.* O'Berry's fourth amendment argument was briefed and argued, and the state appellate court denied the petition, finding no reversible error. *Id.* at 1208-09. That appellate court also stated it was not convinced that O'Berry's appellate right had been frustrated by state action. *See id.* at 1209. The errors asserted were analyzed and found to be without merit. However, the state appellate court then emphasized that the error alleged had not been properly objected to at trial. With this recitation, the state appellate court "accordingly" found no reversible error. *See id.*

The *O'Berry* court undertook a general discussion of what "the opportunity for a full and fair consideration" was within the meaning of Stone v. Powell, 428 U.S. 465 (1976). *See* 546 F.2d at 1209-10. With reference to factual dispute litigation in the state courts, the court found some limited usefulness in the standards announced in Townsend v. Sain, 372 U.S. 293 (1963), which had been cited in *Stone*. The court concluded:

> [W]here there are *facts* in dispute, full and fair consideration requires consideration by the fact-finding court, and at least the availability of meaningful appellate review by a higher state court. Where, however, the facts are undisputed, and there is nothing to be served by ordering a new evidentiary hearing, the full and fair consideration requirement is satisfied where the state appellate court presented with an undisputed factual record, gives full consideration to defendant's Fourth Amendment claims.

546 F.2d at 1213 (emphasis in original). Finding that the state appellate court had been squarely faced with the fourth amendment claim, that the state court had given O'Berry the opportunity for full appellate review, and that the state procedural ground (the contemporaneous objection rule) was an independent, adequate, nonfederal ground serving a legitimate purpose, the court concluded that O'Berry had been given the *Stone* state opportunity for a full and fair litigation of his fourth amendment claim. *Id.* at 1216-17. It was in the context of this discussion, particularly noting that the contemporaneous objection rule did not unduly burden O'Berry's federal rights, that the court volunteered the ineffective counsel language:

corpus if the defendant has somehow not been provided an opportunity for full and fair litigation of the claim.

What, then, is the nature of the deprivation of opportunity that will work this exception? It seems clear that it is the opportunity upon which the Supreme Court has fixed, not the actual litigation of the claim.[183] However, the nature of the opportunity the Court referred to in *Stone*, where the defendants had actually litigated their fourth amendment claims in the state courts, is made ambiguous by the Court's shifting use of language. Is the issue under *Stone* whether the defendant has not in fact received a fair

---

> Petitioner was represented throughout his state trial by counsel and in no phase of this case's tortuous history has any court found that Petitioner failed to receive effective assistance of counsel during his trial. Furthermore, after raising it in the District Court, Petitioner has not even urged the effectiveness of counsel in his brief or oral argument before us so the issue is no longer open for our review. Under these circumstances, we cannot conclude that this state procedural rule unduly interferes with federal rights, since Petitioner had ample opportunity to raise his objections at the time the evidence was introduced, or at the close of all the evidence.

*Id.* at 1218 (footnote omitted).

The *O'Berry* court's reasoning was adopted in Johnson v. Meacham, 570 F.2d 918 (10th Cir. 1978), where the court also noted that an asserted claim of ineffectiveness did not relate to the failure to timely raise a fourth amendment claim.

*See also* Gates v. Henderson, 568 F.2d 830 (2d Cir. 1977) (en banc), *cert. denied*, 98 S. Ct. 775 (1978), stating: "It may further be that even where the state provides the [corrective] process [for fourth amendment violations] but in fact the defendant is precluded from utilizing it by reason of an unconscionable breakdown in that process, the federal intrusion may still be warranted." *Id.* at 840. The court took note that the defendant "has never raised any issue as to the competence of his counsel." *Id.* In LiPuma v. Department of Corrections, 560 F.2d 84 (2d Cir.), *cert. denied*, 98 S. Ct. 189 (1977), a state defendant raised a fourth amendment issue as one claim in seeking federal habeas corpus relief. The state trial court had refused to allow counsel to raise belatedly a motion to suppress during trial. Subsequently, there was evidence to show that counsel had failed to file a pretrial motion, erroneously believing he was on record as having joined in a codefendant's motion. *Id.* at 86-88. The state argued that the state court opportunity to raise the claim in a timely fashion foreclosed habeas review under *Stone*, and, in response, the court of appeals found that failure of counsel to file a pretrial motion amounted to a "waiver." *Id.* at 89-90. However, the court acknowledged that this finding did not dispose of petitioner's claim that the reason for the failure to timely move to suppress was counsel's ineffective assistance. *Id.* at 90. This recognition and the court's confrontation of the ineffectiveness issue on the merits seems to imply recognition by the court that ineffective assistance would, under *Stone*, negate the opportunity to litigate normally available. However, after finding counsel was not ineffective (contrary to the district court's finding), *id.* at 90-93, the court placed the denial of habeas relief on an alternative ground. The court stated it was "also of the opinion that a full and fair consideration was given to all the issues in the case" by the state courts and the case therefore came within *Stone* on that ground. *Id.* at 93. In explanation, the court pointed to the fact that the ineffective assistance claim "had been raised and argued before the state courts," and it thus concluded that petitioner certainly was afforded the *Stone*-type opportunity. *Id.* at 93 n.6. The case thus stands for the proposition that ineffective assistance will negate normal foreclosure, but that if the ineffectiveness issue itself was fairly considered by the state court, the federal court will still apply *Stone*, leaving the ineffectiveness issue to the state court. Assumedly, if the state court failed to provide opportunity for such consideration, the federal court would.

The question of whether state counsel ineffectiveness would allow a fourth amendment claim to be raised in federal court was argued in a recent Supreme Court case. However, the Court decided the case on other grounds and found it unnecessary to reach the question, leaving it "for another day." Browder v. Department of Corrections, — U.S. —, — n.1, 98 S. Ct. 556, 558 n.1 (1978). For further background on the arguments before the Court in *Browder*, see 22 CRIM. L. REP. (BNA) 4025 (1977) (petition for certiorari); 22 CRIM. L. REP. (BNA) 4066 (1977) (oral argument). Because petitioner had not timely objected to the evidence in the state trial proceedings, the issue of whether ineffective assistance qualified as cause under *Sykes* was also intertwined and argued in *Browder*, but the Court likewise declined to reach this issue. Browder v. Department of Corrections, — U.S. at — n.1, 98 S. Ct. at 558 n.1.

183. *See* Gates v. Henderson, 568 F.2d 830, 839 (2d Cir. 1977) (en banc), *cert. denied*, 98 S. Ct. 775 (1978); Hines v. Auger, 550 F.2d 1094, 1097 (8th Cir. 1977); O'Berry v. Wainwright, 546 F.2d 1204, 1218 (5th Cir.), *cert. denied*, 433 U.S. 911 (1977).

opportunity to litigate his or her claim in the state courts,[184] or is it whether the state has afforded the defendant an opportunity to litigate the claim?[185] The two questions are not the same. If what the Court found important was whether the defendant in fact received a real opportunity to litigate the underlying claim in the state courts, then unremedied ineffectiveness of counsel would seem to qualify as a reason allowing the claim to reach into the federal habeas courts, for reasons paralleling the *Sykes* forfeiture discussion above. Here, however, the existence of a state collateral attack mechanism, which allows ineffectiveness to negate the failure to timely raise the underlying fourth amendment claim, also permits consideration of the merits of the underlying claim. Thus, the state remedy here may be accorded a different effect than in the *Sykes* situation, where it may only cause a detour and delay because of the exhaustion doctrine. In contrast, at least where the state court fully and fairly reaches the fourth amendment claim on collateral attack by the ineffectiveness route, this state treatment would comport with the underlying philosophy of *Stone*, barring federal habeas relief permanently.[186] Moreover, it is possible that an ineffective assistance claim, intertwined with a fourth amendment claim, would itself be subjected to the full and fair opportunity standard.[187]

Finally, in addition to *Stone* and *Sykes*, a third line of previously mentioned cases enhances the likelihood that ineffective assistance issues

184. This interpretation is suggested at points in the opinion. *See* 428 U.S. at 469, 486, 495 n.37. *See also id.* at 480 (citing Justice Powell's concurring opinion in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973)); Wainwright v. Sykes, 433 U.S. 72, 79-80 (1977) (characterizing *Stone* as removing from federal habeas corpus review challenges resting on fourth amendment grounds "where there has been a full and fair opportunity to raise them in the state court").

185. This reading also finds support in the opinion. *See* 428 U.S. at 481-82, 489, 494. The Court's "*cf.*" citation to Townsend v. Sain, 372 U.S. 293 (1963), *see* 428 U.S. at 494, is of dubious assistance in answering the particular opportunity question involved here.

186. If *Stone's* intent is to require only that the state provide an opportunity, and to emphasize a state denial of the opportunty, the questions become more difficult. If state procedure affords relief on collateral attack, as described in the text, consideration of the claim would satisfy *Stone* a fortiorari. But if the state were not to allow litigation of the underlying claim on collateral attack, even if the failure to make timely objection was attributable to counsel ineffectiveness, this reading of *Stone* would call for a difficult decision on whether or not ineffective counsel qualifies as state action amounting to state denial of opportunity within the meaning of *Stone*. See text & note 60 *supra*.

Given the deterrence rationale underscored in *Stone*, it is possible that the case could be read to mean only that the state must afford a judicial mechanism for the timely assertion and resolution of the underlying claim if raised, without concern for whether a particular defendant failed to take advantage of that mechanism because of counsel incompetence. If what the Court meant to focus on was the deterrence presented to the police officer at the time of the officer's action, then it would be difficult to say that the police would anticipate that counsel, because of incompetency, would fail to air the police action in court. On the other hand, some attention must be accorded to the "full and fair" opportunity concept; the Court was apparently not asking whether the state *usually* gave a full and fair hearing, which would similarly provide reasonably effective deterrence.

*See also* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). This article was cited in *Stone* by Justice Powell in support of his own earlier call in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), for an "opportunity" test. *See* 428 U.S. at 480 n.13. In a portion of that article, Judge Friendly took the position that, unless the state had prevented counsel from operating competently, even flagrant and apparent ineffective assistance of counsel should not give rise to collateral attack relief unless coupled with a colorable claim of innocence. Friendly, *supra*, at 152 n.46.

187. *See* LiPuma v. Department of Corrections, 560 F.2d 84 (2d Cir.), *cert. denied*, 98 S. Ct. 189 (1977), discussed note 182 *supra*.

will take on continually increasing prominence. *McMann v. Richardson*[188] and its progeny[189] establish ineffectiveness as one possible means of avoiding foreclosure of an issue, since the cases necessitate a demonstration of counsel inadequacy as an essential element in contesting certain guilty pleas.[190]

The shift from personal waiver type standards to assertions of inadequate counsel in the context of an asserted forfeiture will inevitably bring charges that what is being done is simply a repackaging of the same problem in a different wrapping and that the new uses of ineffectiveness represent an unwholesome trend. There is, however, more than a cosmetic remakeup involved. The courts have drawn substantial distinctions between simple counsel failure or error, on the one hand, and ineffective assistance of counsel, on the other, as the ineffectiveness standards cases show.[191] Even if counsel competency standards become more protective of the defendant, findings of ineffectiveness are likely to be reached grudgingly. The courts have resisted ineffectiveness claims generally, and that attitude is likely to continue. Many find it offensive of our adversary system that a judgment can be upset without any fault on the part of the adversary, or even the judge, when the blame is really attributable to one on the side of the party benefiting from the error. Ineffectiveness claims are nearly unique in this respect. As a result of both general attitude and legal differences between mere error and incompetence, the number of foregone errors that will be revitalized on a showing of ineffective assistance will be far fewer than those that would have been assertable under the old deliberate bypass standard approximating waiver. The shift then will be substantial. There will also be assertions that the shift in emphasis to ineffectiveness is unwholesome in itself, and that the underlying claims ought to be reached through more indirect devices. Unfounded ineffectiveness claims may well have a debilitating effect on the bar. At the same time, the courts have devised complicated scripts—usually played out under the banner of personal defendant waiver—for circumventing the real question involved in many instances. The real question is often counsel competence, and the courts are frequently avoiding that issue by using waiver standards to circumvent normal rules of timing and procedure on issues that were foregone by counsel. If counsel are in fact failing to perform duties deemed so basic that

188. 397 U.S. 759 (1970).

189. Tollett v. Henderson, 411 U.S. 258 (1973); Parker v. North Carolina, 397 U.S. 790 (1970); Brady v. United States, 397 U.S. 742 (1970).

190. The *McMann* line is significant enough as far as it goes, but it may portend an even more dramatic shift of law. If the courts continue to place a heavy emphasis on counsel's ability to insulate defendants from error, *McMann* may forecast an expansion of the concept that ineffectiveness *must* be shown in order for a defendant to raise issues not otherwise timely raised.

191. *See* text & notes 9-22 *supra*. *See also* Wainwright v. Sykes, 433 U.S. 72, 105 n.6 (1977) (Brennan, J., dissenting).

they will serve to reopen an otherwise final judgment, perhaps it is just as well that the system's failure be laid directly to the real cause where it can be confronted more clearly. It is ironic that there is little redress for counsel ineffectiveness outside the review of the criminal judgment itself. We have, oddly enough, fallen upon a system in which it has been given to defendants eager to gain their freedom the only substantial device for noticing counsel ineffectiveness in criminal cases.

## CONCLUSION

The law of ineffective assistance of counsel remains in transition in important areas. The constriction in *Sykes* of the deliberate bypass concept, the contraction in *Stone* of grounds assertable on federal habeas corpus, and the linchpin importance assigned by the *McMann* line of cases to counsel's adequacy when a defendant seeks to make certain claims following a guilty plea, all presage a heightened importance assigned to the presumption that counsel has acted competently and buffered the defendant from error. As such, this transition also presages a heightened procedural importance for the claim of ineffective assistance of counsel, which will be asserted to contravene that presumption.

In the face of the new uses and importance of ineffectiveness claims, the courts soon are going to be confronted with the task of more definitively resolving important questions about the changing standards for testing the adequacy of counsel and about the multifaceted procedural aspects of an old claim.