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## INEFFECTIVE ASSISTANCE OF COUNSEL

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At a time when public defenders' offices are overburdened with heavy caseloads, and members of the bar, including many with neither expertise nor experience in criminal litigation, are increasingly being appointed to try criminal cases, the claim that defense counsel has rendered ineffective assistance is being received somewhat more sympathetically than it has been in the past.<sup>1</sup> Unfortunately, the standards of legal competence enunciated by appellate courts provide little guidance for trial or habeas courts to follow. As a result, numerous decisions of trial courts rejecting ineffective assistance claims have been reversed on appeal. The law on ineffective assistance merits review, with emphasis upon what measures may be taken to assure more effective assistance than is typically being rendered, and with the objective of providing clearer standards for the courts to follow.<sup>2</sup>

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<sup>1</sup> One commentator persuasively demonstrates that *Powell v. Alabama*, 287 U.S. 45 (1932), guarantees not merely a timely and operative appointment of counsel, but also, in light of subsequent cases, a right to the assistance of counsel whose quality of performance does not fall below a certain level. See *Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289, 293-95 (1964). See also *White v. Ragen*, 324 U.S. 760 (1945); *Glasser v. United States*, 315 U.S. 60 (1942); *Avery v. Alabama*, 308 U.S. 444 (1940).

The courts are divided on the question of whether there is a constitutional right to defend oneself without counsel. See *United States v. Plattner*, 330 F.2d 271, 274 (2d Cir. 1964) (leading case for proposition that there is an "absolute and primary right to conduct one's own defense in *propria persona*"). Compare *Lowe v. United States*, 418 F.2d 100, 103 (7th Cir. 1969), *cert. denied*, 397 U.S. 1048 (1970); *United States v. Sternman*, 415 F.2d 1165, 1169-70 (6th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970); *Arnold v. United States*, 414 F.2d 1056, 1058 (9th Cir. 1969), *cert. denied*, 396 U.S. 1021 (1970), with *Van Nattan v. United States*, 357 F.2d 161, 163-64 (10th Cir. 1966); and *Brown v. United States*, 264 F.2d 363, 365 (D.C. Cir.), *cert. denied*, 360 U.S. 911 (1959). In a recent, well-reasoned opinion, the Supreme Court of California held that "there is no express federal constitutional compulsion to afford an accused the right of self-representation in criminal trials." *People v. Sharp*, 7 Cal. 3d 448, 457, 499 P.2d 489, 494, 103 Cal. Rptr. 233, 238 (1972).

<sup>2</sup> The leading article on ineffective assistance of counsel is *Waltz, supra* note 1. See

## I

## DEFINITIONAL STANDARDS

Historically, for assistance to be ineffective, counsel's efforts must have been so perfunctory as to render the trial a farce, a mockery of justice.<sup>3</sup> On its face, this standard puts an unduly heavy burden on the defendant. It deprives him of a reasonable opportunity of being acquitted whenever trial counsel's errors, although serious and prejudicial, were not so blatant as to render the trial a farce. Moreover, the farce or mockery standard is unduly vague and is therefore unpredictable and difficult to apply.

Some courts have purported to reject the farce or mockery standard.<sup>4</sup> One court has stated that the appropriate question is whether "gross incompetence blotted out the essence of a substantial defense."<sup>5</sup> This test, however, provides no guidance for a determination of what constitutes "gross incompetence"; it only suggests a finding of prejudice once gross incompetence is established. Another court posed the standard as "whether under all the circumstances of the particular case the [defendant] was afforded genuine and effective representation."<sup>6</sup> Such a test, however, begs the question by incorporating the term to be defined. Moreover, "genuine" means authentic, honest, sincere, real, or "free from hypocrisy or pretense,"<sup>7</sup> a definition which is of no aid in determining counsel's adequacy. It has been noted in several cases "[t]hat 'effective' counsel required by due process . . . is not *errorless* counsel; rather, it is counsel 'reasonably likely to render, *and rendering* reasonably effective assistance.'<sup>8</sup> This formulation likewise begs the question.

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also Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1239-63 (1970); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965); Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531 (1963).

<sup>3</sup> See, e.g., *Bell v. Alabama*, 367 F.2d 243 (5th Cir. 1966), *cert. denied*, 386 U.S. 916 (1967); *Nutt v. United States*, 335 F.2d 817 (10th Cir.), *cert. denied*, 379 U.S. 909 (1964); *United States ex rel. Cooper v. Reincke*, 333 F.2d 608 (2d Cir.), *cert. denied*, 379 U.S. 909 (1964); *Frاند v. United States*, 301 F.2d 102 (10th Cir. 1962); *Cofield v. United States*, 263 F.2d 686 (9th Cir.), *rev'd per curiam*, 360 U.S. 472 (1959); *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

<sup>4</sup> See, e.g., *Scott v. United States*, 427 F.2d 609 (D.C. Cir. 1970); *State v. Merchant*, 10 Md. App. 545, 271 A.2d 752 (1970).

<sup>5</sup> *Scott v. United States*, 427 F.2d 609, 610 (D.C. Cir. 1970).

<sup>6</sup> *State v. Merchant*, 10 Md. App. 545, 550, 271 A.2d 752, 755 (1970).

<sup>7</sup> WEBSTER'S UNABRIDGED INTERNATIONAL DICTIONARY 1047 (2d ed. 1955).

<sup>8</sup> *In re Saunders*, 2 Cal. 3d 1033, 1041, 472 P.2d 921, 926, 88 Cal. Rptr. 633, 638 (1970)

Other tests have been suggested which are akin to malpractice standards: for example, whether counsel's performance was at the level "of normal competency,"<sup>9</sup> or whether it was "equal to the exercise of normal customary skill and knowledge."<sup>10</sup> It has been said that the attorney should "perform at least as well as any attorney with ordinary training in the legal profession, and . . . exercise the usual amount of skill and judgment exhibited by an attorney conscientiously seeking to protect his client's interests."<sup>11</sup> These tests do provide a standard capable of application by a court, since a court can evaluate a particular attorney's practice in light of the normal and customary skill exhibited in the courtroom. This malpractice test, with some modifications to be suggested below, is the most workable and satisfactory standard.

Another test, closely related to the test of normal customary skill, holds counsel's assistance ineffective if no reasonable attorney would have so acted.<sup>12</sup> This test properly gives great leeway to trial counsel, since many acts and omissions might be argued about by reasonably skilled lawyers. If conscientious lawyers might differ as to the propriety of the act or omission, it may properly be said that the defendant has not received ineffective assistance.<sup>13</sup> In applying these tests, courts customarily look to counsel's behavior to determine whether it can be justified by tactical considerations. If there is any reasonable tactical or strategic basis for counsel's conduct, it is not considered ineffective.<sup>14</sup>

A variation of the malpractice standard should be adopted. The formulation of this standard should recognize that lawyers' talents are not fungible. A perfectly competent corporate lawyer may be incompetent in criminal defense work because his training, skills, experience, and interests are not in the criminal process. Merely graduating from law school (where the attorney may have taken only the

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(en banc), quoting *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961) (emphasis in original).

<sup>9</sup> *Moore v. United States*, 432 F.2d 730, 737 (3d Cir. 1970).

<sup>10</sup> *State v. Anderson*, 117 N.J. Super. 507, 519, 287 A.2d 234, 240 (App. Div. 1971).

<sup>11</sup> *Kott v. Green*, 303 F. Supp. 821, 822 (N.D. Ohio 1968).

<sup>12</sup> *State v. White*, 5 Wash. App. 283, 487 P.2d 243 (1971), rev'd, 81 Wash. 2d 223, 500 P.2d 1242 (1972).

<sup>13</sup> See *United States v. Garguilo*, 324 F.2d 795 (2d Cir. 1963).

<sup>14</sup> See *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965); *In re Ernst*, 294 F.2d 556 (3d Cir.), cert. denied, 364 U.S. 943 (1961); *Snider v. Cunningham*, 292 F.2d 683 (4th Cir. 1961); *Bolden v. United States*, 266 F.2d 460 (D.C. Cir. 1959); *Harris v. United States*, 239 F.2d 612 (5th Cir. 1957); *State v. Fulford*, 290 Minn. 236, 187 N.W.2d 270 (1971); notes 97 & 117-36 and accompanying text *infra*.

minimum required courses in criminal law and evidence), passing a bar examination (which typically devotes only a small fraction of questions to criminal law and evidence), and drafting corporate bylaws or filing registration statements with the SEC do not equip an attorney to handle a criminal defense. A criminal defendant is entitled to better assistance than such a corporate attorney could provide. The test of effective assistance of counsel should be whether counsel exhibited the normal and customary degree of skill possessed by attorneys who are *fairly skilled in the criminal law and who have a fair amount of experience at the criminal bar*. In applying this standard to particular actions or omissions of counsel, the relevant question should be whether counsel's behavior was such that reasonably competent and fairly experienced criminal defense lawyers might debate its propriety. If such a debate may exist, assistance should not be found ineffective.

A defendant should not be exposed to any significant risk that his counsel's incompetence contributed to his conviction. A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight. Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate. Such a finding of ineffective representation should reverse a defendant's conviction if counsel's conduct created a reasonable possibility of contributing to that conviction.

It may be argued that a liberal policy of reversal on ineffective assistance grounds will encourage counsel with weak cases to deliberately blunder in order to invalidate the conviction or cause a mistrial.<sup>15</sup> But this argument ignores the devastating effect that a finding of ineffective assistance can have on an attorney's reputation. As the Court of Appeals for the Fifth Circuit has observed:

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<sup>15</sup> See *Norman v. United States*, 100 F.2d 905, 906-07 (6th Cir.), *cert. denied*, 306 U.S. 660 (1939). See also *Waltz*, *supra* note 1, at 313.

Attorneys generally are greatly concerned with their professional reputations. They know that to lose a good reputation for faithful adherence to the cause of the client is not only to lose that which they should most highly treasure but is to lose their practice as well.<sup>16</sup>

Moreover, counsel who are flagrant in their incompetent representation can and should be formally reprimanded or censored by the bar. In addition, trial counsel is usually cognizant of the fact that in the majority of cases, if the defendant is to prevail, he has a far better chance of doing so at the trial rather than at the appellate level. Counsel is not likely to forfeit his chance of success at the trial in the hope of obtaining a reversal on appeal based on ineffective assistance grounds. Even if unethical counsel deliberately "throws" a trial, the result should not be an affirmance of the conviction; the defendant, at least when not a party to counsel's deliberate misfeasance, should be entitled to a new trial in which he is represented by diligent and conscientious counsel.

## II

### CIRCUMSTANCES CONSTITUTING INEFFECTIVE ASSISTANCE

#### A. *Advising the Defendant To Enter a Guilty Plea*

Traditionally, an accused is entitled to the assistance of counsel in deciding whether to plead guilty.<sup>17</sup> Occasionally, counsel assures his client that he will receive a more lenient sentence than he actually does receive. For example, counsel may promise his client that a guilty plea will result in probation or a nonjail sentence. If upon pleading guilty the client is sentenced to imprisonment, it has been held that the defendant was denied effective assistance.<sup>18</sup> Some courts have set aside convictions pursuant to guilty pleas when counsel made promises that went unfulfilled, without indicating whether the ground was ineffective assistance or the absence of a voluntary plea.<sup>19</sup>

On the other hand, it has been said that "[a] mere disappointed

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<sup>16</sup> *Williams v. Beto*, 354 F.2d 698, 706 (5th Cir. 1965).

<sup>17</sup> *See, e.g., Williams v. Kaiser*, 323 U.S. 471 (1945).

<sup>18</sup> *See, e.g., United States ex rel. Thurmond v. Mancusi*, 275 F. Supp. 508 (E.D.N.Y. 1967); *State v. Tunender*, 182 Neb. 701, 157 N.W.2d 165 (1968).

<sup>19</sup> *See, e.g., United States v. Shneer*, 105 F. Supp. 883 (E.D. Pa. 1951), *aff'd*, 194 F.2d 598 (3d Cir. 1952); *People v. Walker*, 250 Ill. 427, 95 N.E. 475 (1911). *See also State v. Casaras*, 104 Mont. 404, 66 P.2d 774 (1937) (guilty plea based on counsel's promise of no death sentence set aside as involuntary).

expectation of great leniency does not vitiate a plea."<sup>20</sup> Cases have held that a defendant was not denied effective assistance and was not entitled to withdraw his guilty plea when his attorney had told him that a light sentence had been arranged,<sup>21</sup> assured him of a suspended sentence,<sup>22</sup> or told him that the prosecutor agreed that on a plea of guilty the defendant would be permitted to join the armed forces.<sup>23</sup> In each of these situations, the sentence was harsher than the attorney had promised.

When an attorney assures a defendant of a particularly lenient disposition and such assurance is not justified, it would appear that the attorney has prevented his client from making an informed and intelligent appraisal of the consequences of a guilty plea. The Supreme Court, in *Kercheval v. United States*,<sup>24</sup> noted that for a guilty plea to be valid it must be "made voluntarily after proper advice and with full understanding of the consequences."<sup>25</sup> Thus, another ground for vacating a guilty plea is counsel's erroneous advice to the defendant of the statutory maximum for an offense.<sup>26</sup> Similarly, if counsel erroneously advises the defendant of the absence of a particular collateral consequence of a guilty plea and the defendant pleads guilty primarily because of that advice, it cannot be said that the plea was intelligently made.<sup>27</sup> A guilty plea will also be set aside if defense counsel connives with the prosecution to induce the plea by false promises.<sup>28</sup> If, how-

<sup>20</sup> *Monroe v. Huff*, 145 F.2d 249 (D.C. Cir. 1944).

<sup>21</sup> *See Thomson v. Huff*, 149 F.2d 842 (D.C. Cir. 1945); *United States ex rel. Wilkins v. Banmiller*, 205 F. Supp. 123 (E.D. Pa. 1962), *aff'd*, 325 F.2d 514 (3d Cir. 1963), *cert. denied*, 379 U.S. 847 (1964).

<sup>22</sup> *See United States v. Weese*, 145 F.2d 135 (2d Cir. 1944).

<sup>23</sup> *See Dorsey v. Gill*, 148 F.2d 857 (D.C. Cir.), *cert. denied*, 325 U.S. 890 (1945).

<sup>24</sup> 274 U.S. 220 (1927).

<sup>25</sup> *Id.* at 223.

<sup>26</sup> *See, e.g., Mathis v. North Carolina*, 266 F. Supp. 841 (M.D.N.C. 1967).

<sup>27</sup> *United States v. Parrino*, 212 F.2d 919, 922 (2d Cir. 1954) (Frank, J., dissenting) (defendant advised that guilty plea would prevent his deportation).

<sup>28</sup> *See, e.g., United States ex rel. Wissenfeld v. Wilkens*, 281 F.2d 707 (2d Cir. 1960). Indeed, under the Supreme Court's recent ruling in *Santobello v. New York*, 404 U.S. 257 (1971), a prosecutor's unfulfilled promise to recommend a light sentence or not to make any recommendation at all is grounds either for setting aside a guilty plea or for allowing the defendant to plead before another judge, whatever may have been defense counsel's role in knowingly bringing about the misguided guilty plea. In *Santobello*, where the prosecutor recommended a maximum sentence in breach of his predecessor's promise not to recommend any sentence, and the trial judge imposed the maximum sentence, the Court remanded the case to the state court for a determination of whether the defendant should be resentenced by a different judge or should be allowed to replead to the original charges. The Court stated: "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262.

ever, the attorney simply indicates to a client his well-considered opinion that a lenient sentence is probable but not certain, then the client takes a calculated risk in pleading guilty and cannot subsequently complain because his hope was not realized.<sup>29</sup>

Once defense counsel has made a definite promise of leniency to a defendant, even a trial judge's compliance with Rule 11 of the Federal Rules of Criminal Procedure<sup>30</sup> or with the plea-taking requirements set forth in *Boykin v. Alabama*,<sup>31</sup> should not be sufficient to negate the ineffective assistance claim. The defendant who is determined to plead guilty can, in most cases, be expected to treat the court's inquiry into the voluntariness of his plea as a ritual he must go through in order to register his guilty plea and to receive the lenient sentence promised by counsel, and will perfunctorily answer "no" if asked whether any promises have been made.<sup>32</sup>

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Even prior to *Santobello* some courts had held that any unfulfilled promise of the prosecutor was grounds for withdrawal of a guilty plea. *See, e.g.*, *People v. Cassidy*, 90 Ill. App. 2d 132, 232 N.E.2d 795 (1967) (defendant promised probation and fine but received prison term); *State v. Wolske*, 280 Minn. 465, 160 N.W.2d 146 (1968) (unkept promise to dismiss court charges); *State v. Krois*, 74 Wash. 2d 404, 445 P.2d 24 (1968) (unkept promise of hospital care). In *Hilliard v. Beto*, 465 F.2d 829 (5th Cir. 1972), the court held that a state prisoner's habeas corpus petition should be granted if he could establish, as alleged, that the prosecution had promised to recommend five years' imprisonment and then stood silently as the judge imposed a life sentence. Going further than the courts in these cases, the Court of Appeals for the Third Circuit has held that even when the prosecutor fulfills his promise to recommend a light sentence, but the trial judge does not accept the recommendation and, in fact, imposes a more severe sentence, *Santobello* requires that the defendant be given an opportunity to withdraw his plea. *See Culbreath v. Rundle*, 466 F.2d 730 (3d Cir. 1972); *cf. United States v. Lester*, 247 F.2d 496 (2d Cir. 1957); *United States v. Paglia*, 190 F.2d 445 (2d Cir. 1951).

<sup>29</sup> For example, in *Davidson v. State*, 92 Idaho 104, 105, 437 P.2d 620, 621 (1968), the court held that a "mere prediction by counsel of the court's likely attitude on a sentence, short of some implication of an agreement or understanding . . . is not ground for attacking a guilty plea."

<sup>30</sup> The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature and the consequences of the plea.

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<sup>31</sup> 395 U.S. 238, 242-43 (1969).

<sup>32</sup> It has been held that the defendant's denial at a guilty plea hearing that the prosecution has made a promise is not enough to validate a guilty plea when a prosecutorial promise has in fact gone unfulfilled. *See Walters v. Harris*, 460 F.2d 988 (4th Cir. 1972). The court in *Walters* observed: "Examination of the defendant alone will not always bring out into the open a promise that has induced his guilty plea." *Id.* at 993. The court noted that disclaimers are often mere ritual generated "out of fear that a truthful response would jeopardize the bargain." *Id.* The court implied that its observation applied equally to promises made by defense counsel. *Id.* One blatant example of the guilty plea ritual occurred in *United States ex rel. McGrath v. La Vallee*, 319 F.2d 308 (2d Cir. 1963). In *La Vallee* the judge told the defendant in chambers what answers to give in the sub-

Guilty pleas have also been set aside when counsel was not aware of the law creating a defense,<sup>33</sup> when counsel did not adequately investigate the facts relating to a possible defense,<sup>34</sup> when counsel failed to raise certain defenses,<sup>35</sup> and when counsel did not advise the defendant of the right to challenge the composition of the grand jury.<sup>36</sup>

To assure that the defendant has been properly advised by counsel, the trial judge, before accepting a guilty plea, should make an inquiry of counsel as to what he told the defendant about the penalty to be imposed, the nature of the charge, the consequences of the guilty plea, and other relevant matters. If the trial judge in the course of this inquiry discovers that counsel misled the defendant or did not fully explain the nature of the charge and the consequences of the plea, counsel ought to be required to fully inform the defendant before the judge makes his Rule 11 or *Boykin* inquiries.

The consequences that should follow from counsel's failure to explain to a defendant his legal rights are well expressed in the dissenting opinion in *Mitz v. State*:<sup>37</sup>

I do not think it matters in the least whether an explanation of all his legal rights would have helped him, nor whether we are able to discover that it would or would not have done so. The only question for us to determine is: Were these rights explained to him? If they were not explained to him he has not had due process. Appellant had no burden to show that the explanation of these rights would have helped him, nor that the failure to make such explanation could have harmed him.<sup>38</sup>

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sequent proceeding for the taking of a guilty plea. See generally Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Proposed Amendments to Criminal Rule 11*, 52 F.R.D. 409, 426 (1971).

<sup>33</sup> See *In re Williams*, 1 Cal. 3d 168, 460 P.2d 984, 81 Cal. Rptr. 784 (1969); notes 39-47 and accompanying text *infra*.

<sup>34</sup> See *McLaughlin v. Royster*, 346 F. Supp. 297 (E.D. Va. 1972); *People v. Bennett*, 29 N.Y.2d 462, 280 N.E.2d 637, 329 N.Y.S.2d 801 (1972); notes 48-65 and accompanying text *infra*.

<sup>35</sup> See *Smallwood v. Warden*, 205 F. Supp. 325 (D. Md. 1962); *State v. Merchant*, 10 Md. App. 545, 271 A.2d 752 (1970).

<sup>36</sup> See *Colson v. Smith*, 315 F. Supp. 179 (N.D. Ga. 1970), *aff'd*, 438 F.2d 1075 (5th Cir. 1971).

<sup>37</sup> 233 Ind. 537, 121 N.E.2d 874 (1954).

<sup>38</sup> *Id.* at 544-45, 121 N.E.2d at 877 (dissenting opinion). A further illustration of the consequences of failing to inform the defendant of his legal rights is found in *Abraham v. State*, 228 Ind. 179, 91 N.E.2d 358 (1950). There, the court set aside a guilty plea because of ineffective assistance when the defendant was neither asked to relate his version of the alleged offense nor requested to indicate which witnesses had relevant information. Furthermore, the accused was never advised by counsel of his right to a jury trial, the nature of the charges against him, or his right to require the state to prove him guilty beyond a reasonable doubt.

## B. Counsel's Ignorance of the Law

When counsel had an erroneous notion of the law and consequently did not raise a defense, move to suppress evidence, or call particular witnesses, some courts have found that ineffective assistance has been rendered.<sup>39</sup> In *People v. Ibarra*,<sup>40</sup> counsel did not challenge the legality of a search which produced heroin because he was unaware of the rule of law that allowed him to do so. The California Supreme Court found that counsel's "decision reflected, not judgment, but unawareness of a rule of law basic to the case; a rule that reasonable preparation would have revealed."<sup>41</sup> In a case before the California District Court of Appeal, counsel had failed to object to illegally seized evidence because he misread the leading case involving the relevance of a parole officer's presence to the legality of a search.<sup>42</sup> The court stated somewhat sarcastically that counsel "should have put the onus of an adverse ruling on the trial judge rather than himself."<sup>43</sup>

When counsel had advised a plea of guilty to the charge of forgery, unaware that under the controlling law the defendant could only be prosecuted under a statute proscribing misuse of credit cards (which carried a lesser penalty than forgery), the California Supreme Court found that counsel had proceeded "in default of knowledge that reasonable inquiry would have produced, and hence in default of any judgment at all."<sup>44</sup> The lack of reasonable inquiry was illustrated in another case in which the conviction of a defendant was reversed when counsel erroneously agreed with the trial judge that the law denied the court power to grant probation.<sup>45</sup> Some courts have also pointed to errors of law or failure to research the law as factors contributing to a finding of ineffective assistance.<sup>46</sup>

The opinions finding ineffective assistance of counsel under the

<sup>39</sup> See, e.g., *People v. McDowell*, 69 Cal. 2d 737, 447 P.2d 97, 73 Cal. Rptr. 1 (1968); *People v. Wellborn*, 257 Cal. App. 2d 513, 65 Cal. Rptr. 8 (1967); cf. notes 40-45 *infra*.

<sup>40</sup> 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

<sup>41</sup> *Id.* at 466, 386 P.2d at 491, 34 Cal. Rptr. at 867.

<sup>42</sup> *People v. Coffman*, 2 Cal. App. 3d 681, 82 Cal. Rptr. 782 (1969).

<sup>43</sup> *Id.* at 691, 82 Cal. Rptr. at 788.

<sup>44</sup> *In re Williams*, 1 Cal. 3d 168, 177, 460 P.2d 984, 990, 81 Cal. Rptr. 784, 790 (1969), quoting *Brubaker v. Dickson*, 310 F.2d 30, 39 (9th Cir. 1962). For a holding finding inexcusable the failure of counsel to raise an almost identical point of law, see *In re Greenfield*, 11 Cal. App. 3d 536, 89 Cal. Rptr. 847 (1970).

<sup>45</sup> See *Wilson v. Reagan*, 354 F.2d 45 (9th Cir. 1965).

<sup>46</sup> In *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963), counsel did not arrange for a psychiatrist to examine his client because he mistakenly believed that the communications would not be privileged. In *Kott v. Green*, 303 F. Supp. 821 (N.D. Ohio 1968), counsel did not research the law bearing on the admissibility of prior convictions or on the claim of larceny and its possible defenses.

circumstances enumerated above are logical; counsel should at least be expected to know or take reasonable steps to discover the law relevant to his client's defense. When counsel proceeds from ignorance or mistake of the law and his action or inaction can reasonably be assumed to have contributed to his client's conviction, the defendant has been prejudiced by counsel's incompetence and the conviction should be set aside.<sup>47</sup>

### C. *Failure of Counsel To Investigate the Facts*

There are a number of decisions in which the failure of counsel to make a factual investigation of matters relating to the alleged crime, to a defense, to suppressibility of evidence, or to other matters important to the defense has been held to constitute ineffective assistance. For example, when counsel did not raise the diminished responsibility defense, a court rejected the argument that counsel's inaction was based on tactical reasons, because counsel had made no serious efforts to obtain available medical reports reflecting past diagnoses and treatment and had made no attempt to have the defendant examined by a psychiatrist.<sup>48</sup>

Failure to investigate the facts relating to an insanity defense has been held to constitute ineffective assistance.<sup>49</sup> In *Brooks v. Texas*,<sup>50</sup> investigation would have uncovered the defendant's prior commitments to at least three different mental institutions and his two attempts at suicide. Counsel did not have the defendant examined by a psychiatrist and did not study the report of the psychiatrist appointed by the prosecuting attorney who had examined the defendant. The court concluded that the trial was no more than a "mockery of justice."<sup>51</sup>

In other cases courts have held that counsel's failure to investigate the circumstances under which the defendant's confession was obtained amounted to ineffective assistance.<sup>52</sup> In one such case, the defendant did not tell his attorney of his confession and the circumstances under which it was given. The court, in finding counsel's assistance inadequate,

<sup>47</sup> This test of prejudice will be explored in notes 170-71 and accompanying text *infra*.

<sup>48</sup> See *In re Saunders*, 2 Cal. 3d 1033, 472 P.2d 921, 88 Cal. Rptr. 633 (1970) (en banc).

<sup>49</sup> See, e.g., *Brooks v. Texas*, 381 F.2d 619 (5th Cir. 1967); *McLaughlin v. Royster*, 346 F. Supp. 297 (E.D. Va. 1972); *Goodwin v. Swenson*, 287 F. Supp. 166 (W.D. Mo. 1968); *People v. Bennett*, 29 N.Y.2d 462, 280 N.E.2d 637, 329 N.Y.S.2d 801 (1972).

<sup>50</sup> 381 F.2d 619 (5th Cir. 1967).

<sup>51</sup> *Id.* at 625.

<sup>52</sup> See, e.g., *Jones v. Cunningham*, 297 F.2d 851 (4th Cir. 1962); *Kott v. Green*, 303 F. Supp. 821 (N.D. Ohio 1968); *Bentley v. Florida*, 285 F. Supp. 494 (S.D. Fla. 1968); *Smotherman v. Beto*, 276 F. Supp. 579 (N.D. Tex. 1967); *Abraham v. State*, 228 Ind. 179, 91 N.E.2d 358 (1950).

observed that the "lawyer who does not probe, does not inquire, and does not seek out all the facts relevant to his client's cause is prepared to do little more than stand still at the time of trial."<sup>53</sup>

Counsel's failure to investigate the circumstances of an arrest and search<sup>54</sup> or the circumstances of pretrial identification of the defendant<sup>55</sup> has been considered ineffective assistance. When counsel kept the defendant from testifying on the belief that he had a prior felony conviction, and proper investigation would have revealed no such conviction, ineffective assistance was found,<sup>56</sup> as it has been when counsel made no inquiry of the defendant's version of the facts.<sup>57</sup>

Several cases have involved multiple failings of trial counsel. In *State v. Anderson*,<sup>58</sup> counsel neglected to examine the prosecution file, failed to seek out the FBI reports, which included a comparison of the defendant's handwriting with that of the demand note used in the robbery of which defendant was accused, failed to interview the accomplice who had testified against the defendant in order to develop the bias and prejudice of the accomplice, failed to examine the grand jury minutes, and failed to obtain the photographs that were shown to the victim. The court held that counsel's performance amounted to no preparation for trial.<sup>59</sup>

Some courts have presumed prejudice to the defendant and have reversed convictions when counsel conducted no investigation and the prosecution cannot affirmatively show lack of prejudice to the accused.<sup>60</sup> The defendant is entitled to have counsel make a reasonably thorough investigation of facts relating to the charges and any possible defenses.<sup>61</sup>

<sup>53</sup> *Smotherman v. Beto*, 276 F. Supp. 579, 588 (N.D. Tex. 1967). See generally *Kott v. Green*, 303 F. Supp. 821 (N.D. Ohio 1968). In *Kott* the court said counsel should have done more than merely rely on the defendant's statement; he should have independently investigated the facts. *Id.* at 823.

<sup>54</sup> See *United States ex rel. Kimbrough v. Rundle*, 293 F. Supp. 839 (E.D. Pa. 1968).

<sup>55</sup> See *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970).

<sup>56</sup> See *People v. Shells*, 4 Cal. 3d 626, 483 P.2d 1227, 94 Cal. Rptr. 275 (1971).

<sup>57</sup> See *Turner v. Maryland*, 303 F.2d 507 (4th Cir. 1962); *Abraham v. State*, 228 Ind. 179, 91 N.E.2d 358 (1950).

<sup>58</sup> 117 N.J. Super. 507, 285 A.2d 234 (App. Div. 1971).

<sup>59</sup> *Id.* at 521, 285 A.2d at 241.

<sup>60</sup> See, e.g., *Coles v. Peyton*, 389 F.2d 224 (4th Cir.), cert. denied, 393 U.S. 849 (1968); *Bentley v. Florida*, 285 F. Supp. 494 (S.D. Fla. 1968).

<sup>61</sup> An American Bar Association Project has suggested that defense attorneys have the responsibility

to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

If counsel does not make such investigation but allows his client to plead guilty or goes to trial with insufficient preparation, the conviction should be set aside on a minimal showing of prejudice. The standard of prejudice set forth in *McLaughlin v. Royster*,<sup>62</sup> is appropriate: "[The] possibility that investigation by counsel might well have unearthed favorable evidence . . . standing alone, is a sufficient showing of prejudice."<sup>63</sup> The test should be whether an adequate factual investigation would have enabled counsel to cast reasonable doubt on the government's evidence or to create a defense sufficient to go to a jury.

In order to assure that counsel renders competent assistance, the court, before accepting a guilty plea, should inquire of counsel, outside the presence of the prosecution, what he told the defendant about the nature of the charges, the consequences of conviction, the right to a jury trial, the government's burden of proof, and other rights that follow from a plea of not guilty. Counsel's inquiries to the defendant and his responses, the consideration and rejection of possible defenses, and the extent of counsel's preparation or investigation of the pertinent law and facts before advice was given on the defendant's plea are also proper subjects for this examination. In *Abraham v. State*,<sup>64</sup> such an inquiry by the court would have revealed ineffective assistance before the guilty plea was accepted. There, the court observed:

Neither counsel made any attempt to determine how the confession had been obtained, or whether it would be admissible upon trial. Appellants were not advised as to their rights to have a jury trial, nor were they advised that the charge of inflicting an injury during the robbery included the offenses of robbery, grand larceny and petit larceny. They were not told they had the right to require the state to prove them guilty beyond a reasonable doubt of some offense charged before they could be convicted. They were not asked to relate their version of the alleged offense, nor was any effort made to ascertain what witnesses would know about the alleged offense, nor was any investigation made as to what their testimony would be.<sup>65</sup>

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ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 4.1 (Approved Draft 1970). See also *id.* § 4.1, at 226-28 (commentary).

<sup>62</sup> 346 F. Supp. 297 (E.D. Va. 1972).

<sup>63</sup> *Id.* at 300. In *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965), the court found no prejudice in counsel's failure to interview witnesses when the defendant did not show that they would have been helpful.

<sup>64</sup> 228 Ind. 179, 91 N.E.2d 358 (1950).

<sup>65</sup> *Id.* at 183-84, 91 N.E.2d at 360 (citation omitted).

D. *Insufficient Time To Prepare for Trial Because of Late Appointment or Short Consultation with the Client*

When counsel has been appointed a very short time before trial or has consulted with his client only briefly, some courts have found ineffective assistance, without indicating in what way the defendant had been prejudiced.<sup>66</sup> Thus, a one-minute consultation has been held to be ineffective assistance,<sup>67</sup> as has a five-minute consultation,<sup>68</sup> an hour consultation,<sup>69</sup> and other short consultations or tardy appointments prior to trial or to a guilty plea.<sup>70</sup>

Some courts have sustained the ineffective assistance claim on the basis that the attorney could have done more had he had more time.<sup>71</sup> For example, failure to have witnesses ready for trial<sup>72</sup> (including locating or subpoenaing alibi witnesses<sup>73</sup>), to investigate an insanity defense,<sup>74</sup> to consider whether to make a pretrial motion to suppress seized evidence and a confession,<sup>75</sup> to study the law and facts relating to penetration in a rape case,<sup>76</sup> and to show that stains on a defendant's shirt were brake fluid and not semen<sup>77</sup> have constituted abuses amounting to inadequate representation. In finding four hours preparation time to be insufficient, one court mentioned the following functions that counsel was required to perform: (1) looking up the statute and

<sup>66</sup> The opinion of the Supreme Court in *Hawk v. Olsen*, 326 U.S. 271 (1945), can be read as implying that an ineffective assistance claim would be sustained without a showing of prejudice when counsel did not confer with his client at all. *But see* *Chambers v. Maroney*, 399 U.S. 42 (1970).

<sup>67</sup> *United States v. Helwig*, 159 F.2d 616 (3d Cir. 1947).

<sup>68</sup> *Turner v. Maryland*, 303 F.2d 507 (4th Cir. 1962); *Bentley v. Florida*, 285 F. Supp. 494 (S.D. Fla. 1968).

<sup>69</sup> *Kott v. Green*, 303 F. Supp. 821 (N.D. Ohio 1968).

<sup>70</sup> *Calloway v. Powell*, 393 F.2d 886 (5th Cir. 1968); *United States v. Vasilick*, 206 F. Supp. 195 (M.D. Pa. 1962); *cf.* *Townsend v. Bomar*, 351 F.2d 499 (6th Cir. 1965).

<sup>71</sup> *See, e.g.*, *White v. Ragen*, 324 U.S. 760 (1945); *Brooks v. Texas*, 381 F.2d 619 (5th Cir. 1967); *Roberts v. Dutton*, 368 F.2d 465 (5th Cir. 1966); *McLaughlin v. Royster*, 346 F. Supp. 297 (E.D. Va. 1972); *United States ex rel. Williams v. Brierley*, 291 F. Supp. 912 (E.D. Pa. 1968); *United States v. Yodock*, 224 F. Supp. 887 (M.D. Pa. 1963); *cf.* *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), *modified*, 289 F.2d 928, *cert. denied*, 368 U.S. 877 (1961).

<sup>72</sup> *See* *White v. Ragen*, 324 U.S. 760 (1945); *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), *modified*, 289 F.2d 928, *cert. denied*, 368 U.S. 877 (1961).

<sup>73</sup> *See* *United States ex rel. Williams v. Brierley*, 291 F. Supp. 912 (E.D. Pa. 1968); *United States v. Yodock*, 224 F. Supp. 877 (M.D. Pa. 1963).

<sup>74</sup> *See* *Brooks v. Texas*, 381 F.2d 619 (5th Cir. 1967); *McLaughlin v. Royster*, 346 F. Supp. 297 (E.D. Va. 1972).

<sup>75</sup> *See* *United States ex rel. Williams v. Brierley*, 291 F. Supp. 912 (E.D. Pa. 1968).

<sup>76</sup> *Roberts v. Dutton*, 368 F.2d 465 (5th Cir. 1966).

<sup>77</sup> *Id.*

cases on the crime involved, (2) communicating to the defendant the prospective testimony counsel had heard, (3) identifying leads which might be helpful in impeachment, (4) ascertaining facts from the defendant's point of view, (5) searching for alibi witnesses, (6) exploring the circumstances under which a photograph was shown to prospective witnesses, (7) compiling information on the client's mental capacity, and (8) scrutinizing the list of jurors.<sup>78</sup>

Other courts have denied the ineffective assistance claim when no prejudice resulted from a late appointment or short consultation.<sup>79</sup> In *Avery v. Alabama*,<sup>80</sup> the Supreme Court rejected the claim that counsel did not have sufficient time and opportunity to investigate and to prepare a defense. The Court found that counsel's inquiries of the defendant and material witnesses yielded nothing that would have helped the defense. Even though counsel did not have an opportunity to confer with doctors who might have known about the defendant's mental condition and had not summoned medical experts, the Court concluded that counsel had rendered effective assistance. The Court found compelling the absence of any indication that counsel could have done more had additional time been granted.<sup>81</sup>

The Fourth Circuit has taken the position that when appointment of counsel is so close to trial that there is very little time to prepare, prejudice will be presumed and the state will bear the burden of proving lack of prejudice.<sup>82</sup> Although the court has stated that it will not require a showing of actual prejudice, in several cases in which it applied the presumption the court indicated what more counsel could have done. In *Twiford v. Peyton*,<sup>83</sup> for example, the Fourth Circuit pointed out that counsel might have taken advantage of facts of which he belatedly learned—the existence of an alibi witness and bias on the part

<sup>78</sup> *Rastrom v. Robbins*, 440 F.2d 1251, 1255 (1st Cir.), cert. denied, 404 U.S. 863 (1971).

<sup>79</sup> See, e.g., *Callahan v. Russell*, 423 F.2d 450 (6th Cir. 1970) (15-minute consultation upheld, subject to showing of actual prejudice); *Daugherty v. Beto*, 388 F.2d 810 (5th Cir. 1967), cert. denied, 393 U.S. 986 (1968) (15-minute consultation alone does not establish ineffective assistance); *Baldwin v. United States*, 260 F.2d 117 (4th Cir. 1958), cert. denied, 360 U.S. 938 (1959) (six hours from appointment to trial not prejudicial). See also *Chambers v. Maroney*, 399 U.S. 42 (1970); *United States ex rel. Spears v. Rundle*, 268 F. Supp. 691 (E.D. Pa. 1967), aff'd, 405 F.2d 1037 (3d Cir. 1969).

<sup>80</sup> 308 U.S. 444 (1940).

<sup>81</sup> *Id.* at 449-52. It has been suggested that it may be possible to prepare adequately for some cases in as short a time as 15 minutes. See *United States v. Wight*, 176 F.2d 376, 378-79 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950).

<sup>82</sup> See *Twiford v. Peyton*, 372 F.2d 670 (4th Cir. 1967); *Martin v. Commonwealth*, 365 F.2d 549 (4th Cir. 1966).

<sup>83</sup> 372 F.2d 670 (4th Cir. 1967).

of prosecution witnesses.<sup>84</sup> In *Martin v. Commonwealth*,<sup>85</sup> the same court indicated that if counsel had had more time he could have inquired into whether the attempted theft of an automobile should have been treated as a misdemeanor and whether a motion for a change of venue was appropriate in light of strong community feeling regarding the case. In *Fields v. Peyton*,<sup>86</sup> the defendant was convicted of burglary and escape. The Fourth Circuit observed that with more time counsel could have inquired into the meaning of the burglary statute under which the defendant was charged and might have learned of factors surrounding the escape that could have mitigated the severe sentence. On the other hand, in *Turner v. Maryland*,<sup>87</sup> the Fourth Circuit found that although counsel's brief consultation with his client was deplorable, the absence of prejudice was evidenced by the fact that the accused had no information to convey to the lawyer that would have been helpful to the defense.

Late appointment of counsel or a very short consultation between counsel and client would seem to be equivalent to no representation at all. In such a case, the defendant should have the burden only of going forward—of showing possible lines of investigation or inquiry that counsel with more time might have pursued. Once this minimal burden has been met there should be a rebuttable presumption of prejudice. This presumption could be rebutted by evidence showing that even if counsel had had more time there would have been no reasonable possibility of uncovering evidence sufficient to take a de-

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<sup>84</sup> *Id.* at 672-73. The Third Circuit, in *United States ex rel. Mathis v. Rundle*, 394 F.2d 748 (3d Cir. 1968), adopted the Fourth Circuit's rule when it approved the following language in *Twiford*:

[W]e have implied that these deplorable practices [late appointment of counsel] are inherently prejudicial, and a mere showing of them constitutes a *prima facie* case of denial of effective assistance of counsel, so that the burden of proving lack of prejudice is shifted to the state.

*Id.* at 752, quoting *Twiford v. Peyton*, 372 F.2d 670, 673 (4th Cir. 1967). In *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970), the court overruled *Mathis*, but replaced the presumption of prejudice with a "strong inference of prejudice from the failure to appoint counsel until the day of trial or very shortly prior thereto." *Id.* at 735.

The Sixth Circuit has implied that it will apply a presumption of prejudice when counsel was appointed very shortly before trial. Thus, in *United States v. Knight*, 443 F.2d 174 (6th Cir. 1971), ineffective assistance was found when counsel had only 30 minutes to prepare before trial and no opportunity to interview witnesses. The First Circuit has considered and rejected the Fourth Circuit's presumption approach to late appointment of counsel. See *Rastrom v. Robbins*, 440 F.2d 1251 (1st Cir.), *cert. denied*, 404 U.S. 863 (1971).

<sup>85</sup> 365 F.2d 549 (4th Cir. 1966).

<sup>86</sup> 375 F.2d 624 (4th Cir. 1967).

<sup>87</sup> 318 F.2d 852 (4th Cir. 1963).

fense to the jury or to cast reasonable doubt on the government's affirmative case. Counsel's failure to make an investigation or inquiry that would have proved fruitless is not a dereliction that is detrimental to the defendant.

In determining when a defendant should prevail under the principles suggested above, the sufficiency of the time of appointment or of the period of consultation should be judged on the basis of whether counsel has had a reasonable opportunity to prepare the defense. A prima facie case of ineffective assistance would be made out if the defendant could show possible lines of investigation that his counsel might have pursued and that counsel did not have enough time to

confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.<sup>88</sup>

In the current movement to assure speedy trials,<sup>89</sup> courts and legislatures should not lose sight of the need to afford counsel sufficient time to prepare. The widespread practice of last-minute appointments, combined with the heavy case loads of public defenders and other attorneys, makes the prima facie standard mandatory. Counsel should be appointed well in advance of arraignment and trial,<sup>90</sup> preferably at the initial presentment after arrest, in order that he may make a reasonably thorough investigation of the facts and the law relating to possible defenses. For legislatures to enact per se rules, such as a rule providing that an arraignment or trial should not take place unless counsel has been appointed at least fifteen days prior thereto, would seem appropriate. If the prescribed preparation time were insufficient in a particular case, counsel would have a duty to move for a continuance and the court would have a duty to grant it.

### E. *Specific Purported Derelictions of Counsel*

When counsel has failed to take a specific action, as, for example, failing to raise a particular defense, to call or examine witnesses, or to

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<sup>88</sup> *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968) (footnote omitted).

<sup>89</sup> See, e.g., 2D CIR. RULES REGARDING PROMPT DISPOSITION OF CRIM. CASES; Note, *Speedy Trial Schemes and Criminal Justice Delay*, 57 CORNELL L. REV. 794 (1972).

<sup>90</sup> Presumably, counsel will be appointed at the preliminary hearing. See *Coleman v. Alabama*, 399 U.S. 1 (1970). But even if no preliminary hearing takes place, the court can and should appoint counsel sufficiently in advance of arraignment or trial.

object to incompetent evidence, courts must determine whether counsel's inaction was justified by tactical or other considerations. Even if counsel's dereliction cannot be justified, courts should not reverse a conviction without proof of prejudice. Proof of prejudice arising from specific derelictions of defense counsel is not often discussed by courts. Nevertheless, several courts have held that in addition to a showing of incompetence by trial counsel, the defendant, to prevail, must show *substantial* prejudice which possibly affected the outcome of the trial.<sup>91</sup> Such a test places minimal importance on the right to counsel. The denial of that right is the denial of a basic constitutional guarantee: "The right to have the assistance of counsel is too fundamental and absolute to allow the courts to indulge in nice calculations as to the amount of prejudice arising from its denial."<sup>92</sup> In *White v. Maryland*,<sup>93</sup> the defendant did not have counsel when he pleaded guilty when arraigned at a preliminary hearing. The Supreme Court, in reversing the conviction, stated: "[W]e do not stop to determine whether prejudice resulted."<sup>94</sup> When the Supreme Court enunciated the harmless error test in *Fahy v. Connecticut*<sup>95</sup> and *Chapman v. California*,<sup>96</sup> it did not suggest that some constitutional violations could go unchecked under less stringent criteria. In both *Fahy* and *Chapman* the Court held that when constitutional rights are violated at a criminal trial—for example, by the introduction of illegally seized evidence or by improper prosecutorial comments to the jury on the defendant's failure to testify—the conviction must be reversed unless there was no reasonable possibility that the violation contributed to the conviction. The conviction must fall unless it can be shown that the error was harmless beyond a reasonable doubt.

### 1. *Failure To Make an Opening Statement*

Failure to make an opening statement to the jury has been generally held not to amount to ineffective assistance,<sup>97</sup> although one court has mentioned it as a factor supporting a determination of ineffective assistance.<sup>98</sup> The absence of an opening statement can usually be justi-

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<sup>91</sup> See, e.g., *People v. Johnson*, 45 Ill. 2d 501, 259 N.E.2d 796 (1970).

<sup>92</sup> *Glasser v. United States*, 315 U.S. 60, 76 (1942).

<sup>93</sup> 373 U.S. 59 (1963).

<sup>94</sup> *Id.* at 60; see *Hamilton v. Alabama*, 368 U.S. 52 (1961).

<sup>95</sup> 375 U.S. 85 (1963).

<sup>96</sup> 386 U.S. 18 (1967).

<sup>97</sup> See, e.g., *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965); *Tahl v. O'Connor*, 336 F. Supp. 576 (S.D. Cal. 1971), *aff'd*, 460 F.2d 1068 (9th Cir. 1972).

<sup>98</sup> *United States v. Hammonds*, 425 F.2d 597 (D.C. Cir. 1970).

fied by a tactical decision not to reveal a weak hand to the court or jury at the outset,<sup>99</sup> to wait and see what the government's case will be, or not to commit the defendant prematurely to any particular line of defense.<sup>100</sup> Moreover, it is difficult to imagine a case in which the absence of an opening statement could be deemed prejudicial to the defendant, even applying the constitutional harmless error test.

## 2. Failure To Challenge Admissibility of Seized Evidence or of a Confession

Several courts have found ineffective assistance when counsel failed to challenge the validity of a confession<sup>101</sup> or of a search.<sup>102</sup> In *Brubaker v. Dickson*,<sup>103</sup> the prisoner's habeas corpus petition made out a prima facie case for exclusion of the defendant's confession. The court, in finding ineffective assistance, rejected counsel's argument that a stipulation of admissibility of the confession, which was the sole evidence of the defendant's guilt, was entered into on the theory that it would be sound strategy to invoke the sympathy of the jury by a display of candor. The court emphasized that the objection to the confession could have been submitted outside the presence of the jury.<sup>104</sup>

In *Commonwealth v. Maroney*,<sup>105</sup> ineffective assistance was found in part because counsel failed to object to the introduction of the defendant's confession. The court found the most obvious explanation to be insufficient preparation. Counsel was unaware of any basis on which to make a coercion claim until his client conveyed the information in his testimony. The court found no sufficient legal or tactical basis to support counsel's failure to object.<sup>106</sup> In *People v. Ibarra*,<sup>107</sup> the court faulted counsel for failure to object to seized evidence and observed that counsel's dereliction precluded resolution of the crucial factual issues supporting the defendant's primary defense. In *People v.*

<sup>99</sup> See, e.g., *Tahl v. O'Connor*, 336 F. Supp. 576, 582 (S.D. Cal. 1971).

<sup>100</sup> See C. TESSMER, CRIMINAL TRIAL STRATEGY 70 (1968).

<sup>101</sup> See, e.g., *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963); *United States ex rel. Williams v. Brierley*, 291 F. Supp. 912 (E.D. Pa. 1968); *Smotherman v. Beto*, 276 F. Supp. 579 (N.D. Tex. 1967); *Commonwealth v. Maroney*, 427 Pa. 599, 235 A.2d 349 (1967).

<sup>102</sup> See, e.g., *United States ex rel. Williams v. Brierley*, 291 F. Supp. 912 (E.D. Pa. 1968); *People v. Ibarra*, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963); *People v. Coffman*, 2 Cal. App. 3d 688, 82 Cal. Rptr. 782 (1969).

<sup>103</sup> 310 F.2d 30 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963).

<sup>104</sup> 310 F.2d at 38 n.46.

<sup>105</sup> 427 Pa. 599, 235 A.2d 349 (1967).

<sup>106</sup> *Id.* at 611, 235 A.2d at 356.

<sup>107</sup> 60 Cal. 2d 460, 466, 386 P.2d 487, 491, 34 Cal. Rptr. 863, 867 (1963).

*Coffman*,<sup>108</sup> counsel did not object to the illegally seized evidence because he misread the leading case. The California District Court of Appeal, in finding ineffective assistance, concluded that without the illegal evidence conviction was reasonably probable; with it, conviction was a virtual certainty.

On the other hand, the Ninth Circuit, in rejecting an ineffective assistance claim when counsel failed to object to the introduction of seized evidence, stated:

Why appellant's counsel failed to move to suppress the evidence, or to object to the testimony, is not discernible from the record. It may have been for any one of several reasons including trial tactics or courtroom strategy since the sole defense offered at the trial was that appellant was completely unaware of the presence of the narcotics in the automobile. We decline to indulge in speculation in an effort to make plain that which is not discernible in the record.<sup>109</sup>

The Ninth Circuit's opinion may be misguided. If counsel had a valid basis for objecting to the admission of seized evidence, yet failed to object, and this evidence influenced the judgment of conviction, the ineffective assistance claim should have been upheld in the absence of reasonably persuasive tactical justifications for counsel's omission.<sup>110</sup> The reason given by the court—that the sole defense was that the defendant was unaware of the presence of narcotics—does not in any way tend to explain or to justify counsel's failure to object to the admission of the evidence.

In *United States ex rel. Chambers v. Maroney*,<sup>111</sup> despite counsel's late appointment, unfamiliarity with all aspects of the case before trial, and ignorance of the manner in which evidence was obtained, the Third Circuit held that failure to file a suppression motion as to items taken from the defendant's car was not prejudicial since the motion would

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<sup>108</sup> 2 Cal. App. 3d 688, 690, 82 Cal. Rptr. 782, 787-88 (1970).

<sup>109</sup> *Barba-Reyes v. United States*, 387 F.2d 91, 93 (9th Cir. 1967). One case upheld a conviction on a plea of guilty even though the defendant subsequently claimed that his counsel did not advise him of the illegality of the arrest, search, seizure, and confession. See *Edwards v. United States*, 256 F.2d 707 (D.C. Cir.), cert. denied, 358 U.S. 847 (1958). Judge Bazelon, dissenting, said that if counsel advised a guilty plea despite knowledge of the circumstances of the confession, then the client was deprived of effective assistance. 256 F.2d at 711.

<sup>110</sup> For example, one justification found by a court for counsel's failure to challenge the admissibility of evidence seized under an invalid warrant was that the search was probably valid as incident to an arrest. See *People v. Washington*, 41 Ill. 2d 16, 21, 241 N.E.2d 425, 428 (1968).

<sup>111</sup> 408 F.2d 1186 (3d Cir. 1969), *aff'd*, 399 U.S. 42 (1970).

undoubtedly have been decided against the defendant. The court stated that even if the search warrant was invalid, the introduction of the items seized from the defendant's home was harmless error.<sup>112</sup>

On review, the Supreme Court concurred in the reasoning of the court of appeals on the ineffective assistance issue.<sup>113</sup> Justice Harlan, dissenting, pointed out that the record suggested that counsel had virtually no acquaintance with the facts of the case. He agreed "that the strength of the search and seizure claims is an element to be considered in the assessment of whether counsel was adequately prepared to make an effective defense," but he could not "agree that the relevance of those claims in this regard disappears upon a conclusion by an appellate court that they do not invalidate the conviction."<sup>114</sup>

If Justice Harlan was saying that an ineffective assistance claim based on the failure to make suppression motions should succeed even if after the fact it is determined that those motions would have failed, or that the introduction of the evidence was harmless error, he is not persuasive. There is no point in having a new trial when one suppression motion would be properly rejected, or even if the suppression motion should have been granted, when there is every probability that the defendant would be convicted again.<sup>115</sup> If, on the other hand, counsel did not investigate the facts relevant to a suppression motion and the habeas court finds that there is a reasonable possibility that investigation would have turned up facts which, as a matter of law, would have supported such a motion, or counsel failed to make a suppression motion because of ignorance of the law, the ineffective assistance claim should be sustained as long as the introduction of the evidence was not harmless error.

### 3. *Failure To Cross-Examine Adverse Witnesses*

Failure to cross-examine one or more adverse witnesses has generally been held not to constitute ineffective assistance.<sup>116</sup> In *Frاند v. United States*,<sup>117</sup> the Tenth Circuit found that although counsel had failed to cross-examine one witness and had only briefly cross-examined

<sup>112</sup> 408 F.2d at 1193-94.

<sup>113</sup> 399 U.S. at 53-54.

<sup>114</sup> *Id.* at 59 (Harlan, J., dissenting).

<sup>115</sup> There is language in Justice Harlan's opinion which suggests a reasonable ground for reversal—when counsel's inexcusable failure to make suppression motions casts substantial doubt on whether, under the circumstances, defense counsel actually had sufficient time to prepare his case. *See id.* at 59-60.

<sup>116</sup> *See, e.g., Frاند v. United States*, 301 F.2d 102 (10th Cir. 1962); *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

<sup>117</sup> 301 F.2d 102 (10th Cir. 1962).

the other witnesses it did not appear that more extensive cross-examination would have proved helpful or advantageous. Moreover, although the cases do not mention this, there may be tactical reasons for declining to cross-examine an adverse witness. Cross-examination may have no reasonable prospect of weakening the witnesses' testimony or credibility and may have the potentially undesirable effect of reinforcing and emphasizing the harmful testimony.<sup>118</sup>

It has also been held that when counsel failed to impeach accomplices' testimony by drawing attention to their prior criminal records in a trial before a judge, "counsel could have permissibly concluded as a trial tactic and in light of trial realities that any attack upon credibility would have [had] little impact."<sup>119</sup> On the other hand, an early opinion suggested that counsel was ineffective by virtue of his inability to lay the foundation for impeaching the victim's parents by proving that they had first charged assault and had later changed the accusation to taking indecent liberties.<sup>120</sup>

The District of Columbia Circuit Court has found the failure to cross-examine to be one of numerous derelictions of counsel which in their totality justify reversal on grounds of ineffective assistance.<sup>121</sup> The Third Circuit has indicated that defense counsel's failure on cross-examination to go into the circumstances of pretrial confrontations between the identification witness and the suspect may amount to ineffective assistance.<sup>122</sup> The court rejected the government's contention that counsel's failure to examine the confrontations was a tactical decision made out of fear of exposing another charge against the defendant. The record, however, indicated that counsel was prepared to risk disclosure of the other accusation against the defendant.<sup>123</sup>

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<sup>118</sup> See C. TESSMER, *supra* note 100, at 95.

<sup>119</sup> *Commonwealth v. Maroney*, 427 Pa. 599, 610, 235 A.2d 349, 355 (1967). In *Commonwealth ex rel. Sprangel v. Maroney*, 423 Pa. 589, 225 A.2d 236 (1967), the court gave a very dubious rationale for counsel's failure to impeach the most important prosecution witness by proof of previous convictions for fraud, forgery, and bogus checks. The court stated:

Defense counsel could quite properly have concluded that impeachment of the credibility of an important prosecution witness by means of a prior conviction might make the jurors look with greater suspicion on the defendant's testimony since defendant had a substantial prior record.

*Id.* at 594, 225 A.2d at 239-40 (citation omitted).

<sup>120</sup> *People v. Schulman*, 299 Ill. 125, 132 N.E. 530 (1921).

<sup>121</sup> See *United States v. Hammonds*, 425 F.2d 597 (D.C. Cir. 1970).

<sup>122</sup> See *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970).

<sup>123</sup> *Id.* at 738. The court in *Moore*, in remanding for an evidentiary hearing, noted that there was no indication that counsel tried to substantiate the defendant's claim that he had been subjected to a lineup, that counsel made any effort to interview the government's witnesses in advance of trial, or that counsel had checked out petitioner's claim

Because of tactical justifications, it would seem a rare case in which failure to cross-examine a witness, standing alone, would constitute ineffective assistance. There may be circumstances, however, in which tactical considerations would be deemed unreasonable and the failure to cross-examine prejudicial. When, for example, counsel possessed substantial impeachment evidence, such as a prior inconsistent statement on a material point that could not readily be explained by a witness, or proof that the government dropped substantial criminal charges against the witness in exchange for his testimony, or evidence that the witness had previously been convicted of perjury, and counsel did not introduce this evidence by cross-examination or otherwise, ineffective assistance should perhaps be found if there is a reasonable possibility that the witness's testimony influenced the conviction.

#### 4. *Failure To Object to Incompetent Evidence or Comments*

Although one court has reversed a conviction when counsel did not object to the introduction and admission of incompetent evidence,<sup>124</sup> several decisions have affirmed convictions despite this omission.<sup>125</sup> A tactical justification given when there was a substantial possibility that the objection would be overruled was expressed by the Fifth Circuit in *Williams v. Beto*:<sup>126</sup> "Defense counsel is to be complimented for remembering that he who often objects, only to have his objections over-ruled, risks alienating the jury even if he does not test the patience of the presiding judge." Also, when the admissibility of testimony is a matter of debate, counsel's failure to object can be justified by the desire not to emphasize admissible adverse evidence.<sup>127</sup>

But what if defense counsel fails to object to clearly incompetent evidence or improper comments to the jury? When the defense counsel failed to object to the trial judge's flagrant invasion of the province of the jury by casting doubt on the credibility of the defendant and

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that they had twice been unable to identify him at the lineup and had identified him at an arraignment on other charges only after an FBI agent pointed him out. *Id.* at 739.

<sup>124</sup> See *People v. Gardiner*, 303 Ill. 204, 135 N.E. 422 (1922).

<sup>125</sup> See, e.g., *Rivera v. United States*, 318 F.2d 606 (9th Cir. 1963); *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir. 1958); *People v. Rettig*, 131 Ill. App. 2d 687, 264 N.E.2d 835 (1970), *aff'd*, 50 Ill. 2d 317, 278 N.E.2d 781 (1972); cf. *Sayre v. Commonwealth*, 194 Ky. 338, 238 S.W. 737 (1922) (no ineffective assistance found, even though defense counsel opened door to prejudicial testimony and failed to object to other incompetent testimony).

<sup>126</sup> 354 F.2d 698, 703 (5th Cir. 1965).

<sup>127</sup> Cf. *Holland v. Swenson*, 313 F. Supp. 565 (W.D. Mo.), *aff'd*, 433 F.2d 909 (8th Cir. 1970).

indicating that the defense was without merit and that the defendant's testimony was false, the court reversed the conviction, finding that counsel's purported representation was "equivalent to or worse than no representation whatsoever."<sup>128</sup>

In *People v. Rettig*,<sup>129</sup> when counsel did not object to hearsay evidence of the victim's identity, the Illinois Court of Appeals recognized that such an objection would probably have been sustained. Nevertheless, the court speculated that "[i]f the identity of the victim had been made an issue in this way it might well have been that the victim's son would have been called to testify, a circumstance unlikely to have been any benefit to defendant."<sup>130</sup> This approach is unsatisfactory; it rejects the possibility of prejudice by mere conjecture. If the evidence entered without objection was clearly inadmissible, the court should have remanded for a determination of prejudice. Only if it were found that the bad evidence did not contribute to the conviction or that non-hearsay evidence to the same effect could readily have been adduced would the court have been justified in finding an absence of prejudice.

When the majority of a panel of the District of Columbia Circuit Court declined to find ineffective assistance in counsel's failure to object to hearsay testimony of the mother and grandmother of a seven-year-old child who had allegedly been raped,<sup>131</sup> Judge Fahy said in dissent:

If it be shown in this case that the conviction rests in substantial degree upon untrustworthy hearsay evidence not objected to, the courts might conclude in the light of this and all other circumstances of the trial, together with the omission of counsel to note an appeal, that there was not accorded to appellant his constitutional right to the assistance of counsel in his defense.<sup>132</sup>

Judge Fahy's approach is consistent with the goal of assuring adequate representation for defendants. If counsel failed to object to incompetent evidence, and the admission of such evidence was not harmless, counsel's failure should be deemed ineffective assistance. The only ostensible tactical justifications for not objecting to harmful inadmissible evidence—reluctance to alienate the judge and jury, and the desire not to emphasize the evidence or to give the impression that the defense has something to hide—cannot be considered reasonable

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<sup>128</sup> *Wilson v. State*, 222 Ind. 63, 83, 51 N.E.2d 848, 856 (1943).

<sup>129</sup> 131 Ill. App. 2d 687, 264 N.E.2d 835 (1970), *aff'd*, 50 Ill. 2d 317, 278 N.E.2d 781 (1972).

<sup>130</sup> 131 Ill. App. 2d at 691, 264 N.E.2d at 838.

<sup>131</sup> *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir. 1958).

<sup>132</sup> *Id.* at 795-96 (dissenting opinion).

excuses for allowing clearly incompetent, prejudicial evidence to go to the jury.

Counsel's failure to object to improper evidence or instructions should not always be grounds for reversal. If the admissibility of the evidence is debatable, the tactical reasons for not objecting may justify counsel's omission. If the suspect evidence is unimportant, harmless error might be found. Also, if the government has equally damaging evidence available which it could have used instead of the inadmissible evidence, or if the questions could have been rephrased to allow introduction of the same evidence,<sup>183</sup> then the failure to object can be considered harmless.

The traditional approach, whereby counsel is required to make an objection on the record before an alleged error will be considered on appeal, is commendable, although the plain error rule is an important exception to such a requirement.<sup>184</sup> Objections should ordinarily be required so that the trial judge has the initial opportunity to rule on them and thereby avoid falling into error. The defendant is entitled to have adequate representation by counsel; counsel should object to any clearly improper evidence or comments that create a reasonable possibility of contributing to a conviction, unless he has acceptable tactical reasons for not registering an objection.<sup>185</sup> Just as the plain error rule assumes that the trial judge should exclude evidence under certain circumstances, even without an objection, so too should the trial judge not require an objection before he takes cognizance of counsel's ineptitude when evidence is obviously inadmissible and prejudicial; the court should intervene to protect the defendant.<sup>186</sup>

##### 5. *Failure To Raise Particular Defenses*

Some courts have held that failure to raise the insanity defense, the defense of diminished responsibility, or the defense of incompetency

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<sup>183</sup> For example, in *State v. Queen*, 73 Wash. 2d 706, 440 P.2d 461 (1968), the court found that improper questions could have been restated unobjectionably and therefore that the failure to object did not "clearly" demonstrate incompetence.

<sup>184</sup> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." FED. R. CRIM. P. 52(b).

<sup>185</sup> Most objections seem to a jury obstructive and indicative that the defense does not want the truth told; thus, needless objections merely invite needless bad will. . . . On the other hand, if evidence is significantly harmful to the defendant, it should generally be objected to, despite any adverse effect that objection might have on a jury or the judge.

<sup>2</sup> A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 416, at 318-19 (1971).

<sup>186</sup> See notes 230-33 and accompanying text *infra*.

to stand trial rendered counsel's assistance ineffective.<sup>137</sup> In *Hintz v. Beto*,<sup>138</sup> counsel did not raise the insanity defense, perhaps because he had no time to examine the results of a study by a court-appointed psychiatrist. The Fifth Circuit rejected the state's attempt to explain by tactical considerations the failure of counsel to raise this defense. The state argued that by not pleading insanity the defendant avoided having a note that he had written prior to his arrest admitted into evidence. The court found this proffered justification weak in light of a prior confession and the failure of the defense to show the jury any excuse whatever for the defendant's conduct. The court also found that there was a factual basis for raising the defense.<sup>139</sup>

In *Goodwin v. Swenson*,<sup>140</sup> the court determined that if counsel had made proper inquiry into the defendant's mental condition, he might well have uncovered evidence which would have established the defense of incompetency to stand trial and, by implication, insanity at the time of the offense. In a case before the California Supreme Court,<sup>141</sup> in which the failure to raise the diminished responsibility defense was claimed, counsel had made no substantial factual inquiry into the specifics of the defendant's condition, although he was advised of head injuries and organic brain damage. Counsel made no effort to obtain available medical reports of which he was aware and made no effort to have petitioner examined by a psychiatrist. The court rejected the argument that counsel did not raise the diminished responsibility defense because he wanted to keep the defendant's admissions to a psychiatrist out of evidence. The court observed that, although counsel's decision not to raise the defense was made for tactical reasons "sufficient in counsel's judgment to support it, in the circumstances of this case the failure of counsel to avail himself of information relevant to the defense removed all rational support from that decision."<sup>142</sup> This case seems to suggest that even if counsel might have a tactical justification for

<sup>137</sup> See, e.g., *Hintz v. Beto*, 379 F.2d 937 (5th Cir. 1967) (insanity); *McLaughlin v. Royster*, 346 F. Supp. 297 (E.D. Va. 1972) (insanity); *Goodwin v. Swenson*, 287 F. Supp. 166 (W.D. Mo. 1968) (insanity-incompetency); *In re Saunders*, 2 Cal. 3d 1033, 472 P.2d 921, 88 Cal. Rptr. 633 (1970) (en banc) (diminished responsibility); *People v. McDowell*, 69 Cal. 2d 737, 447 P.2d 97, 73 Cal. Rptr. 1 (1968) (diminished responsibility).

<sup>138</sup> 379 F.2d 937 (5th Cir. 1967).

<sup>139</sup> *Id.* at 942.

<sup>140</sup> 287 F. Supp. 166, 187 (W.D. Mo. 1968).

<sup>141</sup> *In re Saunders*, 2 Cal. 3d 1033, 472 P.2d 921, 88 Cal. Rptr. 633 (1970) (en banc).

<sup>142</sup> *Id.* at 1049, 472 P.2d at 931, 88 Cal. Rptr. at 643. The court recognized that even if counsel had made an adequate investigation he might well have concluded that the best course was to withhold any defense based upon the defendant's mental condition at the time of the offense. *Id.* at 1049, 472 P.2d at 932, 88 Cal. Rptr. at 644.

declining to raise a particular defense, he cannot make a rational decision unless he has apprised himself of the full strength of other available defenses.

Other courts have held that counsel's failure to raise the insanity defense was not ineffective assistance.<sup>143</sup> In *United States v. Spenard*,<sup>144</sup> the Second Circuit held that counsel was justified in not raising the insanity defense in light of the conflicting reports and evidence on insanity:

[I]t was perfectly proper for defense counsel to exercise his judgment and conclude that it would be better to play upon the jury's possible sympathy for [the defendant's] mental condition without becoming involved in a battle of doctors in which there may have been little likelihood of success.<sup>145</sup>

In *Snider v. Cunningham*,<sup>146</sup> the Fourth Circuit declined to find ineffective assistance in counsel's failure to raise the insanity defense even though evidence of the defendant's mental condition presented a jury question. The court gave two reasons for its conclusion. First, the evidence of the defendant's mental condition did "not disclose such an extreme condition as to require the conclusion that counsel was so grossly neglectful of the prisoner's interest in failing to rely upon his mental condition as a defense as to convert the proceedings into a farce or a mockery of justice."<sup>147</sup> The second reason, rooted in a tactical consideration, was that the insanity defense would have undermined the defense of alibi.<sup>148</sup> The first reason is not persuasive; if counsel had no other viable defense and if he had enough evidence on insanity to go to the jury, his failure to raise it was inexcusable, for it deprived the defendant of the chance to have the jury decide whether the evidence justified acquittal. The second reason is far more persuasive; it presents a tactical justification for declining to raise the insanity defense with which reasonably competent and experienced criminal defense lawyers might agree.<sup>149</sup>

The failure to raise the defense of consent to a charge of rape

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<sup>143</sup> See, e.g., *United States v. Spenard*, 438 F.2d 717 (2d Cir. 1971); *Snider v. Cunningham*, 292 F.2d 683 (4th Cir. 1961).

<sup>144</sup> 438 F.2d 717 (2d Cir. 1971).

<sup>145</sup> *Id.* at 720.

<sup>146</sup> 292 F.2d 683 (4th Cir. 1961).

<sup>147</sup> *Id.* at 684-85 (citation omitted).

<sup>148</sup> *Id.* at 685.

<sup>149</sup> See *People v. Glover*, 257 Cal. App. 2d 502, 65 Cal. Rptr. 219 (1967) (counsel's failure to raise diminished responsibility defense justified by its inconsistency with provocation defense).

has been held to be ineffective assistance.<sup>150</sup> In *State v. Merchant*,<sup>151</sup> the defendant persistently maintained in his statements to the police and to his attorney that the prosecutrix had consented to sexual relations. Counsel made no effort to develop this defense and did not investigate the reputation of the prosecutrix. In finding ineffective assistance, the court pointed to many circumstances that tended to support a consent defense—for example, the prosecutrix's delay in reporting the alleged offense, the absence of signs or marks of violence, the fact that the defendant after leaving the alleged victim's house did not behave as if he felt in any danger of being apprehended, the fact that the defendant was known to the prosecutrix from previous conversations, the fact that he had no criminal record, and that despite being of slight education and low intelligence, he made an exculpatory statement after six and one-half hours of interrogation.<sup>152</sup>

Such findings should be unnecessary. If the defendant wants to raise a consent defense to a rape charge by his own testimony alone, counsel's refusal to allow the defendant to raise this defense should be deemed ineffective assistance in the absence of a showing of tactical reasons with which criminal defense lawyers of some experience might agree. If the defendant has an arguably effective alibi defense, a valid tactical reason for not presenting the consent defense would be that it is wholly inconsistent with the alibi. On the other hand, if the state has made out a strong case and if the defendant has no other defense, no way of demonstrating insufficiency in the state's case, and no other witnesses to testify to consent, the defendant has nothing to lose and everything to gain by testifying. In most cases of this type, it is an insufficient tactical reason for counsel to claim that he did not let the defendant testify because of fear of impeachment by evidence of prior crimes.

In a case in which counsel did not raise the intoxication defense to a charge of first degree murder,<sup>153</sup> the court concluded that counsel's decision was justified by his concern that the witnesses would not be credible, that their testimony would not tend to establish the defendant's incapacity, and that the jury would be prejudiced by testimony tending to indicate that the defendant was on a drunken spree.<sup>154</sup> These are sufficient reasons for not raising the defense.

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<sup>150</sup> See, e.g., *Smallwood v. Warden*, 205 F. Supp. 325 (D. Md. 1962); *State v. Merchant*, 10 Md. App. 545, 271 A.2d 752 (1970).

<sup>151</sup> 10 Md. App. 545, 271 A.2d 752 (1970).

<sup>152</sup> *Id.* at 557-59, 271 A.2d at 758-59.

<sup>153</sup> *Tahl v. O'Connor*, 336 F. Supp. 576 (S.D. Cal. 1971).

<sup>154</sup> *Id.* at 586-87.

The District of Columbia Circuit Court rejected an ineffective assistance claim when counsel did not raise an alibi defense by failing to subpoena, call, or examine alibi witnesses—one Isola Magriver and a friend known as "Ham"—whom the defendant claimed he and an original codefendant, named Galloway, were with at a distant place at the time of the alleged offense.<sup>155</sup> Galloway, against whom the charges were dropped, recanted the alibi evidence he had given at the preliminary hearing when he was still a suspect. The court said:

We do not know why trial counsel did not subpoena Magriver, whose address was not given, or "Ham," whose real name was unknown. He may well have decided, in view of Galloway's recantation, that as a matter of trial tactics it would be better not to present the alleged alibi. Whatever the reason for it, the decision was for the judgment of counsel and should not now be the basis for a charge of inefficiency.<sup>156</sup>

This decision is erroneous if it is assumed that the defendant had no other substantial defenses with which the alibi defense would be inconsistent. The court should have remanded for findings by the lower court on the extent to which counsel made an effort to locate the two witnesses, what inquiries he made of them if they were located, and why he decided not to call them as witnesses. If counsel did not attempt to locate these witnesses, ineffective assistance should be found if a reasonably thorough investigation would have located the individuals, and one or both of them would have testified in support of the alibi. Under these circumstances, prejudice would be apparent since there would be a reasonable possibility of presenting enough evidence to get the defense to the jury.<sup>157</sup>

This standard may appear different from the constitutional harm-

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<sup>155</sup> *Bolden v. United States*, 266 F.2d 460 (D.C. Cir. 1959).

<sup>156</sup> *Id.* at 461.

<sup>157</sup> It may be asked why the test should be different when there is enough time but counsel has not investigated, than when counsel did not have enough time to investigate. In the former case, the defendant must show that investigation would have turned up enough evidence to get a defense to a jury; in the latter case, the late appointment of counsel should create a *prima facie* case of prejudice. The difference is that in the former case counsel is entitled to some discretion as to how intensive an investigation to make. To find ineffective assistance in counsel's discretionary choice not to pursue a particular factual inquiry by applying a *prima facie* presumption of prejudice, when time permitted an investigation, would be to ignore counsel's discretion. Instead, the defendant should have the burden, albeit minimal, of showing that investigation might reasonably have been expected to turn up a defense. On the other hand, when counsel has spent palpably inadequate time consulting with his client, the *prima facie* rule should apply. It is clearly beyond the legitimate scope of counsel's discretion to neglect to consult adequately with his client.

less error test. In practice, however, the harmless error test and the "enough evidence to get to a jury" test usually lead to the same result. If there is enough evidence to get to a jury, there ordinarily would be a reasonable possibility that the defendant would be acquitted.

One court has held that counsel was warranted in not raising an entrapment defense when counsel had considered the defense but concluded that the facts did not justify its introduction.<sup>158</sup> Another court, in dealing with the complaint that counsel failed to raise the entrapment defense, remanded the case for a hearing at which the defendant would have the burden of establishing that there was no reasonable basis for counsel's failure to submit this defense.<sup>159</sup> The court enunciated a very strict standard of prejudice—that the conviction would be set aside only if counsel's omission probably changed the result of the trial<sup>160</sup>—but found that if counsel's omission was not justified in this case, it probably would have affected the outcome of the trial.

As previously noted, failure to raise the defense of statutory inapplicability has been held to be ineffective assistance when there was strong legal justification for believing that the defense would succeed.<sup>161</sup>

Finally, failure to call witnesses to establish lack of motive to commit a crime has been held in at least one instance not to be ineffective assistance, even if counsel erroneously believed that such evidence was inadmissible or of no benefit to the defendant.<sup>162</sup> The court in that case gave a rote citation to the farce, mockery, or sham test,<sup>163</sup> and analyzed the problem no further. The test suggested here would require first an inquiry into whether counsel was reasonably justified in believing that lack of motive evidence would be inadmissible, of doubtful credibility, or of little use to the defendant. If counsel were not so justified, then the test is whether there is a reasonable possibility that failure to call such witnesses contributed to the conviction.

Counsel who does not raise any defenses should be deemed in-

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<sup>158</sup> See *Cofield v. United States*, 263 F.2d 686, 690-91 (9th Cir.), *rev'd per curiam*, 360 U.S. 472 (1959).

<sup>159</sup> See *State v. White*, 5 Wash. App. 283, 487 P.2d 243 (1971), *rev'd*, 81 Wash. 2d 223, 500 P.2d 1242 (1972).

<sup>160</sup> This standard has been considered and rejected. See note 157 and accompanying text *supra*.

<sup>161</sup> *In re Williams*, 1 Cal. 3d 168, 460 P.2d 984, 81 Cal. Rptr. 984 (1969) (en banc).

<sup>162</sup> See *Borchert v. United States*, 405 F.2d 735 (9th Cir. 1968), *cert. denied*, 394 U.S. 972 (1969).

<sup>163</sup> See note 3 and accompanying text *supra*.

competent if he had enough evidence to raise a defense which could get to the jury. Counsel should not have to raise all possible defenses—if he has a relatively strong defense he is justified in not wishing to dilute its force by further argument for a weaker defense. If counsel has two or more defenses of relatively equal strength, he will be justified in not raising inconsistent defenses. But if defense counsel does not raise a defense which any competent criminal lawyer would conclude is far stronger than the defenses he does raise, counsel's dereliction should be deemed ineffective assistance. This last situation will be relatively rare since there is usually room for debate as to which of several possible defenses is stronger.

#### 6. *Failure To Make Adequate Closing Arguments*

In *United States v. Hammonds*,<sup>164</sup> counsel made a pro forma closing argument in which he said absolutely nothing on behalf of the defendant. The court, in finding a lack of adequate assistance of counsel, pointed out what the defendant's new counsel indicated his trial counsel should have said but failed to mention in his closing argument:

[He] should at least have mentioned the presumption of innocence and the requirement that all essential elements of the offenses be proved beyond a reasonable doubt; . . . he should have pointed out to the jury the evidence which could lead to a conclusion that appellant lacked the requisite intent and also the absence of evidence establishing that a person was present at the house at the time of the appellant's entry.<sup>165</sup>

Another court found ineffective assistance when counsel made no argument at all, even though the evidence might have supported a provocation defense.<sup>166</sup>

In *Matthews v. United States*,<sup>167</sup> the District of Columbia Circuit Court found that counsel's casual summation to the jury was constitutional error so prejudicial to the defendant as to require a reversal of his conviction, even though there was strong evidence of his guilt. However, in *People v. Dudley*,<sup>168</sup> in which defense counsel made no closing argument, the Illinois Supreme Court said that despite "the rather extraordinary waiver of final argument, the petition contains nothing to show how, considering the complete evidence of guilt, the trial's

<sup>164</sup> 425 F.2d 597 (D.C. Cir. 1970).

<sup>165</sup> *Id.* at 603 (citation omitted).

<sup>166</sup> *Johns v. Smyth*, 176 F. Supp. 949 (E.D. Va. 1959).

<sup>167</sup> 449 F.2d 985, 992 (D.C. Cir. 1971).

<sup>168</sup> 46 Ill. 2d 305, 263 N.E.2d 1 (1970), *cert. denied*, 402 U.S. 910 (1971).

outcome might have been different had the attorney pursued another tactic."<sup>169</sup>

The test of prejudice should be the same in these circumstances as in those in which counsel failed to raise a defense and such failure had no tactical justification. If no closing argument was made, or if it was merely perfunctory, including nothing that would give the defendant a reasonable possibility of acquittal or even a hung jury, and there was an argument that counsel could have presented that would have created a reasonable possibility of avoiding conviction, counsel's dereliction should be deemed a lack of effective assistance unless it can be justified by tactical reasons.<sup>170</sup> One such tactical justification for defense counsel's waiver of closing argument is sometimes present when the prosecution makes the initial closing argument and a second closing argument in rebuttal of the defendant's argument. As pointed out in a leading trial tactics manual:

Technically, the prosecutor's rebuttal is limited to rebutting. He is allowed some latitude to go beyond reply to defense counsel, however, and many prosecutors abuse this latitude by making a short initial closing and saving their big tirades for "rebuttal." Sometimes counsel may want to destroy this tactic by waiving closing argument, with the comment that neither the prosecution's case nor its argument appears to demand reply. This leaves the prosecutor in dry-dock.<sup>171</sup>

### 7. Failure To Request Instructions

One court has suggested that counsel's failure to request a cautionary instruction as to the testimony of an accomplice could amount to ineffective assistance.<sup>172</sup> Other courts have held that counsel's failure to request an instruction as to a lesser offense supported by the evidence could be justified by a legitimate strategy of going for an "all or nothing" verdict and by the desire not to give the jury a second chance to convict.<sup>173</sup> This approach seems valid as long as there is a reasonable possibility that under the evidence the defendant will be

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<sup>169</sup> *Id.* at 309, 263 N.E.2d at 3-4.

<sup>170</sup> I do not suggest a test that would find ineffective assistance if there is anything at all that would create a reasonable probability of avoiding conviction that counsel could have argued but did not. Counsel is justified in using his discretion to argue what he thinks will be most effective and to forego weaker arguments.

<sup>171</sup> 2 A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 135, § 444, at 341.

<sup>172</sup> See *People v. Georgev*, 38 Ill. 2d 165, 230 N.E.2d 851 (1967), *cert. denied*, 390 U.S. 998 (1968).

<sup>173</sup> See, e.g., *State v. Fulford*, 290 Minn. 236, 187 N.W.2d 270 (1971); *People v. Byers*, 10 Cal. App. 3d 410, 88 Cal. Rptr. 886 (1970).

acquitted of the more serious offense. However, even though the government's case as to the more serious offense is overwhelming,<sup>174</sup> if there is also evidence that could support a conviction of a lesser offense, so that the judge would have to give an instruction if requested, counsel's failure to request a lesser offense instruction should be considered ineffective assistance.

### 8. *Counsel Involved in a Conflict of Interest*

When counsel jointly represents two or more codefendants and a conflict of interest exists in representation, ineffective assistance will be found.<sup>175</sup> In *Glasser v. United States*,<sup>176</sup> the Supreme Court reversed the conviction of one of two codefendants represented by the same counsel, finding that counsel declined cross-examination of a witness adverse to the defendant-appellant in order to protect his other client and indicated that specific prejudice need not be shown. The Court emphasized the defendant's contention that counsel failed to object to hearsay for fear that an objection on his behalf would leave the jury with the impression that the testimony was true as to the codefendant.<sup>177</sup> In *United States v. Harris*,<sup>178</sup> joint representation by one attorney was found to be ineffective assistance when he advised the defendant to testify only because his testimony would tend to exculpate the codefendant.

Many courts, however, apparently ignoring the language in *Glasser* as to the lack of necessity of showing specific prejudice,<sup>179</sup> and im-

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<sup>174</sup> There may be cases in which the evidence against a defendant is legally or factually overwhelming, but on an emotional level the thrust of the case suggests a fair possibility of acquittal, e.g., in mercy killings. In such cases, defense counsel would be justified in not requesting a lesser included offense instruction since he has at least a possibility of obtaining an outright acquittal if the jury is faced with an "all or nothing" decision.

<sup>175</sup> See, e.g., *Glasser v. United States*, 315 U.S. 60 (1942); *United States v. Harris*, 155 F. Supp. 17 (S.D. Cal. 1957), *aff'd*, 261 F.2d 792 (9th Cir. 1958), *cert. denied*, 360 U.S. 933 (1959). On appeal, conflict of interest has also been found to render assistance ineffective. See *Randazzo v. United States*, 339 F.2d 79 (5th Cir. 1964).

<sup>176</sup> 315 U.S. 60 (1942).

<sup>177</sup> *Id.* at 73-74.

<sup>178</sup> 155 F. Supp. 17 (S.D. Cal. 1957), *aff'd*, 261 F.2d 792 (9th Cir. 1958), *cert. denied*, 360 U.S. 933 (1959).

<sup>179</sup> To determine the precise degree of prejudice sustained by [defendants] as a result of the court's appointment of [the same counsel as his codefendant] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

315 U.S. at 75-76 (dictum).

PLICITLY looking to the *actual* showing of prejudice in that case,<sup>180</sup> have found no conflict of interest in joint representation by one attorney.<sup>181</sup> In *Peek v. United States*,<sup>182</sup> the Ninth Circuit found that there was nothing to indicate that counsel "had to, or that he in fact did, slight the defense of one defendant for that of the other. The interests of [the defendants] . . . were not in conflict with each other."<sup>183</sup> In *Sanders v. United States*,<sup>184</sup> the Fourth Circuit found no conflict of interest because there was no evidence offered in the codefendant's behalf and it did not appear that he had any interest adverse to the establishment of the defendant's alibi.

Conflict of interest has also been found when counsel represented, in a proceeding concerning improper handling and disposition of narcotics, both the defendant and the narcotics officer who was a central figure in the case against the defendant and who would have to be implicated to establish entrapment,<sup>185</sup> and when counsel failed to cross-examine a prosecution witness because of a prior attorney-client relationship.<sup>186</sup> In the former situation, the Fifth Circuit stated that effective representation is lacking

if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents—as a vigorous advocate having the single aim of acquittal by all means fair and honorable—are hobbled or fettered or restrained by commitments to others.<sup>187</sup>

When there is joint representation, the test of prejudice should be whether there is any reasonable possibility that counsel's representation of the codefendant adversely affected the defense of the defendant. Such a test would evaluate counsel's cross-examination of witnesses, presentation of defense testimony, and closing arguments to the jury.

<sup>180</sup> See text accompanying note 177 *supra*.

<sup>181</sup> See, e.g., *Peek v. United States*, 321 F.2d 934 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964); *United States v. Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *Lebron v. United States*, 229 F.2d 16 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 974 (1956); *Lott v. United States*, 218 F.2d 675 (5th Cir. 1955), *cert. denied*, 351 U.S. 953 (1956); *Sanders v. United States*, 183 F.2d 748 (4th Cir. 1950), *cert. denied*, 340 U.S. 921 (1951); *United States ex rel. Green v. Rundle*, 305 F. Supp. 523 (E.D. Pa. 1969), *remanded for hearing*, 434 F.2d 1112 (3d Cir. 1970), *new trial ordered*, 326 F. Supp. 456 (E.D. Pa. 1971).

<sup>182</sup> 321 F.2d 934 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964).

<sup>183</sup> 321 F.2d at 944.

<sup>184</sup> 183 F.2d 748, 749 (4th Cir. 1950), *cert. denied*, 340 U.S. 921 (1951).

<sup>185</sup> See *Porter v. United States*, 298 F.2d 461 (5th Cir. 1962), *aff'd per curiam after new trial*, 339 F.2d 258 (5th Cir. 1964).

<sup>186</sup> See *Tucker v. United States*, 235 F.2d 238 (9th Cir. 1956).

<sup>187</sup> *Porter v. United States*, 298 F.2d 461, 463 (5th Cir. 1962).

### 9. *Other Purported Failings of Defense Counsel*

Among the derelictions of defense counsel which courts have found to constitute or to contribute to a finding of ineffective assistance, or to require at least a hearing on the defendant's claim, are: failure of counsel to examine a psychiatrist's report;<sup>188</sup> failure to object to the trial of his client in a jail uniform;<sup>189</sup> failure to examine an expert witness properly;<sup>190</sup> counsel's stipulation that the court could consider, during a bench trial for carrying a concealed weapon, the defendant's testimony given at a hearing on a motion to suppress, which amounted to a judicial confession and deprived the defendant of any defense he might have had;<sup>191</sup> failure to object to or comment on the government's failure to call two eyewitnesses;<sup>192</sup> failure to obtain the defendant's work records, which might have corroborated his alibi;<sup>193</sup> and counsel's motion for a mistrial without authorization by the defendant when counsel knew of the defendant's perjured testimony.<sup>194</sup>

Counsel's failure to advise the defendant of time limitations and rights to appeal, to appointed counsel, and to a free transcript on appeal has constituted a denial of adequate representation.<sup>195</sup>

[A] waiver of right to appeal cannot intelligently be made in the absence of counsel's examining the trial proceedings and, if necessary, researching the law for possible errors and thereafter admonishing the defendant of the possibilities for relief, or lack thereof, which an appeal would afford him. This is not requiring too much of trial counsel.<sup>196</sup>

The defendant's desire to pursue an appeal must be accommodated by counsel.<sup>197</sup> Another court found ineffective assistance when the defen-

<sup>188</sup> See *Brooks v. Texas*, 381 F.2d 619 (5th Cir. 1967). See also *Hintz v. Beto*, 379 F.2d 937 (5th Cir. 1967).

<sup>189</sup> See *Brooks v. Texas*, 381 F.2d 619 (5th Cir. 1967).

<sup>190</sup> See *People v. Bennett*, 29 N.Y.2d 462, 280 N.E.2d 637, 329 N.Y.S.2d 801 (1972). Counsel was unable, even after the judge gave him additional time, to rephrase the hypothetical question for the psychiatrist he had called to the stand, and finally had to use the prosecution's question, which was designed to elicit testimony that the defendant was sane.

<sup>191</sup> See *People v. Martin*, 115 Ill. App. 2d 402, 252 N.E.2d 722 (1969).

<sup>192</sup> See *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970).

<sup>193</sup> See *United States ex rel. Green v. Rundle*, 305 F. Supp. 523 (E.D. Pa. 1969), *re-manded for rehearing*, 434 F.2d 1112 (3d Cir. 1970), *new trial ordered*, 326 F. Supp. 456 (E.D. Pa. 1971).

<sup>194</sup> See *McKissick v. United States*, 379 F.2d 754 (5th Cir. 1967).

<sup>195</sup> *Smotherman v. Beto*, 276 F. Supp. 579 (N.D. Tex. 1967).

<sup>196</sup> *Id.* at 585.

<sup>197</sup> *Id.* See also *Turner v. Maryland*, 303 F.2d 507 (4th Cir. 1962); *Turner v. Warden*, 220 Md. 669, 155 A.2d 69 (1959), *cert. denied*, 364 U.S. 885 (1960). *But see* *Kime v. Brewer*,

dant refused an appeal because his counsel erroneously advised him that a successful appeal might result in a subsequent prosecution for second-degree murder resulting in a much harsher sentence.<sup>198</sup> This court, in ordering that an out-of-time direct appeal be granted, did not discuss the question of prejudice. It is suggested that there is a sufficient showing of prejudice in such a case as long as there are arguable points of error.

Ineffective assistance of appellate counsel has also been held to be an appropriate ground for relief. In *In re Smith*,<sup>199</sup> the California Supreme Court found that representation in the district court of appeal was demonstrably inadequate. The court observed that "in a case bristling with arguable claims of error, petitioner's counsel filed an opening brief consisting of a 20-page recitation of the facts and a one-page argument [which was frivolous]."<sup>200</sup> The court held that petitioner need not establish that he was entitled to reversal in order to show that he was prejudiced by counsel's ineptitude.<sup>201</sup> The court implied that a showing of potential assignments of error, none of which counsel raised, that arguably might have justified a reversal would be sufficient. This opinion should not be taken to mean that if counsel has several potentially arguable points of error and he raises some, but foregoes others, the appellant has been denied effective assistance. Counsel is certainly acting well within the range of his legitimate professional discretion in judging what points of error would be most likely to persuade an appellate court and what points would only detract from the force of his argument.<sup>202</sup>

Many lapses of counsel do not constitute ineffective assistance. Claims of inadequate representation have been rejected when counsel failed to object to leading questions,<sup>203</sup> when reputation witnesses were

182 N.W.2d 154 (Iowa 1970) (counsel's failure to perfect appeal did not amount to ineffective assistance).

198 See *Stewart v. Wainwright*, 309 F. Supp. 1023 (M.D. Fla. 1969).

199 3 Cal. 3d 192, 471 P.2d 8, 87 Cal. Rptr. 687 (1970).

200 *Id.* at 198, 471 P.2d at 11, 87 Cal. Rptr. at 690.

201 *Id.* at 202, 471 P.2d at 14, 87 Cal. Rptr. at 694.

202 See *Cardarella v. United States*, 375 F.2d 222, 230 (8th Cir.), *cert. denied*, 389 U.S. 884 (1967):

[C]ounsel is under no duty to brief every assignment of error made in a motion for new trial, particularly where, as here, there is no prejudice in fact, and counsel's own experience and the precedents . . . indicate the point would not be sustained, and there are other assignments of error which counsel believes to be more meritorious.

203 See *Harris v. United States*, 239 F.2d 612 (5th Cir. 1957); *People v. Byers*, 10 Cal. App. 3d 410, 88 Cal. Rptr. 886 (1970).

not called,<sup>204</sup> when the defendant was not put on the witness stand,<sup>205</sup> when counsel stipulated that the owner of a vehicle would testify that he was the owner, had custody of it, and had given no permission to unlock it,<sup>206</sup> when counsel was prevented by the trial court from presenting certain arguments to the jury or asking irrelevant questions,<sup>207</sup> when a timely motion to quash an indictment was not made,<sup>208</sup> and when counsel was under the influence of intoxicating liquor during the course of the trial.<sup>209</sup>

Most of these actions or inactions of trial counsel can be justified by tactical reasons or found not to be reversible error because of a lack of prejudice. When counsel did not object to leading questions to a young girl who was the alleged victim of a rape, the court noted that if counsel had objected frequently, such objections might well have engendered a negative attitude toward the defendant in the minds of the jury.<sup>210</sup> Leading questions might also go uncontested in order to allow a witness the opportunity inadvertently to impeach his own testimony or because the same material could readily be elicited without leading questions. Counsel's failure to call reputation witnesses may be justified by a desire not to put the defendant's reputation in issue.<sup>211</sup> Counsel's decision not to put the defendant on the witness stand may be justified by such motives as not bringing out prejudicial impeachment evidence against the defendant<sup>212</sup> or not subjecting the defendant to the hazards of vigorous cross-examination.<sup>213</sup> This decision may also be justified by a concern that the general demeanor of the defendant and his inability to testify convincingly would make him appear guilty.<sup>214</sup> The stipulation as to the testimony of an owner of a

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<sup>204</sup> See *Norman v. United States*, 100 F.2d 905 (6th Cir.), *cert. denied*, 306 U.S. 660 (1939).

<sup>205</sup> See *United States v. Garguilo*, 324 F.2d 795 (2d Cir. 1963); *Norman v. United States*, 100 F.2d 905 (6th Cir.), *cert. denied*, 306 U.S. 660 (1939).

<sup>206</sup> See *United States ex rel. Hayes v. Johnston*, 330 F. Supp. 1115 (E.D. Pa. 1971).

<sup>207</sup> See *Reid v. United States*, 334 F.2d 915 (9th Cir. 1964).

<sup>208</sup> See *Michel v. Louisiana*, 350 U.S. 91 (1955).

<sup>209</sup> See *Hudspeth v. McDonald*, 120 F.2d 962 (10th Cir.), *cert. denied*, 314 U.S. 962 (1941). The court based its finding on two considerations: (1) that the defendant employed counsel of his own choosing, and (2) that the defendant did not call his counsel's condition to the attention of the trial court. 120 F.2d at 968. See also *People v. Gourdin*, 108 Cal. App. 333, 291 P. 701 (1930).

<sup>210</sup> See *Harris v. United States*, 239 F.2d 612, 615 (5th Cir. 1957).

<sup>211</sup> See *Norman v. United States*, 100 F.2d 905, 906 (6th Cir.), *cert. denied*, 306 U.S. 660 (1939).

<sup>212</sup> See 100 F.2d at 906.

<sup>213</sup> See *United States v. Garguilo*, 324 F.2d 795 (2d Cir. 1963).

<sup>214</sup> See *C. TESSMER*, *supra* note 100, at 86.

vehicle is not prejudicial if in fact the owner would have given the testimony stipulated to.<sup>215</sup> Indeed, a stipulation can avoid the impact of direct testimony by a particularly convincing witness. When counsel is properly disallowed from making certain arguments or asking certain questions, it cannot be said that this creates a reasonable possibility of contributing to the conviction. But when counsel did not make a timely motion to quash an indictment on the basis of discriminatory selection of the grand jury, the court gave a very unconvincing explanation of counsel's failure, reasoning that "the delay might be considered sound trial strategy, particularly since the co-defendant could not be found."<sup>216</sup> If a timely motion would have had a reasonable possibility of success, counsel's failure to make it should be considered ineffective assistance, since there is no defensible tactical reason for counsel's omission.<sup>217</sup>

Many cases suggest that when counsel is retained, a greater showing of incompetency is required than when counsel is appointed.<sup>218</sup> Although no court has articulated different standards for reviewing the performance of retained or appointed counsel, cases indicate that the action of retained counsel is the action of the client and binds the client unless he voices a specific objection to such actions.<sup>219</sup> The view that retained counsel is the agent of the defendant and that such counsel's incompetence cannot be considered state action has been severely criticized by Professor Jon Waltz:

The agency rationale whereby the conduct of retained counsel is imputed to an accused constitutes a concept gone astray . . . . The logical-moral underpinnings of a principal's liability to an innocent third party for the acts of the principal's agent vanish when the agency concept is superimposed on the attorney-client relationship in criminal cases; there is no innocent beneficiary of

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<sup>215</sup> See *United States ex rel. Hayes v. Johnston*, 330 F. Supp. 1115 (E.D. Pa. 1971).

<sup>216</sup> *Michel v. Louisiana*, 350 U.S. 91, 101 (1955).

<sup>217</sup> The Fifth Circuit upheld a challenge to the composition of the jury on the ground that blacks were systematically excluded, despite the fact that counsel did not raise this issue at trial or on appeal, and that the claim had been rejected by the state court and by the federal district court. *United States ex rel. Goldsby v. Harpole*, 249 F.2d 417 (5th Cir. 1957).

<sup>218</sup> See, e.g., *O'Malley v. United States*, 285 F.2d 733 (6th Cir. 1961); *Stanley v. United States*, 239 F.2d 765 (9th Cir. 1956) (per curiam); *United States ex rel. Darcy v. Handy*, 203 F.2d 407 (3d Cir. 1953), *aff'd*, 351 U.S. 454 (1956); *Weatherman v. Peyton*, 287 F. Supp. 819 (W.D. Va. 1968); *United States ex rel. Wilkins v. Banmiller*, 205 F. Supp. 123 (E.D. Pa. 1962), *aff'd*, 325 F.2d 514 (3d Cir. 1963), *cert. denied*, 379 U.S. 847 (1964); *People v. Washington*, 41 Ill. 2d 16, 241 N.E.2d 425 (1968); *Sayre v. Commonwealth*, 194 Ky. 338, 238 S.W. 737 (1922).

<sup>219</sup> See, e.g., *United States ex rel. Darcy v. Handy*, 203 F.2d 407 (3d Cir. 1953), *aff'd*, 351 U.S. 454 (1956); *Sayre v. Commonwealth*, 194 Ky. 338, 238 S.W. 737 (1922).

the accused's agency-born liability for the ineptitude of his retained attorney-agent. Moreover, . . . the principal-agent relationship presupposes a principal sufficiently informed to direct and supervise his agent. . . .

. . . [It] assuredly is not possible to avoid the unmistakable onset of state action . . . when, through its judicial machinery, the state convicts an accused and passes sentence upon him on the basis of a trial so miserably conducted by retained defense counsel as to fall below the due process line. Here, graphically speaking, there may be as much as 2,300 volts of state action.<sup>220</sup>

The retained/appointed distinction has been rejected by a number of courts.<sup>221</sup> Such rejection is clearly the better-considered view.

The limitation that ineffective assistance will not be found unless the defendant has apprised the trial court of his objections to counsel's performance or unless counsel's incompetence is apparent to the trial court, has been expressed in numerous opinions.<sup>222</sup> In *United States ex rel. Wilkins v. Banmiller*,<sup>223</sup> the court found no state action because the trial court, in accepting a guilty plea, was unaware that counsel had misrepresented to his client the fact that a deal had been made for a light sentence. Other courts have held that counsel's incompetence must be so manifest "that it becomes the duty of the court or the prosecution to observe it and correct it."<sup>224</sup> These cases rest primarily on indefensible agency and state action theories,<sup>225</sup> and usually have involved retained counsel.<sup>226</sup>

<sup>220</sup> Waltz, *supra* note 1, at 297-99.

<sup>221</sup> See, e.g., *Blanchard v. Brewer*, 429 F.2d 89 (8th Cir. 1970), *cert. denied*, 401 U.S. 1002 (1971); *United States ex rel. Maselli v. Reincke*, 383 F.2d 129 (2d Cir. 1967); *Wilson v. Rose*, 366 F.2d 611 (9th Cir. 1966); *Abraham v. State*, 228 Ind. 179, 91 N.E.2d 358 (1950).

<sup>222</sup> See, e.g., *United States ex rel. Darcy v. Handy*, 203 F.2d 407, 425-28 (3d Cir. 1953) (Maris, J., concurring), *aff'd*, 351 U.S. 454 (1956); *Tompsett v. Ohio*, 146 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945); *Hudspeth v. McDonald*, 120 F.2d 962 (10th Cir.), *cert. denied*, 314 U.S. 617 (1941); *Sayre v. Commonwealth*, 194 Ky. 338, 238 S.W. 737 (1922). See also *Nutt v. United States*, 335 F.2d 817 (10th Cir.), *cert. denied*, 379 U.S. 909 (1964). *People v. Tomaselli*, 7 N.Y.2d 350, 165 N.E.2d 551, 197 N.Y.S.2d 697 (1960) (ineffective assistance claim must be rejected unless responsibility can be attributed to the court or prosecution).

<sup>223</sup> 205 F. Supp. 123 (E.D. Pa. 1962), *aff'd*, 325 F.2d 514 (3d Cir. 1963), *cert. denied*, 379 U.S. 847 (1964).

<sup>224</sup> *Williams v. Beto*, 354 F.2d 698, 704 (5th Cir. 1965); see *In re Ernst*, 294 F.2d 556, 558 (3d Cir.), *cert. denied*, 364 U.S. 943 (1961).

<sup>225</sup> In *United States ex rel. Wilkins v. Banmiller*, 205 F. Supp. 123, 128 (E.D. Pa. 1962), the court said that the state must play a part in the wrong done to the accused if the ineffective assistance claim is to be sustained.

<sup>226</sup> For example, in *Tompsett v. Ohio*, 146 F.2d 95, 98 (6th Cir. 1944), the court stated: [T]he lack of skill and incompetency of the attorney is imputed to the defendant who employed him, the acts of the attorney thus becoming those of his client and

In addition to the arguments against the state action and agency theories, the requirement that the defendant make manifest to the trial judge his objections to counsel's performance assumes, without justification, that the defendant at his trial was aware of his counsel's deficiencies and that he can appreciate the fact that his counsel's performance was incompetent. Yet the defendant may not be aware of such matters as his counsel's ignorance of the law or his failure to investigate the facts adequately, and may not appreciate such matters as the viable defenses which counsel might have raised but did not. The defendant may also fail to raise an objection to counsel's performance because of a belief, shared by many criminal defendants, that his counsel, the prosecuting attorney, and the trial judge are all part of the same club—the establishment—and that they will listen to nothing he has to say regarding counsel's deficiencies.

The requirement that counsel's inadequacies be brought to the attention of the trial court, although not defensible, does contain positive implications which should be followed. First, if the defendant does make a motion for dismissal of his counsel, the trial court should allow him to state why he thinks his counsel is ineffective,<sup>227</sup> since the "defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom."<sup>228</sup> More important, as the Fifth Circuit in *MacKenna v. Ellis*<sup>229</sup> suggested: "Fundamental fairness to a person accused of crime requires such judicial guidance of the conduct of a trial that when it becomes apparent . . . counsel are not protecting the accused, the trial judge should move in and protect him."<sup>230</sup> One device for protecting the accused has been suggested earlier: before accepting a guilty plea, the court should make inquiry of counsel as to what transpired between him and his client and what factual and legal investigations were made.<sup>231</sup>

Second, as several cases have stated or implied, when the defendant chooses to go to trial, the judge has a duty to protect him.<sup>232</sup> This does not mean that the judge should intervene in the defense of the

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so recognized and accepted by the court, unless the defendant repudiates them by making known to the court at the time his objection to or lack of concurrence in them.

227 See *People v. Marsden*, 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970).

228 *Id.* at 123, 465 P.2d at 47, 84 Cal. Rptr. at 159.

229 280 F.2d 592 (5th Cir. 1960), *modified*, 289 F.2d 928, *cert. denied*, 368 U.S. 877 (1961).

230 280 F.2d at 600.

231 See note 34 and accompanying text *supra*.

232 See note 230 and accompanying text *supra*.

accused when the propriety of counsel's conduct is debatable. Ordinarily, the trial judge should be the disinterested arbiter of the adversary process and should rely on counsel for both sides to use their best efforts, judgments, and skills. But trial judges should, nevertheless, be alert to such matters as counsel's failure to object to incompetent evidence, failure to cross-examine witnesses, failure to request a lesser offense instruction, and failure to make an adequate closing argument. If the judge cannot discern any reasonable tactical basis for counsel's evidently prejudicial conduct, he should intervene by examining defense counsel, outside the presence of the prosecution, on the basis for his action or inaction. If counsel comes forward with a justification that no reasonably competent criminal defense attorney might agree with, then the court should suggest what more advantageous action counsel might take.<sup>233</sup> If counsel persists in rendering prejudicial ineffective assistance, the court should declare a mistrial.

## II

### SUGGESTIONS TO ASSURE MORE EFFECTIVE REPRESENTATION BY DEFENSE COUNSEL

Whenever defense counsel renders ineffective assistance, it is a disgrace to our system of justice, a system which promises a fair trial to all criminal defendants. Setting aside a conviction does not completely remove the stain caused by denial of the opportunity to make a vigorous defense by all fair means. The only satisfactory solution is the elimination of incompetent defense counsel. As suggested earlier, many attorneys are simply not prepared or equipped by training, knowledge, experience, or inclination to defend criminal cases. Criminal defense work is a highly specialized endeavor. To practice this specialty, an attorney should be required to pass a special examination dealing with criminal procedure, evidence, and trial tactics. The examination should go well beyond what is ordinarily covered in the criminal law and evidence portions of the bar examination. It should include, *inter alia*: (1) the elements of crimes, (2) the elements of de-

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<sup>233</sup> It has been suggested that the court should not intervene to protect the defendant because such intervention might seriously prejudice the defendant by placing his counsel in a bad light. *See* *People v. Stephens*, 6 Ill. 2d 257, 128 N.E.2d 731 (1955). But this possibility is minimized by the fact that the trial judge can make discreet inquiries of defense counsel outside the hearing of the jury. Moreover, the prejudice caused by incompetent counsel, sufficient to move the trial court to intervene, is far more serious than any prejudice resulting from placing counsel in a bad light.

fenses, such as insanity, diminished responsibility, intoxication, provocation, mistake, self-defense, and entrapment, (3) the constitutional bases for assailing statutes, such as the vagueness doctrine and first amendment violations, (4) the constitutional criminal procedure, including the law of search and seizure, limitations on admissibility of confessions, electronic eavesdropping, and line-up identifications, and (5) the local rules of criminal procedure dealing with such matters as discovery, bail, defenses raised before trial, preliminary hearings, bases for challenging indictments, and bills of particulars. In addition to these matters, the attorney should be tested in the traditional areas of evidence law and on his ability to frame questions properly, to conduct a proper cross-examination, to present expert testimony, to handle and present documents and letters, to frame objections, and to make an adequate jury presentation.<sup>234</sup>

This examination should be given to all attorneys who wish to be appointed to criminal cases, to represent criminal defendants on retainer, or to work in public defender offices.<sup>235</sup> Although it may be argued that an examination requirement will discourage lawyers from taking criminal cases, there are a number of law school graduates each year who wish to practice criminal law, at least part time, and public defender offices are swamped with applications for full-time positions.<sup>236</sup>

In addition to passing a special criminal defense examination, an attorney, before being permitted to represent a defendant in a felony case, should be required to have a certain amount of experience. Several courts have considered the inexperience of counsel as a factor

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<sup>234</sup> See generally Burger, *A Sick Profession*, WIS. B. BULL., Oct. 1969, at 7-118.

<sup>235</sup> Although the federal courts do not give a bar examination, there is a distinct body of criminal law and procedure in the federal system. It is recommended that the judicial conferences of each circuit appoint a committee to prepare and administer a criminal defense examination. Perhaps to avoid unnecessary inconvenience to lawyers who practice in more than one federal circuit, successful completion of an examination in one circuit should qualify an attorney to practice in any circuit, even though criminal law doctrines vary in certain respects from circuit to circuit.

<sup>236</sup> Another tool for encouraging lawyers to qualify as criminal defense specialists and for ensuring more effective assistance of counsel is to make sure that the fee or salary paid to assigned counsel and public defenders, respectively, is comparable to the going rate for retained counsel or at least to the salaries paid public prosecutors. Counsel is more likely to be attracted to indigent criminal defense work and to spend adequate time on such cases if he is adequately compensated. If more funds are allocated to public defender offices, more attorneys can be hired, and the heavy caseloads which currently burden attorneys in those offices can be reduced to a reasonable level.

The value we place on any institution or system is no higher than the price we are willing to pay for its effective functioning. Certainly our society places a very high value on the ideal of a fair trial. Society ought to be willing to spend whatever it takes to guarantee the implementation of that ideal.

contributing to the finding of ineffective assistance.<sup>237</sup> In one case in which ineffective assistance was found because counsel had no opportunity to discuss the case with his client, the court found it significant that counsel had graduated from law school only the year before, had been admitted to the bar the year of the trial, and was handling his first criminal case.<sup>238</sup> In another case, in which numerous deficiencies in the representation of the defendant were held to constitute inadequate assistance, the court observed that the unassisted representation of indigents should not be used as a training method for the neophyte lawyer.<sup>239</sup> The Fifth Circuit has observed that "a trial judge who appoints fledgling attorneys as defense counsel, over the defendant's protest, cannot wash his hands of their mistakes."<sup>240</sup> In one case in which counsel was inexperienced, had only four hours to prepare his case, and ultimately made an unsuccessful motion for a continuance, the First Circuit said: "[W]hen a case of this nature demands prompt resolution, the court must consider counsel's experience and, where experience is absent or minimal, either grant, if requested, a continuance, or appoint more experienced counsel."<sup>241</sup> Some courts have indicated a greater willingness to reverse for unobjected to errors at trial when counsel was inexperienced.<sup>242</sup>

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<sup>237</sup> See, e.g., *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), *modified*, 289 F.2d 928 (5th Cir.), *cert. denied*, 368 U.S. 877 (1961); *Smotherman v. Beto*, 276 F. Supp. 579 (N.D. Tex. 1967); *United States v. Yodock*, 224 F. Supp. 877 (M.D. Pa. 1963).

<sup>238</sup> *United States v. Yodock*, 224 F. Supp. 877, 879 (M.D. Pa. 1963).

<sup>239</sup> *Smotherman v. Beto*, 276 F. Supp. 579, 589 (N.D. Tex. 1967). In *Stinnett v. Commonwealth*, 468 S.W.2d 784 (Ky. 1971), the court indicated that the local custom was to appoint attorneys in criminal cases from a panel made up of the newest members of the bar. Such a practice seems tantamount to treating criminal defendants as second class citizens.

<sup>240</sup> *MacKenna v. Ellis*, 280 F.2d 592, 600 (5th Cir. 1960). *But see* *Frاند v. United States*, 301 F.2d 102 (10th Cir. 1962); *Achtien v. Dowd*, 117 F.2d 989 (7th Cir. 1941). In *Achtien*, the court rejected the ineffective assistance claim when counsel was inexperienced, noting that

all lawyers must have their first cases, . . . in said first case diligence and anxious effort are often quite the equivalent of experience. It is also observable that counsel with much experience often have co-pending matters of importance which necessitate the division of time and attention, whereas the young counsel is unvexed and unperplexed by other matters and questions, and not bothered by more profitable and persistent clients.

*Id.* at 992-93. But there is no reason to assume that lawyers who have the disadvantage of little experience will be more diligent and vigorous in the defense of the accused, nor are young lawyers in busy law offices and public defender offices any less pressed for time than more experienced attorneys. The value of experience should not be minimized.

<sup>241</sup> *Rastrom v. Robbins*, 440 F.2d 1251, 1256 (1st Cir.), *cert. denied*, 404 U.S. 863 (1971).

<sup>242</sup> For example, in *People v. Blevins*, 251 Ill. 381, 96 N.E. 214 (1911), inexperienced defense counsel failed to object to incompetent evidence. The Illinois Supreme Court stated: "[T]he court owed it to . . . [the defendant] to see to it that no advantage came

The goal of assuring that counsel has some experience at the criminal bar can be accomplished by requiring that, as a prerequisite to handling a felony case on his own, counsel represent a certain number of misdemeanor defendants under the supervision of an experienced criminal lawyer, and that he be supervised by a senior criminal defense attorney in the representation of a certain number of felony defendants. Counsel should certainly have the experience of at least one jury trial before representing a felony defendant alone. When counsel has successfully completed the criminal defense examination and has acquired the requisite experience, he should be entitled to hold himself out as a specialist in criminal law.<sup>243</sup>

Another tool the courts might use to help assure more effective assistance is to provide defense counsel with a checklist of functions he must perform preparatory to a trial or a guilty plea. The United States District Court for the District of Maryland provides defense counsel with such a checklist.<sup>244</sup> It emphasizes such responsibilities as interviewing the defendant, interviewing witnesses, discussing the case with the prosecutor, explaining elements of the crime to the defendant, reading the penalty to the defendant, motioning for a bill of particulars, motioning to inspect, taking depositions, subpoenaing relevant witnesses, considering possible defenses such as illegal arrest, unlawful search, and entrapment, utilizing any alibi or evidence of mental illness, and requesting the government to produce any evidence favorable to the defendant on the issues of guilt or appropriate penalty. This type of checklist should help bring about thorough and painstaking representation that pursues all avenues possibly helpful to the defense.

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to the State by reason of the inexperience of counsel selected by the court for him." *Id.* at 393, 96 N.E. at 219. See generally *People v. Winchester*, 352 Ill. 237, 185 N.E. 580 (1933).

<sup>243</sup> The American Bar Association might use the area of criminal law as a stepping stone to the eventual official recognition of various specialty areas. The unique constitutional safeguards present in the area of criminal law may mandate the total use of specialists along the lines considered above. The literature on specialization is not very extensive and little has been found that deals with specialization in criminal law. For general discussions of specialization, see M. PIRSIG, *CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* 233-39 (2d ed. 1970), quoting Special Committee on Recognition and Regulation of Specialization in Law Practice, *Report*, 88 A.B.A. REP. 672 (1963), and Special Committee on Availability of Legal Services, *Report on Specialization*, 92 A.B.A. REP. 584, 586 (1967). See also Harnsberger, *Publication of Specialties and Legal Ability Ratings in Law Lists*, 49 A.B.A.J. 33 (1963); Niles, *Ethical Prerequisites to Certification of Special Proficiency*, 49 A.B.A.J. 83 (1963); Yegge, *Time for Specialization*, 3 TRIAL, Aug.-Sept. 1967, at 62.

<sup>244</sup> See Judicial Conference of the United States, *Report: Jan. 13, 1965*, 36 F.R.D. 277, 338 (1965).

Another means of assuring more effective representation is to increase the compensation paid to appointed attorneys. It is unrealistic to suggest, as Chief Judge Weintraub of the New Jersey Supreme Court has asserted, that an attorney will give just as much effort to a case whether or not he is compensated<sup>245</sup> and thus to imply that we can pay a court-appointed attorney one-half the going rate without affecting his commitment of time and energy to the defense of his case. Moreover, the compensation ought not to be computed on the basis of a fixed amount per case. Such a system encourages the attorney to spend minimal time on a case so that he can handle additional cases. This piecework approach motivates the attorney to maximize the volume of cases he handles. The attorney should be compensated either per hour that he devotes to the case, with maxima that recognize that some cases involve 100 or 200 hours or more at the trial level, or at the least he should be compensated per day in court with no limitations on the maximum he can receive.

Finally, as to attorneys in public defender offices, there should be a self-imposed limit on the volume of cases they deal with each year. The National Legal Aid and Defender Association has suggested that experienced attorneys handle no more than 150 felony cases per year, rather than, as Chief Judge Bazelon has indicated with disapproval, the case load of over 500 felony cases per attorney with which some public defender offices in major cities are burdened.<sup>246</sup>

#### CONCLUSION

Judicial recognition of the standards formulated above for the resolution of ineffective assistance claims, and the courts' assumption of a more protective role in trial and pretrial supervision should help to assure adequate legal representation for criminal defendants. More important, perhaps, is the implementation of a system designed to guarantee experienced, competent, and well-paid counsel for all defendants. The development of such an integrated plan will assure the accused that ineptitude or lack of diligence of his attorney will not deprive him of a fair trial. Rather, he will have the full benefit of the adversary process to which he is entitled—vigorous, skillful, knowledgeable, and experienced representation.

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<sup>245</sup> *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966).

<sup>246</sup> Address by Chief Judge David Bazelon, Robert S. Marx Lecture, Dec. 6-7, 1972, College of Law, University of Cincinnati, at 6, 8.