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Kentucky's Standard for Ineffective Counsel: A Farce and A Mockery?

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COMMENTS

KENTUCKY'S STANDARD FOR INEFFECTIVE COUNSEL: A FARCE AND A MOCKERY?

I. INTRODUCTION

The sixth amendment to the Constitution provides that the accused in a criminal prosecution “shall enjoy the right . . . to have the Assistance of Counsel for his defence.” The Supreme Court in Powell v. Alabama1 imposed the additional requirement that this counsel be “effective.”2 The Court’s mandate of “effective” counsel has generated a diversity of claims to the appellate courts which have been “limited only by the ingenuity of convicts and their post-trial counsel. Defense counsel’s actions from the earliest stages to the bitter end have been assailed . . . .”3 Despite the variety and frequency of ineffective counsel claims,4 courts have faced the issue only with reluctance, often rejecting such claims with the “sweeping statement that counsel’s assistance is constitutionally inadequate only when it is so deficient as to make the trial a ‘farce and a mockery of justice.’”5

Until recently, the “farce and mockery of justice” stan-

1 287 U.S. 45 (1932).
2 Id. at 71. See also Reese v. Georgia, 350 U.S. 85, 90 (1955); Hawk v. Olson, 326 U.S. 271, 274(1945); Turner v. Maryland, 303 F.2d 507, 511 (4th Cir. 1962). But see Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958) for a restrictive interpretation of “effective.”
The farce and mockery standard apparently originated in the District of Columbia Circuit Court of Appeals. In *Diggs v. Welch*, in which court was faced with an appeal from the denial of a writ of habeas corpus in which the defendant, Cecil Diggs, alleged that his court-appointed counsel had given him “such bad advice through negligence or ignorance” that he had been denied “effective or competent counsel.” In answer to this claim, the D.C. Circuit first declared that the sixth amendment protection was unavailable to this defendant because

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7 Berry v. Commonwealth, 490 S.W.2d 741 (Ky. 1973).
9 491 F.2d 687 (6th Cir. 1974).
10 Id. at 696.
11 Berry v. Cowan, 497 F.2d 1274 (6th Cir. 1974).
13 Id. at 668.
"the [trial] court appointed a reputable member of the bar in whom it had confidence," and ". . . once competent counsel is appointed his subsequent negligence does not deprive the accused of any right under the Sixth Amendment." On the basis of this reasoning, the court concluded that the petitioner could obtain relief only if he had been denied his right to a fair trial under the Fifth Amendment. The court determined that in order to justify relief "an extreme case must be disclosed," and formulated the following standard: "It must be shown that the proceedings were a farce and a mockery of justice." The appeal of Cecil Diggs was denied, and the standard developed has since been adopted by numerous jurisdictions, to the extent that it is now the prevailing standard for effective assistance of counsel.

148 F.2d at 669-70. This interpretation of "effective" counsel was still held by this circuit thirteen years later. See Judge Prettyman's analysis in Mitchell v. United States, 259 F.2d 787, 789-90 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958); see generally Waltz, supra note 3, at 293-95.

17 427 F.2d at 609 (citations omitted).

There are several reasons why the farce and mockery standard has survived and indeed flourished. Some of the explanations which have been advanced are: (1) a more liberal standard would encourage frivolous appeals and other post-conviction proceedings; (2) a lesser standard would encourage defense attorneys to intentionally lower their performance in order to invalidate a conviction; (3) appellate courts are reluctant to reverse, for to do so would be an implied censure of the trial court; (4) appellate courts hesitate to criticize appointed counsel, fearing that in the future they would be even more reluctant to accept court assignments; and (5) "the belief—rarely articulated, but, I am afraid, widely held—that most criminal defendants are guilty anyway." There are other reasons perhaps, but in any event, it is safe to say that there has been, and is, a general reluctance on the part of appellate courts to recognize the problem of ineffective defense counsel at trial.

Judicial reluctance to consider the problem of ineffective counsel has manifested itself not only in the strict farce and mockery standard, but also in two interrelated theories which

1974); State v. O'Neill, 216 N.W.2d 822 (Minn. 1974); State v. Williams, 213 N.W.2d 727 (Neb. 1974).

2 See Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945), where the court stated: "To allow a prisoner to try the issue of the effectiveness of his counsel under a liberal definition of that phrase is to give every convict the privilege of opening a Pandora's box of accusations which trial courts near large penal institutions would be compelled to hear."

2 See Annot., 74 A.L.R.2d 1390, 1401 (1960); People v. De Simone, 138 N.E.2d 556, 561 (Ill. 1956) (government charged that counsel's incompetency was a "desperate gamble," intending to reduce the trial to a farce). But see Bines, Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus, 59 Va. L. Rev. 927, 940 n.67 (1973) [hereinafter cited as Bines] ("Surely concern that some lawyers will specialize in throwing cases is overdone. . . . The deliberate perversion of the trial process is grounds for disbarment."). For the likelihood of disciplinary action, see Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1, 17 (1973) [hereinafter cited as Bazelon]; Note, 78 Harv. L. Rev. supra note 3, at 1451.

2 See Note, 49 Va. L. Rev., supra note 5, at 1540. See, e.g., United States ex rel. Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948); State v. Dreher, 38 S.W. 567 (Mo. 1897).

2 See Bazelon, supra note 22, at 25; United States v. Re, 336 F.2d 306 (2d Cir.), cert. denied, 379 U.S. 904 (1964) (counsel referred to as Mr. Z).

2 See Gray v. United States, 299 F.2d 467 (D.C. Cir. 1962). "The charge of ineffective assistance is so often leveled at appointed counsel by convicted defendants that many lawyers dislike to accept assignments in behalf of indigents." Id. at 468.

2 Bazelon, supra note 22, at 26.
courts have used to avoid the constitutional claim altogether. These theories have as their basis the assumption that unless the court was directly responsible for the defense attorney's inadequacy, the defendant may not later claim that his right to effective assistance of counsel was denied.

The first theory is borrowed from the commercial law concept of agency. Under the agency theory, if the allegedly ineffective attorney was not appointed by the court, but was instead privately retained by the defendant, any negligence by the agent-attorney is imputed to the principal-defendant. In effect, this concept says to the defendant: "You retained the counsel, so you are estopped from claiming that his inadequacy violated your constitutional rights." The only exception to this theory is that if the defendant served notice to the trial court that he was dissatisfied with his counsel, the negligence of the attorney is not to be imputed to the defendant. In such a case, the failure of the trial court to appoint satisfactory counsel or to allow the defendant to obtain new counsel requires the appellate court to determine if the assistance of the attorney was, in fact, constitutionally inadequate.

The agency theory has been criticized on two grounds. First, it has been argued that because agency is "essentially a creature of commercial law," forcing it into the attorney-client relationship removes its logical underpinnings. The basis for this argument is that the commercial "principal" is normally able to inform and instruct his "agent," whereas the typical criminal defendant is unfamiliar with the criminal law and often incarcerated. He is, therefore, unable to intelligently aid, direct or supervise his defense. The second criticism is that it is difficult to perceive why the mere fact that a defendant has enough wealth to employ counsel should deprive him of the constitutional safeguard afforded his indigent brother. The

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28 United States ex rel. Darcy v. Handy, 203 F.2d 407, 426 (3rd Cir.) (concurring opinion), cert. denied, 346 U.S. 865 (1953); Tompsett v. Ohio, 146 F.2d 95, 98 (6th Cir.), cert. denied, 324 U.S. 869 (1944). See also Annot., 74 A.L.R.2d 1390, 1405-06.

29 Waltz, supra note 3, at 297.

30 Id.

distinction that the right to effective counsel is involved only when the counsel was appointed by the court (so that the court is therefore partly responsible for the inadequacy) seems insufficient to support the denial of constitutional protection. The essence of both of these attacks on the agency theory is that "it makes little sense, and even less justice, to allow imputation of the [defense counsel's] errors to the accused to defeat his opportunity for relief."\(^3\)

The second theory relied upon by many courts to avoid addressing the ineffective counsel issue rests on the premise that unless "state action" is involved, there can be no denial of constitutional rights.\(^3\) The distinction made here is that the state is responsible for the performance of attorneys appointed by the court; but it is not responsible for the conduct of privately retained counsel unless the defendant complains about his representation to the court,\(^3\)\(^4\) or unless the counsel's incompetence is so extreme that the trial court comes under a duty to intervene and fails to do so.\(^3\)\(^5\) This theory differs from the "agency" theory in that it places on the trial court an affirmative duty to recognize and to eliminate any prejudicial incompetence by a defense counsel whether or not counsel was appointed by the court. The basis for this theory can be found in Hudspeth v. McDonald,\(^3\) where the court found "a vast difference between lacking the effective assistance of competent counsel and being denied the right to have the effective assistance of competent counsel."\(^3\)\(^7\)

\(^3\) Comment, 25 Baylor L. Rev., supra note 31, at 311.


\(^3\) Mandell v. People, 231 P.199 (Colo. 1924); Sayre v. Commonwealth, 238 S.W. 737 (Ky. 1922).


\(^3\) Id. at 968 (emphasis added). The state action theory was carried to its ultimate heights (or possibly depths) in United States ex rel. Wilkins v. Banmiller, 205 F. Supp. 123 (E.D. Pa. 1962). In a habeas corpus proceeding the relator alleged that his defense counsel misrepresented to him that he had investigated the case and found sufficient evidence to convict the defendant. The attorney further misrepresented to the defendant that he had made a deal with the state wherein a light sentence would be provided.
Like the agency theory, the state action theory has been the object of criticism. It has been argued that because lawyers are essential to the American system of justice, licensed by the state, and subject to the discipline of the courts, the incompetence of an attorney representing a criminal defendant is sufficient state involvement to bring the constitutional safeguards into play. Critics have also asserted that the action of the court in convicting and sentencing under circumstances of ineffective representation is sufficient to constitute "state action." Finally, it has been contended that the distinction made in Hudspeth misses the point because it is not the denial of effective counsel that violates the defendant's constitutional rights, but rather the denial of a fair trial that is constitutionally repugnant.

The criticisms of the agency and state action theories have convinced some courts that the distinction between retained and appointed counsel should be abandoned. Several have now eliminated status of counsel or state involvement as convenient nails upon which to hang a defendant's constitutional claim, and instead address the effectiveness issue raised on the appeal.

in return for a guilty plea. The defendant did enter a guilty plea and a life sentence was imposed. In denying the writ the court said: "As we view this case, the significant fact is the deliberate misrepresentation by the attorney of the prospective testimony of certain witnesses. But the due process standard is solely whether or not the state played any part in the wrong done the accused." Id. at 127. The court later declared that the "trial may not have been a completely 'fair' one in the conceptualistic sense. However, intervention by this court requires that the denial of relator's rights be the doing of the state." Id. at 128 (footnote omitted).


38 See Waltz, supra note 3, at 299. If the state convicts a defendant and sentences him to death in the electric chair after a denial of due process, "there may be much as 2,300 volts of state action." Id.

37 See Note, 78 HARV. L. REV., supra note 3, at 1437. This argument swings away from the sixth amendment right to effective counsel and focuses instead on the right to a fair trial under the due process clause of the fifth amendment. The rights of the fifth and sixth amendments were often seen as overlapping by the early courts. This approach is evidenced in Diggs v. Welch, 148 F.2d 667 (D.C. Cir. 1945).

III. The New Standard for Effective Counsel in the Sixth Circuit

Until recently, the Sixth Circuit Court of Appeals was one of the many courts which applied the farce and mockery of justice standard in appraising claims of ineffective counsel. In *Scott v. United States*, the court had stated: "Only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court, can a charge of inadequate legal representation prevail." This standard was often reaffirmed by the court, but in *Beasley v. United States* the Sixth Circuit was presented with conduct by a defense attorney that required it to re-evaluate, and ultimately to discard, the standard expressed in *Scott*.

Millard Robert Beasley had been convicted of attempted armed robbery and sentenced to 25 years imprisonment. After an unsuccessful appeal, he filed a motion to vacate the sentence and judgment in federal district court, alleging that the incompetence of his counsel during trial violated his sixth amendment right to effective assistance of counsel. The district court found that although the defendant had been afforded "incompetent and ineffective representation," he had not been denied his sixth amendment right because the attorney's performance had not rendered the trial a "farce and a mockery, shocking to the Court." In evaluating the attorney's performance, the district court made a number of findings. First, the defense counsel was incompetent in calling as the only defense witness an antagonistic F.B.I. agent whose testimony supported the defendant's guilt and criticized his character, and whose appearance allowed the state to introduce evidence of past criminality of the defendant. Second, the court found further incompetence in that counsel advised the defendant to

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Id. at 73.


491 F.2d 687 (6th Cir. 1974).


waive a jury trial while knowing that the trial judge had read a damaging F.B.I. report which could not have been introduced at trial. Third, the state's fingerprint evidence went unchallenged even though the evidence was subject to attack on two grounds. The defense counsel not only failed to call a witness who could have rebutted the evidence, but he also failed to request an independent fingerprint test, made available by the court, which if taken would have revealed a defect in the state's evidence. Fourth, counsel failed to call several res gestae witnesses who could have testified that they were unable to identify the attempted robber. Fifth, the defense counsel was ill and suffering pain during the trial. Sixth, investigation by the defense counsel was only cursory and consequently the defendant's only alibi witness died before being contacted by counsel.48

Faced with these findings, the Sixth Circuit framed its issue: "[T]he question we are faced with is how ineffective and incompetent an attorney's representation of a criminal defendant must be before an accused's Sixth Amendment right is violated."49 In addressing the question, the court evaluated its previous standard: "The phrase 'farce and mockery' has no obvious intrinsic meaning. What may appear to be a 'farce' to one court may seem a humdrum proceeding to another . . . . The law demands objective explanation, so as to ensure the even dispensation of justice."50 To aid in establishing an objective standard, the court reviewed past Supreme Court holdings51 and concluded "that the 'farce and mockery' test should be abandoned as a meaningful standard for testing Sixth Amendment claims."52 The court then adopted a new standard which appears to combine the subjective reasonableness standard developed by the Fifth

48 491 F.2d at 690-91.
49 Id. at 690.
50 Id. at 692.
51 The court discussed, in chronological order: Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel interpreted to mean "effective"); Avery v. Alabama, 308 U.S. 444 (1940) (mere formal appointment not enough); Glasser v. United States, 315 U.S. 60 (1942) (inadequate counsel renders conviction void); White v. Ragen, 324 U.S. 760 (1945) (effective assistance is a requirement of due process); McMann v. Richardson, 397 U.S. 759, 771 (1970) ("defendants cannot be left to the mercies of incompetent counsel").
52 491 F.2d at 693.
The court declared: "We hold that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance." To provide objectivity, the court added:

Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interests undeflected by conflicting considerations. Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a timely and proper manner. The court then offered this guideline for application of the new standard: "If, however, action that appears erroneous from hindsight was taken for reasons that would appear sound to a competent criminal attorney, the assistance of counsel has not been constitutionally defective."

The new standard of the Sixth Circuit, though untested by time, appears to be a reasonable reconciliation between the practical problem of frivolous appeals on the one hand and the constitutional problem of the ineffectively represented defendant on the other. Its adoption raises the question of whether the farce and mockery of justice test should remain as the standard in Kentucky.

IV. RIGHT TO EFFECTIVE COUNSEL IN KENTUCKY

The right to counsel for criminal defendants in felony cases was recognized in Kentucky long before the Supreme Court's

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53 See West v. Louisiana, 478 F.2d 1026, 1033 (5th Cir. 1973) ("counsel reasonably likely to render and rendering reasonably effective assistance"); see also Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974) (ineffective counsel may occur even when no farce or mockery has occurred).

54 See Note, 78 Harv. L. Rev., supra note 3, at 1435.

55 See Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968) ("Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed . . ."); State v. Thomas, 203 S.E.2d 445, 461 (W. Va. 1974) (Test is whether counsel's performance "exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law.").

56 491 F.2d at 696.

57 Id. (citations omitted).

58 491 F.2d at 696; see Finer, supra note 3, at 1080.
mandate in *Gideon v. Wainwright.* Section 11 of the Kentucky Constitution provides: "In all criminal prosecutions the accused has the right to be heard by himself and counsel . . . .", and the Kentucky Court has long held that in a criminal prosecution the "court may appoint counsel for [the defendant], and must do so, where a felony is charged, if he fails to select one of his own choosing." The value of this right and the necessity that counsel be "effective," were expressed by the Court in *Powell v. Commonwealth:* This right of counsel throughout the trial is firmly rooted in our criminal jurisprudence. It is cherished as one of the most important safeguards against an unfair trial. Like the right of the defendant to be present himself, his right to the effective assistance of counsel is a requirement of our Bill of Rights, § 11, Ky. Const., and the presence of both is a condition of due process of law assured by the Fourteenth Amendment to the Federal Constitution.

Given this statement by the Court, the question naturally arises as to whether the Court has applied this concept to the claims of ineffective counsel asserted by convicted defendants.

Claims of ineffective counsel were infrequent before the right to counsel was underscored by *Gideon*. One very early claim was presented in *Vowells v. Commonwealth,* but the Court held: "The fact that the defendant's attorney was, in the opinion of some of the spectators, not well enough to try the case did not authorize a new trial." Another early claim of ineffective counsel occurred in *O'Brien v. Commonwealth,* where the defendant alleged that his counsel, employed by his mother, was so intoxicated during the trial that he was denied a fair trial; and that it was "the duty of the court to see that

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59 372 U.S. 335 (1963) (the right to counsel is fundamental and is obligatory upon the states by the fourteenth amendment).
60 *O'Brien v. Commonwealth,* 74 S.W. 666, 669 (Ky. 1903). *See also* Ky. R. CRIM. P. 8.04 (If a defendant is unable to obtain counsel, "the court shall, before his arraignment, appoint counsel to represent him in all future stages of the proceeding, including appeal, unless he elects to proceed without counsel or is able to obtain counsel.").
61 346 S.W.2d 731 (Ky. 1961).
62 *Id. at* 734.
63 15 Ky. L. Rptr. 574 (1894).
64 *Id.
65 74 S.W. 666 (Ky. 1903).
66 *Brief for Appellant, O'Brien v. Commonwealth,* 115 Ky. 608, 610 (1903). The
no one, especially a minor of tender age, shall be subjected to the death penalty without being represented by counsel capable of so presenting his case to the court and jury as to give him a fair and impartial trial."7 In rejecting the defendant's arguments, the Court primarily relied on the principle that it was without power to review on appeal an allegation that had not been raised in the lower court.68 It also noted, however, that the attorney was retained, that at trial the defendant did not object to his representation, and that there was nothing in the record to indicate malfeasance by defense counsel.69 Thus it is clear from the opinion that the agency principle discussed above influenced the Court's decision.

In 1922, the Court again had the issue of ineffective counsel before it, and this time it expressly relied on the agency theory for its decision. In Sayre v. Commonwealth,70 the Court conceded that "[t]here are many other things in the record which indicate that counsel for appellant at the trial represented him very unskillfully. Indeed, we are persuaded that appellant's defense would have been as well presented had he had no attorney at all."71 The Court avoided the constitutional issue, however, by applying the agency theory: "The general rule seems to be that negligence, unskillfulness, or incompetency of counsel is imputed to the client, and the client is bound thereby, because the act of the counsel is the act of the client."72

The issue of the right to effective counsel remained relatively dormant in Kentucky until 1963, when the Court adopted the "farce and mockery" standard in the case of Rice v. Davis.73 The defendant in that case had been convicted of

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state conceded that final arguments had to be postponed one day "to enable counsel to get into proper condition to present his argument to the jury." Id. at 611.
69 74 S.W. at 669.
70 Id. For cases where intoxication of defense counsel was ground for reversal, see Franklin v. State, 471 S.W.2d 780 (Ark. 1971); North Dakota v. Keller, 223 N.W. 698 (N.D. 1929).
71 238 S.W. 737 (Ky. 1922).
72 Id. at 738.
73 Id. at 739. In candor, it should be noted that one act of unskillfulness, i.e., putting on a false defense, was known and acquiesced in by the defendant. Agency is therefore more applicable. See also Payne v. Commonwealth, 79 S.W.2d 204 (Ky. 1935) (perjury on advice of counsel is not a ground for reversal).
74 366 S.W.2d 153 (Ky. 1963).
shooting and wounding with intent to kill and sentenced to 20 years in prison. He filed a writ of habeas corpus, the denial of which was appealed to the Court of Appeals. The defendant alleged several irregularities in support of his contention that his constitutional rights had been violated, but these allegations could not be verified because there was no transcript made at the trial. The defendant asserted that he had requested his employed counsel to obtain a court reporter, that, after his attorney failed to do so, he had asked the trial court to either furnish a court reporter or allow him time to secure one, and that this request had been denied. The Court found that the defendant had, indeed, been denied effective assistance of counsel and ordered a new trial.

Effective representation by counsel, in order to satisfy the accused's constitutional rights to a fair trial, is a rule of law that has been strictly construed. It must mean representation so lacking in competence that it becomes the duty of the court to observe such a condition and correct it. Allegations of serious mistakes on the part of an attorney, standing alone, even where harm results, are not a ground for habeas corpus. In all the cases decided on this subject, the circumstances surrounding the trial must be such as to shock the conscience of the court and make the proceeding a farce and a mockery of justice.

11 Id. at 156-57. The Court addressed the theory of agency, but added more confusion than clarity to the theory's role in claims of ineffective counsel. On the one hand, it quoted with approval Berry v. Gray, 155 F. Supp. 494 (W.D. Ky. 1957): "'It is immaterial whether such counsel was appointed by the Court or selected by the accused . . . . The prejudice to a defendant from the failure to have the effective assistance of counsel results whether counsel is court appointed or selected by the accused.'" 366 S.W.2d at 156. On the other hand, the Court stated unequivocally that "the lack of skill and unfitness of the attorney may be imputed to the defendant who employed him, the acts of the attorney thus becoming those of his client unless they are rejected and such a fact is made known to the court." Id. at 157. This inconsistency is reflected in the fact that one commentator soon thereafter cited Rice v. Davis for the proposition that the status of counsel is immaterial. See Waltz, supra note 3, at 300 n.72, while subsequent cases reaffirmed or perhaps reestablished the agency theory. See King v. Commonwealth, 408 S.W.2d 204 (Ky. 1966), cert. denied, 386 U.S. 924 (1967) (an accused cannot complain when the court did not appoint his counsel); Whack v. Commonwealth, 390 S.W.2d 161 (Ky. 1965). That the current position of the Court remains ambiguous is evidenced by its recent statement that a defendant is "chargeable with error of judgment on the part of his retained counsel, unless it appears that the efforts of his retained counsel were such as to shock the conscience of the court or to render the proceedings a farce and a mockery of justice." Lay v. Commonwealth, 506 S.W.2d 507, 508 (Ky. 1974).
Rice v. Davis is one of the very few cases in which the Kentucky Court of Appeals has found a denial of the right to effective assistance of counsel. Significantly, an analysis of the circumstances before the Court indicates that it had little or no other choice. In the first place, the Court was unable to find that the trial record revealed no malfeasance, for the absence of the trial record was itself the product of the negligence of the attorney and the lower court. Secondly, the Court could not rely on the agency theory because one exception to this doctrine is that the attorney’s negligence is not to be imputed to the defendant if the defendant made his objection known to the court. Finally, the state action theory could not be applied because it was the alleged refusal of the court to comply with the defendant’s request for a court reporter which resulted in the absence of a trial record. Thus it appears that the Court had no alternative but to order a new trial.

The farce and mockery standard adopted in Rice has since been called upon in numerous instances to do battle with the post-trial allegations of convicted defendants. In King v. Commonwealth, the Court found that the refusal of defense counsel to plead self-defense was not shocking, and that the proceedings were not rendered a mockery. In Ramsey v. Commonwealth, the Court said that effective counsel does not guarantee “error-free representation,” but does guarantee that there shall be no “mockery of justice.” Similarly, the Court in Penn v. Commonwealth held: “This court meant what it said in Rice v. Davis that counsel’s representation must be ‘so lacking in competence that it becomes the duty of the court to observe such a condition and correct it . . . .’”

A discussion of Kentucky’s approach to the issue of effective counsel would not be complete without some mention of the burden of proof imposed on the defendant, and certain extrinsic factors which occasionally result in a finding of ineffective counsel. Regarding the burden of proof, the Court has held that there is a presumption of competence on the part of

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72 408 S.W.2d 204 (Ky. 1966), cert. denied, 386 U.S. 924 (1967).  
73 399 S.W.2d 473, 475 (Ky.), cert. denied, 385 U.S. 865 (1966).  
74 427 S.W.2d 808 (Ky. 1968).  
75 Id. at 809 (citations omitted).
appointed defense counsel. In *Copeland v. Commonwealth,* the Court remarked, rather optimistically, that “when the court in good faith appoints a member of the bar in good standing to represent the defendant, the presumption is that such counsel is competent and diligent. Otherwise, he would not be in good standing at the bar or appointed by the court in the first place.” This presumption, in turn, places a heavy burden on a convicted defendant who appeals alleging ineffective counsel. Thus, in *Commonwealth v. Campbell,* the Court held that the defendant must “do more than raise a doubt about the regularity of the proceedings under which he was convicted. He must establish convincingly that he has been deprived of some substantial right which could justify the extraordinary relief afforded by this postconviction proceeding.” The Court, in reversing the vacating of judgment by the trial judge, went on to conclude that even though the lower court had “serious doubt” as to the adequacy of representation, the defendant had failed to satisfy his heavy burden.

To overcome the presumption of competence, the Court has required a defendant alleging incompetent counsel to plead with particularity. In *Lawson v. Commonwealth,* the Court said: “The charge of inadequate counsel, if made with such particularity as to suggest substance, may become a valid basis for a hearing and relief under R. Cr. 11.42.” To demonstrate the degree of specificity required, the Court added: “Appellant does not assert that counsel badgered him into entering a guilty plea, nor does he claim that he failed to understand the consequences of his guilty plea. Under these circumstances, the record shows on its face that no basis has been laid upon which

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79 397 S.W.2d 59 (Ky. 1965).
80 *Id.* at 61.
81 *Id.* at 614 (Ky. 1967).
82 *Id.* at 616.
83 *Id.*
84 386 S.W.2d 734 (Ky. 1965).
85 *Id.* at 735. KY. R. CRIM. P. 11.42(1) provides: “A prisoner in custody under sentence who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court which imposed the sentence to vacate, set aside or correct it.”
to support the claim of inadequate counsel."

Aside from defense attorney's intrinsic incompetence, certain extrinsic circumstances often produce claims of a sixth amendment violation. Two such claims are that defense counsel lacked adequate time to prepare for the trial,97 and that defense counsel had a conflict of interest which impaired his ability to effectively represent his client.98 In Kentucky, either claim may result in a reversal on the ground of ineffective counsel,99 but neither provides a convicted defendant with guaranteed relief.

Concerning time for preparation, the Court has held that a failure by defense counsel to request a continuance "would not of itself support a motion to set aside the conviction on the ground of ineffective assistance of counsel."100 This position has produced some interesting results. In *Uwaniwich v. Commonwealth,*91 the Court found no reversible error even though the defendant was indicted, arraigned, tried and convicted all in the same day. The Court observed: "That the whole thing was done in one day does not necessarily damn it. The administration of justice is supposed to be prompt. More often than not it is criticized because it is not prompt

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98 386 S.W.2d at 735. See Mullins v. Commonwealth, 454 S.W.2d 689 (Ky. 1970); Wahl v. Commonwealth, 396 S.W.2d 774 (Ky. 1965), cert. denied, 384 U.S. 976 (1966).

99 See generally Finer, supra note 3, at 1089-92; Comment, Right to Effective Counsel; Constitutional Rights Violated by Denial of Continuance, 19 KAN. L. REV. 622 (1971); Comment, 14 S.D.L. REV., supra note 4, at 294-96.

100 See generally Finer, supra note 3, at 1108-09; Comment, 14 S.D.L. REV., supra note 4, at 296-97; Note, 18 VAND. L. REV., supra note 3, at 1926.

101 For reversals resulting from lack of time to prepare because the trial court refused to grant a continuance, see, e.g., Roberts v. Commonwealth, 339 S.W.2d 640 (Ky. 1960). "[T]he right to counsel 'means counsel with reasonable opportunity to prepare the case.'" Id. at 643 (footnote omitted); Johnston v. Commonwealth, 124 S.W.2d 1035 (Ky. 1939). For conflict of interest claims, see Maynard v. Commonwealth, 507 S.W.2d 143 (1974); Maye v. Commonwealth, 386 S.W.2d 731 (Ky. 1965). When one attorney represents co-defendants, "there is always a possibility, and usually a probability, of conflicting interests between the two, and only separate counsel can protect each from possible advantage by the other." Id. at 733 (footnote omitted).

102 Jones v. Commonwealth, 388 S.W.2d 601 (Ky. 1965) (counsel was appointed on the morning of the trial). See Hargrove v. Commonwealth, 396 S.W.2d 75 (Ky. 1965); Collins v. Commonwealth, 392 S.W.2d 77 (Ky.), cert. denied, 382 U.S. 881 (1965) (defendant convicted of armed robbery is not necessarily denied due process solely because he was tried and convicted on the same day counsel was appointed).

103 390 S.W.2d 658 (Ky. 1965).
enough.” Moreover, in Burton v. Commonwealth, the Court found adequate representation even though the defendant was given “30 seconds or less” before trial to consult with his court-appointed counsel. The Court remarked: “[The defendant] does not contend this brief time was insufficient, or that he asked for more time and was refused. His attorney could ask, ‘are you guilty’, and get a yes or no answer in less than three seconds. We conclude this ground insufficient to entitle appellant to a hearing.”

In the case of Vaughan v. Commonwealth, the Court did find that the defendant had been denied the effective assistance of counsel. There, the defendant alleged not only that his counsel had spent a mere 15 minutes in trial preparation, but also that his appointed counsel had an apparent conflict of interest because he was representing a co-defendant. Recognizing both factors, the Court held: “Under the totality of the circumstances . . . it is our opinion that Vaughan was denied effective assistance of counsel . . . .”

The Vaughan decision is an example of a case in which representation of a co-defendant at least contributed to a reversal. However, other less apparent conflicts of interest have not proven to be sufficient grounds for reversal. In Cole v. Commonwealth the Court held in a habeas corpus proceeding that because the issue was not raised on direct appeal, the defendant could not later allege a conflict of interest because his appointed defense attorney was also the city prosecuting attorney. While in Dawson v. Commonwealth, which was a direct appeal from a conviction for attempted rape, the Court, citing Cole, concluded that representation was adequate and that there was no conflict of interest even though defense counsel was also the local prosecutor.

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1 Id. at 659.
2 394 S.W.2d 933 (Ky. 1965).
3 Id. at 934.
4 Id. (emphasis added).
5 505 S.W.2d 768 (Ky. 1974).
6 Id. at 770.
7 441 S.W.2d 160 (Ky. 1969).
8 498 S.W.2d 128 (Ky. 1973).
9 Id. at 129.
V. ANALYSIS OF THE FARCE AND MOCKERY OF JUSTICE STANDARD

The farce and mockery of justice standard reflects the refusal of appellate courts to face the problem of ineffective assistance of defense counsel. This reluctance is evidenced by the relatively few reversals that have occurred in jurisdictions utilizing the standard. Because it is strict, and met only when there is an overwhelming case of incompetency, the farce and mockery standard has proven vulnerable to criticism. In fact, the Sixth Circuit concluded in Beasley that "farce and mockery" was not a viable test which the court could realistically apply on a case-by-case approach, but was instead a mere "conclusory description" of a proceeding in which assistance of counsel was constitutionally deficient. In support of the contention that the farce and mockery standard is no test at all, one commentator described it as rationalization, used to justify the result, which provides no practical basis for considering the constitutional issue. Whether this "test" is viewed as a conclusion, or as a rationale, the argument that the farce and mockery standard does not provide the tool required to properly measure the performance of defense counsel is persuasive.

Other attacks on the farce and mockery standard have not questioned its validity as a test, but have instead been directed at the weaknesses apparent in its application. One criticism is that the vagueness of the standard renders it vulnerable to different interpretations, thus causing it to be unwieldy in its application and unpredictable in its consequences. This lack of objectivity makes it "readily apparent that . . . the courts have not fashioned a test which is capable of precise application in future situations, since [the] terms are highly subjective."

A second criticism of the test is that it is not adequate to protect the constitutional rights of the accused. Involved in the question of ineffective counsel are both the sixth amendment

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101 Bazelon, supra note 22, at 28.
102 Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974).
103 Comment, 25 BAYLOR L. REV., supra note 31, at 300.
104 Beasley v. United States, 491 F.2d 687, 692 (6th Cir. 1974).
105 Finer, supra note 3, at 1078.
right to counsel, as expanded by Powell v. Alabama, and the fifth amendment right to a fair trial under the due process clause. Although these two rights are interrelated, it has been argued that the standard "farce and mockery" is inadequate to provide real protection for a criminal defendant under either one. The due process argument is that it seems, "somewhat specious to define a ‘fair trial’ as one which is only little better than a mockery and a farce . . . ." Surely, the requirements of due process are not satisfied if a defendant is convicted in a trial in which his attorney, although performing unsatisfactorily, was not so bad as to render the trial a farce and a mockery of justice, and not so appalling as to shock the conscience of the court.

Rights under the sixth amendment focus more on the performance of the defense attorney than on the fairness of the trial. A standard that finds an attorney’s performance to be not “ineffective” because it stopped just short of rendering the trial a farce and a mockery is detrimental not only to the victimized defendant, but to the legal profession as well. The contention here is that the standard “requires such a minimal level of performance from counsel that it is itself a mockery of the sixth amendment.”

A final criticism of the standard is that it is not easily adaptable to the myriad of situations that can confront the court. For example, in Wedding v. Commonwealth, the Kentucky Court had before it a case in which the entire Harrison County Bar, “except one elderly gentlemen and the public prosecutors,” was appointed to represent the defendant. A respected attorney conducted the actual trial, but admitted on appeal that “none of the attorneys ever interrogated any of the prospective Commonwealth witnesses and each proceeded on the ancient adage that ‘everybody’s business is nobody’s business,’ and that . . . no single or united effort was made to prepare the defendant’s defense . . . .” Faced with this ad-

107 287 U.S. 45 (1932).
108 Comment, 25 BAYLOR L. REV., supra note 31, at 301.
109 Bazelon, supra note 22, at 28.
110 394 S.W.2d 105 (Ky. 1965) (Montgomery, Palmore, Stewart, J.J., dissenting).
111 Id.
112 Id. at 106.
mission, the Court was nevertheless unwilling to find that the defendant's representation had rendered the proceeding a farce and a mockery of justice. The Court was likewise unwilling to ignore the fact that the defense attorney had admitted that the defendant had been denied effective counsel. Confronted with this dilemma, the majority simply reversed the conviction, concluding that the defendant had been denied effective assistance of counsel. In so holding, the Court made no mention of the Rice standard. The dissenters, however, contended that the farce and mockery test was applicable, and that under that test there had been no denial of effective counsel. Justice Stewart, joined in his dissent by Justices Montgomery and Palmore, wrote: “A hindsight attack on what were obviously deliberate trial tactics (and tactics, we might add, which leave no room for criticism, even at this late date) falls far short of demonstrating ineffective assistance of counsel.” After restating the farce and mockery standard contained in Rice v. Davis, he concluded: “I submit that appellant's trial which resulted in his conviction should be upheld when this test is applied to all the surrounding facts.”

VI. AVAILABLE ALTERNATIVES TO THE FARCE AND MOCKERY STANDARD

Should the farce and mockery test be found inadequate, there are several available alternatives currently in use by other courts. The Third Circuit, in United States v. Hines, utilized a standard which is comparable to the now discarded tort standard for medical malpractice; that is, counsel is adequate if he exercises "the customary skill and knowledge which normally prevails at that time and place." In West Virginia

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113 Id. For a similar case where representation was found to be adequate, see Call v. Commonwealth, 482 S.W.2d 770 (Ky. 1972), modified, 492 S.W.2d 195 (Ky. 1973) (modified as to sentence imposed).
114 394 S.W.2d at 109.
115 Id.
118 470 F.2d at 231. For an analysis of this standard, and the contention that convictions be vacated under it only when the ineffective counsel clouded the issue of guilt or when the actions become so bad as to require intervention by the trial judge to protect the trial process, see Bines, supra note 22.
the test is whether counsel demonstrated the skill of an attorney "reasonably knowledgeable of criminal law," while the Fourth Circuit has opted for objectivity with a specific set of criteria with which an attorney must comply in order to satisfy his constitutional duties.

The standard adopted in the Fifth Circuit is "... counsel reasonably likely to render and rendering reasonably effective assistance." This test, without more, begs the issue by incorporating the term to be defined—"effective." It is similar in this respect to the test of the District of Columbia Circuit, which inquires "whether gross incompetence blotted out the essence of a substantial defense." Clearly, "gross incompetence" is no more objectively definable than "effective." With regard to both of these standards it has been said that their "vagueness and cryptic application rob [them] of any prophylactic effect."

These various alternatives provide a mixture of standards ranging from the most general to the most specific. Perhaps the ideal test would provide both the flexibility required for a lasting constitutional standard and the objectivity necessary to provide pertinent guidelines to both courts and defense attorneys. The test most nearly meeting these goals is the Beasley standard adopted by the Sixth Circuit. The general standard adopted in Beasley is that counsel must be reasonably likely

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Standards include: (1) counsel must confer with his client early, and as often as necessary; (2) counsel must advise him of his rights; (3) counsel must ascertain and develop all appropriate defenses; (4) counsel must conduct all necessary investigations; and (5) counsel must allow time before trial for preparation and reflection. Judge Bazelon writes of this standard:

The inflexibility of a minimal list of specific duties may serve only to create more elaborate rituals to satisfy sixth amendment requirements. There is a danger that these concretized standards will be seen as a ceiling as well as a floor. But this standard does have its virtues: its approach to the problem of "prejudice", its focus on a lawyer's performance rather than on his ability and its embryonic attempt to establish clear guidelines for courts and counsel in future cases.

Bazelon, supra note 22, at 33.
121 MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960).
122 Finer, supra note 3, at 1078-79.
124 See Bazelon, supra note 22, at 23; Finer, supra note 3, at 1078.
125 Bazelon, supra note 22, at 29.
to render and must actually render reasonably effective assistance. This portion of the standard is identical to that of the Fifth Circuit and is thus subject to the same criticism that it contains the term sought to be defined. However, this defect is cured by the addition of objective guidelines for performance. In requiring a performance equal to that of an attorney "with ordinary training and skill in the criminal law," the court has provided a handle for the elusive constitutional standard of effective counsel.

In an effort to establish further objectivity, however, the court has perhaps created some ambiguity between the performance standard of "ordinary training and skill in the criminal law," and its method for applying the standard, i.e., assistance is not constitutionally defective if it would appear sound in hindsight to a "competent criminal attorney." It is conceivable that an act done in good faith and conscience by an attorney with "ordinary training and skill in the criminal law" would not appear "sound" to an attorney "competent" in the field. The two can be reconciled, however, if it is agreed that an attorney possessed of ordinary training and skill is thereby rendered competent in criminal law. Nevertheless, to be more consistent, the court might better have stated that a defense attorney's behavior would not be deemed constitutionally defective so long as "reasonably competent and fairly experienced criminal defense lawyers might debate its propriety." This approach would better equate the standard with its method of application.

VII. Conclusion

Even though the farce and mockery standard retained by the Kentucky Court of Appeals is still utilized by many appellate courts, the Court should perhaps reconsider this standard in light of the new standard adopted by the Sixth Circuit in Beasley, and the subsequent criticism of the farce and mockery

124 491 F.2d at 696.
127 Id. (emphasis added). This approach reflects the concern of one commentator that "ordinary skill and care," in order to protect the defendant, "must be the skill and care of a competent criminal attorney." Bines, supra note 22, at 939.
128 Finer, supra note 3, at 1080.
test in *Berry v. Cowan*. Certainly, a lowering of the standard to one of "reasonableness" runs the risk of increasing the number of appeals and other post-conviction proceedings; but this risk should be balanced against the benefits to be derived. Most importantly, a liberalizing would provide substance to the heretofore hollow constitutional right of effective assistance of counsel. In addition, decisions under a more liberal standard would furnish better guidelines of courtroom conduct for defense attorneys, as well as needed discipline for those attorneys whose reputation and pride would be injured by a reversal produced by their ineffectiveness. In the long run, hopefully, the combination of objective guidelines and examples of ineffective counsel provided by reversals would improve the performance of defense attorneys to the point where reversals under the more liberal standard would be just as infrequent as are reversals under the current farce and mockery standard. In any event, it is suggested "that the constitutional mandate is for fair trials through effective representation, and not merely for proceedings which are something short of a travesty or mockery of justice . . . ." The Court should consider adopting a standard better designed to effectively implement this mandate.

*Bruce F. Clark*

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128 497 F.2d 1274 (6th Cir. 1974).
129 Waltz, *supra* note 3, at 342.