

# Federal Habeas Corpus - A Hindsight View of Trial Attorney Effectiveness

Lawrence L. Jones

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consumers are simply paying the cost of the many essential, as well as luxurious, products traceable either directly or indirectly to the marine petroleum industry. It is doubtful that this situation would be tolerated were the oil industry more competitive—were there no tariffs or import quotas. Only because they enjoy a privileged position can oil companies get prices to cover such costs and pass the ultimate burden of Jones Act liability on to the consumer.

Larry P. Boudreaux, Sr.

### FEDERAL HABEAS CORPUS—A HINDSIGHT VIEW OF TRIAL ATTORNEY EFFECTIVENESS

As a result of federal court decisions extending the right to counsel in state criminal proceedings,<sup>1</sup> a flood of habeas corpus petitions from state prisoners has come to the federal courts.<sup>2</sup> Many relate to the lack of counsel at some stage of the criminal proceedings from arrest<sup>3</sup> to appeal,<sup>4</sup> but a large number of them complain of the lack of "effective" trial counsel.

The right to effective assistance of counsel was first enunciated by the Supreme Court in *Powell v. Alabama*,<sup>5</sup> an extreme case in which the trial judge had appointed on the morning of the trial the entire bar of the county to defend a group of Negro boys accused of raping two white girls. Justice Sutherland, speaking for the Court, laid down the rather broad pronouncement that failure to make an effective appointment of counsel violated the sixth amendment's right to counsel provision and was thus a denial of due process within the meaning of the fourteenth amendment.<sup>6</sup> Justice Black in the later case of *Avery*

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1. See *Gideon v. Wainwright*, 372 U.S. 335 (1963); Symposium, *Administration of Criminal Justice*, 26 I.A. L. REV. 666, 789 (1966).

2. The right of state prisoners to seek federal habeas corpus was broadened by the Supreme Court in *Fay v. Noia*, 372 U.S. 391 (1963). The Court held that only state remedies "presently" available need be exhausted before petitioning for habeas corpus in the federal district courts. This eliminated the need to "exhaust" all state remedies and to seek certiorari in the United States Supreme Court before seeking relief by habeas corpus. See Comment, 26 I.A. L. REV. 705 (1966).

3. *E.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1963).

4. *Douglas v. California*, 372 U.S. 353 (1963).

5. 287 U.S. 45 (1932).

6. *Id.* at 71.

7. 308 U.S. 444 (1940).

*v. Alabama*<sup>7</sup> restated the Court's position that the sixth amendment requires effective assistance of counsel.<sup>8</sup>

Although the Supreme Court has made it clear that the sixth amendment requires effective assistance of counsel, it has been left to the lower federal courts to establish standards of trial attorney effectiveness. These courts have been slow to do so, perhaps because most judges have experienced the difficulties of a trial attorney and realize that "the conduct of a case in court is a peculiar art for which many men, however learned in law are not fitted."<sup>9</sup> They may also see that allegations of ineffective counsel constitute a direct attack on the attorney's professional stature and on the profession itself; as members of that profession, judges are naturally reluctant to be too critical of it or of its members.<sup>10</sup> It is questionable whether the courts should take this attitude, as the profession would be better off if ineffectiveness were exposed and standards of competent trial defense were outlined.

The courts also fear that liberality in finding lack of effective counsel may cause a stampede of prisoners claiming their attorneys were not effective just because they were not acquitted. It is submitted, however, that such a fear is illusory and perhaps stems from the loose use of the word "effective" which connotes *results*; even the most liberal court could not read the sixth amendment as requiring representation that will obtain an acquittal. Rather, the sixth amendment must be read as part of all the amendments relating to a fair trial. Once this is done, it is perhaps better to say that counsel must be "adequate" or

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8. See *Ellis v. United States*, 356 U.S. 674 (1958) (proper representation requires attorney to assume the role of an advocate, rather than that of *amicus curiae*); *Mitchel v. Louisiana*, 350 U.S. 91 (1955) (ruled against petitioner, but left little doubt that in proper case, evidence of incompetence of counsel would be grounds for granting relief); *Hawk v. Olson*, 326 U.S. 271 (1945) (violation of due process for state to force a defendant to trial in such a way as to deprive him of the effective assistance of counsel); and to the same effect, *White v. Ragen*, 324 U.S. 760 (1945); *Glasser v. United States*, 315 U.S. 60 (1942) (defendant was denied effective assistance of counsel because of attorney's conflict of interests); *Avery v. Alabama*, 308 U.S. 444 (1940) (constitution is not satisfied by mere appointment of counsel; if he is not allowed to prepare his defenses, appointment would be no more than a "sham"); *Powell v. Alabama*, 287 U.S. 45 (1932), (appointment of entire bar on morning of trial).

9. WELLMAN, *THE ART OF CROSS EXAMINATION* 3 (4th ed. 1936).

10. See *Diggs v. Welch*, 148 F.2d 667, 669 (D.C. Cir. 1945), where the court stated that the drafting of habeas corpus petitions had become a game with prisoners and that enforced leisure hours allowed them to attempt to try their former counsels through such petitions. See also Jarvi, *Effective Representation—An Evasive Substantive Notion Masquerading as Procedure*, 39 WASH. L. REV. 819 (1964).

"sufficient" enough to see that defendant has a fair trial, *i.e.*, that counsel aids defendant in getting the benefit of all constitutional guarantees.

This Comment will explore some of the jurisprudence in an attempt to point out where attorneys have failed to be "effective" or "adequate" in criminal cases.

#### STATUS OF COUNSEL AFFECTING COURT'S VIEW OF COMPETENCE

The problem of inadequate defense counsel has not been limited to cases in which attorneys were appointed to defend indigents. There have also been cases in which privately retained counsel have been found to be inadequate.<sup>11</sup> The courts, however, have often attached some significance to whether an attorney was privately retained or court appointed in determining whether relief should be granted. As a result, a defendant with privately retained counsel has been denied relief where it would have probably been forthcoming had counsel been court appointed.<sup>12</sup> The two basic justifications put forth for such a distinction have been (1) that under an agency relationship the acts of the attorney are imputed to the client who has retained him,<sup>13</sup> and (2) that where counsel is privately retained there is no requisite "state action" denying the defendant's fourteenth amendment rights.<sup>14</sup>

The making of such a distinction has been severely criticized by some courts which refuse to adopt it and hold that it is immaterial whether counsel is chosen or appointed.<sup>15</sup> Upholding

11. *E.g.*, *Wilson v. Rose*, 366 F.2d 611 (9th Cir. 1966); *Randazzo v. United States*, 339 F.2d 79 (5th Cir. 1964).

12. Many courts have indicated that a dual standard of competency exists. *E.g.*, *Root v. Cunningham*, 344 F.2d 1 (4th Cir.), *cert. denied*, 382 U.S. 866 (1965); *Popeko v. United States*, 294 F.2d 168 (5th Cir. 1961), *cert. denied*, 374 U.S. 835 (1963); *Snead v. Smyth*, 273 F.2d 838 (4th Cir. 1959); *Taylor v. United States*, 238 F.2d 400 (9th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957).

13. *E.g.*, *Tompsett v. Ohio*, 146 F.2d 95, 98 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945): "The incompetency or negligence of an attorney employed by a defendant does not ordinarily constitute grounds for a new trial and *a fortiori* will not be grounds for the application of the Fourteenth Amendment. . . .

"The concept of this rule is that the 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 the client and so recognized and accepted by the court, unless the defendant repudiates them by making known to the court at the time his objection."

14. *E.g.*, *Dusseldorf v. Teets*, 209 F.2d 754 (9th Cir.), *cert. denied*, 347 U.S. 969 (1954); *Farrell v. Langan*, 166 F.2d 845 (1st Cir.), *cert. denied*, 334 U.S. 853 (1948).

15. *E.g.*, *Bell v. Alabama*, 367 F.2d 243 (5th Cir. 1966); *Wilson v. Rose*, 366 F.2d 611 (9th Cir. 1966); *Randazzo v. United States*, 335 F.2d 79 (5th Cir. 1964); *Porter v. United States*, 298 F.2d 461 (5th Cir. 1962).

the distinction would have the effect of affording lesser rights to those who bear the cost of their own defense.<sup>16</sup> Also, the purpose of the constitutional guarantee of counsel is to protect the accused, under the assumption that he knows little law and would thus be unable to conduct his own defense.<sup>17</sup> It would be contrary to this assumption to say that the defendant should be held to know when his retained attorney has committed errors, or should be held to have waived his objection thereto, on any misapplied agency theory.<sup>18</sup>

The lack of state action theory falls also when one considers that the prisoner who seeks relief was not charged, convicted, and punished by private individuals, but by the state.<sup>19</sup> Further, since it is the right of the state to license and control the conduct of attorneys, it would not be going too far to find state action where the effectiveness of retained counsel is being attacked.<sup>20</sup>

#### CRITERIA BY WHICH COUNSEL'S ADEQUACY IS JUDGED

At what point does the conduct of an attorney constitute incompetence justifying granting relief to the convicted? The federal court hearing a habeas corpus petition claiming inadequate counsel will start with the presumption that the prisoner's rights were safeguarded by the trial court, and that defense counsel faithfully performed his duty to protect defendant's rights.<sup>21</sup> It then becomes incumbent upon the prisoner to prove his right to relief by showing the incompetency of his counsel.<sup>22</sup> Such a burden is a heavy one, as the applicant's charge of ineffectiveness should not be sustained unless it appears well grounded.<sup>23</sup> Thus, relief is granted generally in "extreme cases."

The extreme case seems to require that counsel be so ineffective as to constitute practically no representation at all, thus reducing the trial to a "farce," a "sham," and a "mockery of

16. *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962).

17. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

18. See *Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 *Nw. U. L. Rev.* 289, 296-301 (1964); *Henry v. Mississippi*, 379 U.S. 443 (1965).

19. *Wilson v. Rose*, 366 F.2d 611 (9th Cir. 1966).

20. *Ibid.*

21. *Busby v. Holman*, 356 F.2d 75 (5th Cir. 1966).

22. *E.g.*, *Snead v. Smyth*, 273 F.2d 838 (4th Cir. 1959); *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir. 1945).

23. *Gray v. United States*, 299 F.2d 467 (D.C. Cir. 1962).

justice.”<sup>24</sup> The Fifth Circuit Court of Appeals has adopted a reasonableness approach to determine adequacy of trial counsel: “We interpret the right to counsel as the right to effective counsel. We interpret effective counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance.”<sup>25</sup> This court has determined that “reasonably effective” assistance means an attorney has used his knowledge, talent, and experience to the best of his ability in defense of his client.<sup>26</sup>

The tests for an “extreme” case, as stated, give no objective standards by which to judge trial counsel’s effectiveness and thus give no guidance as to what constitutes an effective trial defense. In an attempt to lay some guidelines the following sections will present some of the cases in which the courts have considered habeas corpus petitions alleging ineffective representation by trial counsel.

#### SOME SPECIFIC ALLEGATIONS OF INEFFECTIVENESS

As indicated by the above discussion, courts have been reluctant to second-guess the considered actions of apparently qualified attorneys, and tend to dispose of such claims on very broad principles.<sup>27</sup> However, all such claims have not been so readily denied. Courts have engaged in some hindsight judgment of attorney effectiveness.

#### *Failure To Object to Defects of Indictment, Composition of Jury, or Admission of Certain Constitutionally Questionable Evidence*

The failure to object to some defect in the indictment is frequently asserted. It has been held that the only defects which would be serious enough to require a reversal on the grounds of ineffective counsel would be those violative of due process in themselves or those affecting a court’s jurisdiction, either of

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24. *E.g.*, *Davis v. Bomar*, 344 F.2d 84 (6th Cir. 1965); *Lunce v. Overlade*, 244 F.2d 108 (7th Cir. 1957); *United States ex rel. Darcy v. Handy*, 203 F.2d 407 (2d Cir.), *cert. denied*, 346 U.S. 865 (1953); *Burton v. United States*, 151 F.2d 17 (D.C. Cir. 1945).

25. *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960); *cert. denied*, 368 U.S. 877 (1961).

26. *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965).

27. See, *e.g.*, *Tompa v. Virginia ex rel. Cunningham*, 331 F.2d 552 (4th Cir. 1964) (mistakes in trial tactics not reviewable); *Harding v. Logan*, 251 F.Supp. 710 (E.D. N.C. 1966). See also Note, 78 HARV. L. REV. 1434 (1965).

which would vitiate the trial without a finding of incompetent counsel being necessary.<sup>28</sup> Trial attorney's failure to object to other defects, referred to by the courts as "minor defects," is held not to imply incompetency.<sup>29</sup> The principal reasoning behind this view is that such objections, even if urged usually amount to no more than delaying tactics and failure to object does not seriously jeopardize the defendant.

Another often urged inadequacy is failure to object to the composition of the jury. The Fifth Circuit decided in *United States ex rel. Goldsby v. Harpole*<sup>30</sup> that failure to object to systematic exclusion of Negroes from the jury will be taken to constitute inadequate counsel unless satisfactorily explained. Since that decision, there have been frequent pleas from members of minority groups alleging inadequate representation because of the attorney's failure to object to such practices.<sup>31</sup> In the Fifth Circuit at least, such an allegation will seemingly be successful as a challenge to trial attorney's effectiveness.<sup>32</sup> It appears possible, however, that the court was striking at the systematic exclusion of Negroes from southern juries rather than evaluating the adequacy of the attorneys who failed to challenge a defective indictment.<sup>33</sup> The question of adequacy of counsel is not necessarily answered in the face of the violation of due process by the state in excluding minorities from the jury. This position is supported by the fact that where the composition of the jury was not in violation of due process, failure to challenge its composition has not been held to constitute inadequate representation.<sup>34</sup>

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28. *Snead v. Smyth*, 273 F.2d 838 (4th Cir. 1965) (inconsistency between counts in indictment); *Snead v. Smyth*, 273 F.2d 838 (4th Cir. 1959) (indictment failed to describe stolen goods); *Bostic v. Rives*, 107 F.2d 649 (D.C. Cir. 1939), *cert. denied*, 309 U.S. 664 (1940) (indictment failed to state place of death).

30. 263 F.2d 71 (5th Cir.), *cert. denied*, 361 U.S. 850 (1959); Note, 72 *YALE L.J.* 559 (1963). This view has been criticized in that it requires counsel to explain his failure to challenge as being a requirement that defense counsel support his client's conviction. See Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 *Nw. U.L. REV.* 239 (1964).

31. *E.g.*, *United States ex rel. Seals v. Wiman*, 304 F.2d 53 (5th Cir. 1962), *cert. denied*, 372 U.S. 915 (1963).

32. *Ibid.*

33. *Ibid.*

34. *E.g.*, *Pierce v. Hudspeth*, 126 F.2d 337 (10th Cir. 1942) (counsel allegedly disregarded accused's wish that a juror be challenged); *Carruthers v. Reed*, 102 F.2d 933 (8th Cir. 1939), *cert. denied*, 307 U.S. 643 (1939) (defense counsel chose not to challenge composition of jury which he knew to be improper as he erroneously assumed that this would count in accused's favor since the attorney was personally acquainted with some of the jurors).

Failure to file a motion to suppress either an illegally obtained confession or illegally obtained evidence often forms the basis of an allegation of ineffective counsel. Such allegations have not frequently met with success,<sup>35</sup> although there are at least two cases in which federal courts have granted relief for failure to object to an involuntarily obtained confession.<sup>36</sup> In one of those, however, the court held that the representation amounted to a total failure to present the cause of accused since, in addition to the failure to object to the confession before trial, it found a failure to call certain witnesses who could have established defendant's innocence and a failure to introduce certain vital evidence.<sup>37</sup> In the other case the court seemed to be more occupied with the invalidity of the confession upon which the conviction rested than with trial counsel's ineffectiveness in failing to object to it.<sup>38</sup> It is thus somewhat doubtful whether counsel would be found to be ineffective merely on the allegation of failure to object to constitutionally questionable evidence.<sup>39</sup> Recently, however, the Fifth Circuit remanded a case to district court to determine if a confession was involuntary and indicated that counsel's failure to ascertain this and to object constituted ineffective counsel.<sup>40</sup>

Thus, it appears the courts are reluctant to find incompetence on the part of an attorney who has failed either to object to defects in the indictment, or to composition of the jury, or to constitutionally questionable evidence. It is clear, however, that when such failure is one of a series of omissions that reduces the trial to a sham or a farce, habeas corpus relief will be granted.<sup>41</sup> Further, where the composition of the jury, the evidence or confession admitted, or the defective indictment themselves vitiate

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35. *E.g.*, *Wilkins v. United States*, 258 F.2d 416 (D.C. Cir. 1958) and *Martin v. United States*, 248 F.2d 651 (D.C. Cir. 1957) (failure to move for suppression of evidence obtained as result of an illegal search); *Bowen v. United States*, 192 F.2d 515 (5th Cir.), *cert. denied*, 343 U.S. 943 (1951), (failure to object to an illegally obtained confession). *But cf.* *People v. Ibarra*, 60 Cal.2d 460, 386 P.2d 487 (1963) (failure to object to introduction of illegally obtained evidence was held to have deprived defendant of an adequate defense).

36. *Ledbetter v. Warden, Maryland Penitentiary*, 368 F.2d 490 (4th Cir. 1966); *Jones v. Huff*, 152 F.2d 14 (D.C. Cir. 1945).

37. *Jones v. Huff*, 152 F.2d 14 (D.C. Cir. 1945).

38. *Ledbetter v. Warden, Maryland Penitentiary*, 368 F.2d 490 (4th Cir. 1966).

39. See *Bowler v. Maryland*, 236 F. Supp. 400 (D. Md. 1964), where the court specifically held that the attorney's failure to urge the unconstitutional aspects of a confession did not constitute incompetence.

40. *Bell v. Alabama*, 367 F.2d 243 (5th Cir. 1966).

41. See, *e.g.*, *Jones v. Huff*, 152 F.2d 14 (D.C. Cir. 1945).



the trial, relief will be granted.<sup>42</sup> It is difficult to determine in this latter situation if the court is striking at the lack of adequate counsel, since it is likely that the courts would have reversed even if the lack of effective counsel question had never been raised. It is submitted, however, that if counsel's effectiveness were to be judged in these situations, the courts could generally find inadequate counsel, since allowing his client to be convicted by use of unconstitutional means would not be aiding him in obtaining a "fair trial," in the absence of special reason.

#### *Failure To Urge or Perfect Particular Available Defenses*

Courts realize the matter of choosing which defenses to urge strikes at the heart of trial strategy.<sup>43</sup> Their reluctance to find inadequate representation for failure to urge particular defenses is especially strong where the alleged abandoned defense was a bizarre or unsupported one suggested by the defendant. Attorneys are not required to urge defenses which they intelligently and in good faith do not believe to be supported by the facts,<sup>44</sup> nor to work miracles with wild defense stories.<sup>45</sup> One of the most frequently pleaded failures is the attorney's neglect to or choice not to urge insanity as a defense. Such petitions are usually disallowed, especially where insanity would have been inconsistent with the defenses that were urged.<sup>46</sup> But where defense counsel failed to properly plead the defense of insanity where it was the only defense urged, petitioner was deprived of effective representation.<sup>47</sup>

Generally, where it has been alleged that trial counsel failed to urge an apparently available defense, as a result of ignorance or neglect rather than as a deliberate choice, courts have been willing to hold that the petitioner's claim would support the granting of habeas corpus relief.<sup>48</sup> The test of competency in this area would thus seem to be whether the attorney intelligently

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42. See, e.g., *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir.), cert. denied, 361 U.S. 850 (1959).

43. See *United States v. Sobell*, 142 F. Supp. 515 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2d Cir.), cert. denied, 355 U.S. 873 (1957). See also *Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 *Nw. U.L. Rev.* 289, 313-18 (1964).

44. See, e.g., *Wood v. United States*, 357 F.2d 425 (10th Cir. 1966); *White v. Hancock*, 355 F.2d 262 (1st Cir. 1966).

45. See, e.g., *Green v. United States*, 256 F.2d 483 (1st Cir.), cert. denied, 358 U.S. 854 (1958).

46. See, e.g., *James v. Boles*, 339 F.2d 431 (4th Cir. 1964); *Snider v. Cunningham*, 292 F.2d 683 (4th Cir. 1961).

47. *Schaber v. Maxwell*, 348 F.2d 664 (6th Cir. 1965).

48. See, e.g., *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962).

looked at the available defenses to determine which were soundest and in the best interest of his client. To apply this test the court will look at the circumstances to determine if the attorney had enough time to discover possible defenses and to contemplate the wisdom of urging them.<sup>49</sup> If this minimum test is met, there should be no finding of ineffectiveness on the part of the trial attorney, due process being satisfied though all available defenses were not urged.

### *Failure To Call Particular Witnesses and Refusal To Allow Defendant to Testify*

Closely allied to the failure to urge available defenses is the failure to call particular witnesses whom the person convicted claims would have cleared him of the charges.<sup>50</sup> It is usually held that determination of which witnesses to call is a question of judgment for the attorney because he is usually in a better position to ascertain which ones are telling the truth and whether they would do his client more harm than good.<sup>51</sup> However, failure to call witnesses who will establish a substantial defense will lend weight to a final determination of ineffective representation where that omission is one of several failings of counsel in the course of trial.<sup>52</sup>

The decision not to allow defendant to take the stand in his own defense is often put forth as evidence of the trial attorney's incompetency. The courts have held this to be an exercise of trial strategy or tactics because of the many legitimate reasons, including the accused's vulnerability to cross-examination, which may combine to dictate a determination not to call the accused as a witness.<sup>53</sup> Only where the attorney refused to allow a defendant to testify in his own behalf against the defendant's expressed wishes and in the presence of strong circumstances indicating the favorable value of his testimony would the court consider such evidence as indicating an attorney's incompetence.<sup>54</sup>

49. *Martin v. Commonwealth of Virginia*, 365 F.2d 549 (4th Cir. 1966).

50. See *Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. REV. 289, 318-19 (1964).

51. See, e.g., *United States v. Gutterman*, 147 F.2d 540 (2d Cir. 1945); *Lewis v. Sanford*, 79 F. Supp. 77 (N.D. Ga. 1948).

52. See, e.g., *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962); *Jones v. Huff*, 152 F.2d 14 (D.C. Cir. 1945); *United States ex rel. Hall v. Ragen*, 60 F. Supp. 820 (N.D. Ill. 1945).

53. See, e.g., *Hall v. Warden, Maryland Penitentiary*, 313 F.2d 483 (4th Cir.), cert. denied, 374 U.S. 809 (1963); *Newsom v. Smyth*, 261 F.2d 452 (4th Cir. 1958), cert. denied, 359 U.S. 969 (1959).

54. *Hall v. Warden, Maryland Penitentiary*, 313 F.2d 483 (4th Cir. 1963).

It is submitted that the courts are justified in their reluctance to second guess counsel's judgment as to what defenses to urge and what witnesses to present. Often the reasons behind a particular strategy in this area are outside the formal record and beyond the scope of judicial analysis. About the only indication of trial counsel's incompetence in these matters of strategy are the allegations of the supposedly unqualified convict.<sup>55</sup> Courts thus justifiably decline to give the petitioner an opportunity to learn whether a different strategy, involving his own testimony and that of witnesses chosen by him, would result in his acquittal.<sup>56</sup>

#### *Failure to Present or Object to Evidence and to Cross Examine*

In general, courts have refused to vacate a conviction because trial counsel failed to adduce certain testimony,<sup>57</sup> failed to raise objections to evidence offered by the prosecution,<sup>58</sup> or failed to cross-examine the prosecution's witnesses.<sup>59</sup> The courts are reluctant to grant relief on these bases because it is generally impossible to determine whether the attorney was ignorant or negligent in his failure, or was simply exercising his judgment as to proper strategy. This is especially true in cases of failure to object to evidence, since frequent objections may prejudice the court or the jury against the defendant's case. As to failure to cross-examine, courts realize that there are many situations where cross-examination may be fruitless or even prejudicial, as where the witness is obviously hostile and it is questionable that he could be shaken.<sup>60</sup>

There are a few cases, however, where the courts have been willing to find ineffective representation and grand habeas corpus relief in the basis of these allegations.<sup>61</sup> However, these contained other failings which in combination helped the courts

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55. See text accompanying note 18 *supra*.

56. See, e.g., *United States v. Sumpter*, 111 F. Supp. 507 (S.D. N.Y. 1953); *United States v. Cameron*, 84 F. Supp. 289 (S.D. Miss. 1949).

57. See, e.g., *Miller v. Hudspeth*, 176 F.2d 111 (10th Cir. 1949); *Farley v. Skeen*, 107 F. Supp. 881 (N.D. W. Va. 1952).

58. See, e.g., *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965); *Stanley v. United States*, 239 F.2d 765 (9th Cir. 1957); *Moon v. Peyton*, 257 F. Supp. 998 (E.D. Va. 1966).

59. See, e.g., *Shuman v. Peyton*, 361 F.2d 646 (4th Cir. 1966); *Nutt v. United States*, 335 F.2d 817 (10th Cir. 1964).

60. See *Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. REV. 289 (1964).

61. See e.g., *Jones v. Huff*, 152 F.2d 14 (D.C. Cir. 1945); *Johnson v. United States*, 110 F.2d 562 (D.C. Cir. 1940); *United States ex rel. Hall v. Ragen*, 60 F. Supp. 820 (N.D. Ill. 1945).

determine that there was ineffectiveness. It is submitted that, in the absence of such other combination of circumstances, courts would be unwilling to find a lack of effective representation on the alleged failure to present or object to certain evidence, or failure to cross-examine certain prosecution witnesses, due to the reluctance to engage in second guessing an attorney's use of judgment. The great weight of the cases would tend to support this view.<sup>62</sup>

*Failure to Ask For or Object to Instruction and Failure to Present Arguments*

A plea frequently made by unsuccessful defendants is that counsel failed to request or object to instructions, or failed to present arguments to the jury. Where the court finds that the charge fully and fairly presented the accused's defensive position, the failure to request or object to instructions does not form the basis of habeas corpus relief.<sup>63</sup> Where, however, defense counsel has failed to request or object to an instruction on an issue crucial to his case, the courts have held that this is grounds for relief.<sup>64</sup> It has been suggested however, that these holdings may be based on the independent error of the trial court in allowing the instructions rather than a finding of counsel's ineffectiveness.<sup>65</sup> An exception seems to exist where the failure of counsel to ask for or object to instruction is based on his complete lack of preparation for the case.<sup>66</sup>

Failure to present arguments to the jury is held to be a matter for counsel's judgment which is regarded as insufficient to justify setting aside the conviction.<sup>67</sup> However, it has been held that counsel's refusal to present arguments to the jury because of his own pre-judgment of his client's guilt constitutes "ineffective" representation.<sup>68</sup>

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62. See cases cited 74 A.L.R.2d 1390, 1455-56 (1960).

63. See, e.g., *Kearney v. Peyton*, 360 F.2d 589 (4th Cir. 1966); *Kilgore v. United States*, 323 F.2d 369 (8th Cir. 1963).

64. See, e.g., *Banks v. United States*, 249 F.2d 672 (9th Cir. 1957), cert. denied, 358 U.S. 886 (1958); *Lunce v. Overlade*, 244 F.2d 108 (7th Cir. 1957).

65. *Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289, 326 (1964).

66. *Pineda v. Bailey*, 340 F.2d 162 (5th Cir. 1965).

67. *Hickman v. United States*, 246 F.2d 178 (8th Cir.), cert. denied, 355 U.S. 874 (1957).

68. *Johns v. Smyth*, 176 F. Supp. 949 (E.D. Va. 1959).

## CONCLUSIONS

In their hindsight view, the federal courts have failed to lay down clear standards by which attorneys can be guided in their efforts to defend the accused. The somewhat nebulous terms used by the courts have, however, given them the flexibility to handle each case on its own facts, a situation which is not necessarily undesirable.

This does not, however, give guidance to the attorney faced with a criminal defense appointment, in determining how he can avoid being found to have rendered inadequate or ineffective aid to the accused. It has been held that court-appointed attorneys owe their clients the same duty imposed on a conscientious, diligent, and honorable employed counsel under the same circumstances.<sup>69</sup> Canon Five of the American Bar Association Canons of Professional Ethics gives guidance to all counsel for defendants in criminal cases. It lays down as a standard that an attorney should use "all fair and honorable means to present every defense that the law permits to the end that no person may be deprived of life or liberty, but by due process of law."<sup>70</sup>

Canon Five's broad language really indicates that what is required is to see that the accused has a fair trial. Since a fair trial connotes something less than perfection but yet more than a farce or a sham, it becomes incumbent upon the courts to balance fair trial for the accused against their natural reluctance to second guess trial counsel. If the courts would engage in this balancing, it is submitted that they should favor a fair trial for the accused, and any reservation about second guessing trial counsel would have to be set aside.

In concluding, an additional problem might be raised—the duty of the trial judge with respect to both the attorney appointed by him to represent the indigent accused and to the attorney retained by the accused. Does the trial judge discharge his duty to the indigent by the mere appointment of an attorney to represent him? It has been suggested in several fairly recent cases that the trial judge has the additional duty of seeing that

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69. *Hoard v. Dutton*, 360 F.2d 673 (5th Cir. 1966); *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965); *Jackson v. United States*, 258 F. Supp. 175 (N.D. Texas 1966).

70. As quoted in *Jackson v. United States*, 258 F. Supp. 175, 183 (N.D. Texas 1966).

his appointments do an effective job in securing a fair trial.<sup>71</sup> What, however, is the trial judge's duty when retained counsel commits errors which prejudice an accused's right to fair trial? It is submitted that in this situation the judge may have some duty to privately advise the retained attorney of errors noted by the court, because of the general duty of the judge to conduct a fair trial. Caution should be exercised, however, so that the judge cannot be accused of interfering with the defendant's freedom to choose his own counsel.

Lawrence L. Jones

## INVITEE STATUS IN LOUISIANA

### INTRODUCTION

Traditionally the standard of care owed by an occupier of land to one entering upon the land has been determined by the circumstances surrounding the entry. In determining this standard, courts have considered two elements, the consent of the occupier and the economic benefit derived by him from the visit. Based on these considerations the common law has recognized three broad statuses: trespassers, licensees, and invitees. The *trespasser*, coming on the land without the consent of the occupant and with no intention of bestowing an economic benefit, takes the premises as he finds them. The landowner owes no duty other than not to harm him intentionally.<sup>1</sup> The *licensee* is on the land with an expressed or implied invitation from the occupant, but with no purpose of rendering an economic benefit.<sup>2</sup> However, licensee status has also been given one who enters without the required invitation, but who intends to bestow some real or fancied benefit on the occupier.<sup>3</sup> The standard of care owed is not to injure the licensee wilfully or wantonly or cause him harm from active negligence. The occupier must also warn the licensee against all known hidden hazards.<sup>4</sup> The *invitee* comes on the

71. *Braxton v. Peyton*, 365 F.2d 563 (4th Cir. 1966); *Jones v. Cunningham*, 313 F.2d 347 (4th Cir. 1963); *Mackenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960).

1. RESTATEMENT (SECOND), TORTS § 333 (1965); *Barrilleaux v. Noble Drilling Corp.*, 160 So. 2d 319 (La. App. 4th Cir. 1964).

2. PROSSER, TORTS § 60, at 385 (3d ed. 1964); *Taylor v. Baton Rouge Sash & Door Works, Inc.*, 68 So. 2d 159 (La. App. 1st Cir. 1953).

3. *Malatesta v. Lowry*, 130 So. 2d 785 (La. App. 4th Cir. 1961); *Mercer v. Tremont & R. Ry.*, 19 So. 2d 270 (La. App. 2d Cir. 1944) (plaintiff was granted invitee status); *Mills v. Heidingsfield*, 192 So. 786 (La. App. 2d Cir. 1939).

4. RESTATEMENT (SECOND), TORTS § 341 (1965); *Potter v. Board of Comm'rs*, 148 So. 2d 439 (La. App. 4th Cir. 1963).