The Right to Competent Defense Counsel: Emergence of a Sixth Amendment Standard of Review on Appeal and the Persistence of the Sham and Farce Rule in California

William B. Look Jr.
COMMENTS

THE RIGHT TO COMPETENT DEFENSE COUNSEL: EMERGENCE OF A SIXTH AMENDMENT STANDARD OF REVIEW ON APPEAL AND THE PERSISTENCE OF THE "SHAM AND FARCE" RULE IN CALIFORNIA

INTRODUCTION

In the years since the decision in Gideon v. Wainwright exculsed from the law the notion that the assistance of counsel is not an essential element of a fair trial, construction of the constitutional guarantee of counsel has undergone a steady, progressive expansion. The scope of the guarantee of counsel is now very broad under the sixth and fourteenth amendments. The right to counsel extends to any proceeding in which an accused may be subjected to a penalty of incarceration, on appeal from a conviction in such a proceeding, and at every other critical stage in a criminal prosecution where substantive rights of a defendant may be affected.

As an aspect of this progressive expansion, Gideon stimulated an increased recognition of the right to the effective assistance of counsel. The Supreme Court has indicated in a consistent series of cases that the right to counsel means the right to effective assistance, and that "[t]he effective assistance of counsel . . . is a constitutional requirement of due process which

2. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."
6. See generally Waltz, Inadequacy of Trial Defense Representation as a Ground for Postconviction Relief in Criminal Cases, 59 NW. U. L. REV. 289 (1964) [hereinafter cited as Waltz].
no member of the Union may disregard." Although it is said that the Court has not yet fully defined "effective assistance," in two recent cases involving claims of ineffective assistance of counsel it has said that defendants who enter pleas of guilty are entitled to advice which falls "within the range of competence demanded of attorneys in criminal cases." This requirement of the "effective assistance of competent counsel" under the sixth and fourteenth amendments represents the Supreme Court's contemporary construction of the guarantee of counsel.  

Ever since Gideon v. Wainwright—and now Argersinger v. Hamlin—increased the number of cases in which the assistance of counsel is constitutionally required, the body of cases dealing with the adequacy of the representation of defendants in criminal cases has expanded. A denial of the effective assistance of coun-

11. McMann v. Richardson, 397 U.S. 759, 771 (1970). The Supreme Court announced this standard in the context of a retroactive claim of ineffective assistance at the time of entering a guilty plea, where the defendant alleged that his plea was induced by a coerced confession. The Court distinguished the case where the defendant does not have the advice of counsel (id. at 767), and determined that the defendant's later petition for collateral relief asserting that a coerced confession induced his plea is at most a claim that the admissibility of his confession was mistakenly assessed and that since he was erroneously advised ... his plea was an unintelligent and voidable act. Id. at 769. Hence the issue turned upon whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases," since defendants are "entitled to the effective assistance of competent counsel. ..." Id. at 770-71.

In Tollett v. Henderson, 411 U.S. 258 (1972), a case involving a retroactive claim of ineffective assistance at the time of a guilty plea, where counsel failed to object to the racial composition of a 1948 Tennessee grand jury, the Court stated that McMann laid down the general rule by which federal collateral attacks on convictions based on guilty pleas rendered with the advice of counsel [are] to be governed. ... Id. at 264. The Court framed the issue as "whether the guilty plea had been made intelligently and voluntarily with the advice of competent counsel. ..." Id. at 265. The Court remanded to a lower federal court for a finding of fact on the issue of whether counsel's advice was within the range of competence for criminal attorneys (holding that racial bias of the grand jury did not "automatically" entail federal collateral relief). Id. at 268-69. It is therefore clear that in the context of a guilty plea counsel's assistance is governed by a standard of reasonable competence.

COMPETENT DEFENSE COUNSEL

sel has long been recognized as a ground for postconviction relief,\textsuperscript{14} and reviewing courts are increasingly faced with allegations of ineffective assistance of counsel.\textsuperscript{15}

Until very recently, however, the standard under which claims of ineffective assistance were evaluated on appeal in a majority of jurisdictions was exceptionally harsh, the product of an anachronistic rule intended to discourage allegations of inadequate representation.\textsuperscript{16} In keeping with the progressive development of the law respecting the guarantee of counsel, this older standard is rapidly being abandoned, and newer standards applicable under the sixth amendment have now emerged.\textsuperscript{17}

In this comment, the origin of the older rule as a standard applicable under the fifth amendment, and its subsequent adoption and inconsistent application under the sixth amendment, will be critically examined. Thereafter, an exposition of the contemporary requirements of the sixth amendment and the factors which led to the abandonment of the older rule will be provided. The second portion of the comment is devoted to a description of the rules applied where the older standard has been abandoned, and indicates that there has been a partial divergence in the approach taken. Lastly, because the older standard persists in California, a criticism of the rules applied in California in ineffective assistance cases is included.

THE "FARCE AND MOCKERY" RULE: DIGGS V. WELCH
AND ITS PROGENY

It is a curious anomaly in the history of constitutional law that sixth amendment claims of the ineffective assistance of counsel have been governed for some thirty years by a rule propounded in an obscure District of Columbia case, \textit{Diggs v. Welch}.\textsuperscript{18} It was the \textit{Diggs} court which first\textsuperscript{19} articulated the current majority\textsuperscript{20} rule that to merit relief a defendant alleging a denial of the effective

\textsuperscript{14} See Waltz, supra note 6.
\textsuperscript{16} See text accompanying notes 27-56 infra.
\textsuperscript{17} See text accompanying notes 76-105 infra.
\textsuperscript{18} 148 F.2d 667 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945).
\textsuperscript{19} Beasley v. United States, 491 F.2d 687, 694 (6th Cir. 1974); Risher v. State, 523 P.2d 421, 424 (Alas. 1974). A partial exception to the derivation of the rule from \textit{Diggs v. Welch} is evident in the Tenth Circuit. The rule in that circuit derives from Thomas v. District Court, 90 F.2d 424 (10th Cir. 1939) and Beckett v. Hudspeth, 131 F.2d 195 (10th Cir. 1945). See Nutt v. United States, 335 F.2d 817 (10th Cir. 1964). \textit{But see} Frand v. United States, 301 F.2d 102 (10th Cir. 1962), following Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958).
\textsuperscript{20} See cases collected at Grano, supra note 9, at 1241, n.325; Comment, \textit{Incompetency and Inadequacy of Counsel as a Basis for Relief in Federal Habeas Corpus Proceedings}, 20 Sw. L.J. 136, at 138, n.15 (1966).
assistance of counsel on appeal must demonstrate that his counsel's performance was so poor as to reduce his trial to a farce and a mockery of justice. The rule has been stated in various ways, and now often includes a "sham" element, but the rule of Diggs, that "[i]t must be shown that the proceedings were a farce and a mockery of justice" constitutes the prevailing standard. It is well entrenched in the decisional authority of the several state and federal courts, and has recently been reapplied.

The farce and mockery rule has been extensively criticised as a rule of decision for more than a decade, and the rule is no longer applied in a growing number of jurisdictions. In order to appreciate the force of the reasoning which has resulted in the abandonment of the rule, it is necessary to examine certain elements of its historical development.

The Diggs Rationale

While the farce and mockery rule is applied under the sixth amendment to claims of ineffective assistance of counsel, it orig-

21. Several colorful expressions are collected in Bines, Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus, 59 Va. L. Rev. 927, 928 n.4 (1973) [hereinafter cited as Bines]. Beckett v. Hudspeth, 131 F.2d 195 (10th Cir. 1942) required "bad faith, sham, mere pretense."

22. See, e.g., People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963) ("sham and farce").

23. 148 F.2d at 668-69.


inated as a standard under the fifth amendment. At the time *Diggs v. Welch* was handed down, the first allegations of a denial of "effective" assistance of counsel, based on such cases as *Powell v. Alabama*\(^{27}\) and *Glasser v. United States*,\(^{28}\) had appeared in the lower federal courts.\(^{29}\) The court in *Diggs* took the view that what was required under the sixth amendment was the effective *appointment* of counsel.\(^{30}\) Hence, although the petitioner in that case alleged that his defense was incompetently conducted, the *Diggs* court ruled that because counsel had been appointed and had appeared at trial, no relief was possible under the sixth amendment.\(^{31}\) On the basis of this construction of the sixth amendment, the result in *Diggs v. Welch* was a holding that relief could be granted only in habeas corpus under the fifth amendment. The court held that if the ground for appeal was the inadequacy of the defense, relief was possible only where the defects of counsel's services reduced the trial to "a farce and a mockery of justice."\(^{32}\) That is, the *Diggs* case stands for the rule that provided an effective appointment of counsel is made, post-conviction relief can be granted for incompetent representation only if it can be shown that the defendant has been denied a fair trial under the fifth amendment.

This construction of the law was current in the District of Columbia for many years before the decision in *Gideon v. Wainwright*.\(^{33}\) *Diggs*’ farce and mockery language, however, was uncritically applied in cases involving inadequate representation in other federal jurisdictions without regard for its original application under the fifth amendment.\(^{34}\) As certain early cases were in turn followed by state courts\(^{35}\) and federal circuit courts\(^{36}\)...

---

\(^{27}\) 287 U.S. 45, 53 (1932) (designation of counsel "so close upon trial as to amount to a denial of effective and substantial aid . . . ").

\(^{28}\) 315 U.S. 60, 76 (1941) (conflict of interest "denied Glasser his right to have the effective assistance of counsel . . . ").


\(^{31}\) Id.

\(^{32}\) Id. at 669-70.


\(^{34}\) E.g., *Latimer v. Cranor*, 214 F.2d 926 (9th Cir. 1954); *United States v. Wight*, 176 F.2d 376 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950); *United States ex rel. Feely v. Ragen*, 166 F.2d 976 (7th Cir. 1948).


\(^{36}\) E.g., *United States v. Reinke*, 333 F.2d 608 (2d Cir. 1964); *Lyons v.
adoption of the farce and mockery rule, the basic premise of Diggs, that the sixth amendment demanded no more than an appointment of counsel, became obscured. Instead, the rule that relief would be granted for ineffective assistance only if a mock trial were shown was applied as the law under the sixth amendment.37

Utility of the Farce and Mockery Rule: Prophylaxis

Even in the District of Columbia the farce and mockery rule was not literally applied. The year Diggs was decided, the same court held in Jones v. Huff that if the enumerated mistakes of counsel there alleged38 could be proven, then relief could be granted for ineffective assistance by the district court on remand.39 Yet the court had relied upon the Supreme Court case of Moore v. Dempsey40 in reaching its conclusion that a farce and mockery of justice was required in Diggs.41 In Dempsey the Supreme Court granted habeas corpus to certain black defendants who had been convicted of murder and sentenced to death in a small southern town at a trial conducted in an atmosphere of mob violence. Although the “kangaroo court” circumstances of the Dempsey case may have been a mockery of justice, they are very far removed from those of the Huff case where technical mistakes of counsel in an otherwise ordinary proceeding were said to deny “the accused the fair trial contemplated by the Fifth Amendment.”42

Thus in Jones v. Huff, if not in Diggs, the “farce and mockery” language was not literally applied. Once it was accepted that ineffective assistance was a ground for relief, the language was used in connection with the conduct of the defense by counsel

38. 152 F.2d 14, 15 (D.C. Cir. 1945):

[T]he attorney for the defendant (1) failed to object to the admission of a confession . . . (2) failed to call witnesses . . . and (3) failed to take such steps as would have permitted the jury to see a sample of the defendant's handwriting after a request for this evidence had been made by a juror.
39. Id.
40. 261 U.S. 86 (1923).
42. 152 F.2d at 15.
rather than to describe the overall circumstances of the trial, such as had been the case in *Dempsey*.43

That is, the phrase “farce and a mockery” was a metaphor. Its utility was not as a rule of decision per se, but as a rule expressive of a defendant’s heavy burden of proving prejudice resulting from inadequate representation, as is currently acknowledged.44 This is the manner in which the rule was applied in *Huff* and later cases applying the farce and mockery standard under the sixth amendment. The utility of the rule in imposing upon defendants a heavy burden of proof of their counsels’ ineffectiveness is the reason for its widespread adoption during the 1950’s.

The courts very early expressed a great disaffection, an abhorrence, for sixth amendment appeals.45 These appeals were regarded as having a potentially disruptive effect upon the administration of justice if a liberal rule were promulgated.46 It was believed that attorneys, faced with hopeless cases, would deliberately feign incompetence if relief were thereby accessible.47 Since most such appeals were thought to be the product of convicted defendants’ resentment and hindsight, a heavy burden of proof was imposed to stem an anticipated wave of frivolous prisoner appeals alleging incompetent representation.48 The courts were extremely reluctant to issue a decision which might destroy the reputation of the attorney involved by holding his representation inadequate, and they feared their consideration of allegations of ineffectiveness would be turned into trials of defense counsel.49 These concerns persist as considerations affecting the treatment of sixth amendment appeals.50 It is evident that at the time the

---

43. The phrase “farce and mockery” does not appear in *Dempsey* nor in any other Supreme Court case. *See note 7 supra.*

44. McQueen v. Swenson, 498 F.2d 207, 214 (8th Cir. 1974); Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970) (“The ‘farce and mockery’ standard . . . exists in the law only as a metaphor that the defendant has a heavy burden to show requisite unfairness . . . .”).


46. *See Comment, Effective Representation—An Evasive Substantive Notion Masquerading as Procedure, 39 Wash. L. Rev. 819, 838 (1964).* See Jones v. Huff, 152 F.2d 14, 16 (D.C. Cir. 1945) (“A rule of procedure more flexible than is necessary . . . would impose an unbearable burden upon the trial courts and ultimately result in the defeat rather than the success of justice.”).


farce and mockery rule came into vogue it represented a means of insuring that only the most egregious cases of incompetence would be accepted on appeal.

An element of this harsh treatment of early ineffective assistance cases was the once prevalent discrimination between cases involving retained counsel and those involving appointed counsel. Based upon an agency theory of accountability, attributing the consequences of incompetent representation to the defendant, it was commonly held that ineffective assistance of counsel was not a ground for post-conviction relief if the attorney had been retained by the defendant. This "[e]xpedience in reaching preordained results," transparently unjust to the unwitting clients of incompetent retained counsel, served to forestall sixth amendment appeals in many cases. Several courts perceived, however, that the distinction was immaterial to the issue of the adequacy of counsel's services, and claims of ineffective assistance of retained attorneys were gradually subsumed under the farce and mockery rule. But the effects of the use of devices such as the agency theory are still felt, and the farce and mockery rule constitutes a prophylactic limitation placed by the courts upon the right to effective assistance.

The Farce and Mockery Rule in Practice: Confusion and Discord

Constantly confronted with allegations of ineffective assistance, the courts have reluctantly—and inconsistently—granted relief under the farce and mockery test in a number of cases. More than one case-by-case analysis has demonstrated that errors of counsel deemed dispositive in one case are not so considered in others with similar facts. Attempts to categorize judicial find-

51. See Waltz, supra note 6, at 296-301. This distinction was sometimes based upon a state action theory that retained counsel error was not traceable to governmental invasion of the right to counsel. See Note, Effective Assistance, supra note 25, at 1437-38; e.g., United States ex rel. Darcy v. Handy, 203 F.2d 407, 426 (3d Cir.), cert. denied, 346 U.S. 865 (1953).
52. See, e.g., People v. Morris, 3 Ill. 2d 437, 121 N.E.2d 810 (1954).
53. Waltz, supra note 6, at 297.
56. See, e.g., People v. Allen, 270 N.E.2d 54, 58 (Ill. Ct. App. 1974) ("While the Illinois courts still recognize the distinction between privately retained and court appointed counsel situations, there has been some relaxation in the strict accountability rule.").
ings of ineffective assistance have been made with an eye toward enumerating the mistakes and omissions which result in reversal, but such attempts impart little predictability to the application of the farce and mockery rule. For example, one duty often deemed necessary for the effective assistance of counsel is to conduct appropriate research of the law in order to prepare the client’s defense. Often cited for this principle is a California case, *People v. Ibarra,* where defense counsel failed to object to the introduction of certain evidence because of his admitted ignorance of a rule of law. This failing was held to have reduced Ibarra’s trial to a mockery of justice. Yet in a later Ninth Circuit case, despite an attorney’s failure to research the law, resulting in the deportation of the defendant, the court refused to find a mockery of justice. Hence, while a defendant may carry his burden of proof of ineffective assistance by showing a breach of a clearly defined duty in one case, a similar showing may fail in another. Indeed, the vagueness and difficulty of application of the rule are its chief characteristics.

In addition to its use as a measure of the burden of proof of prejudice resulting from ineffective assistance, the farce and mockery language has sometimes been applied as a standard for the conduct of counsel. In the case of *United States v. Wight,* for example, the court stated, “[t]here can be no quarrel with the proposition that the right to counsel means the right to the conscientious services of competent counsel.” The court went on to rule:

The proof of the efficiency of such assistance lies in the character of the resultant proceedings, and unless the purported representation by counsel was such as to make the trial a farce and mockery of justice the mere allegations of incompetency or inefficiency will not ordinarily suffice.

---

59. See Finer, supra note 25, at 1085. Other examples of omissions by counsel for which relief may be granted are: failure to advise and consult with the client at the time of entering a plea; failure to investigate the facts; failure to raise appropriate defenses; failure to withdraw from a conflict of interest.
60. 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).
61. Id. at 466, 386 P.2d at 491, 34 Cal. Rptr. at 867.
62. Vizzcarra-Delgadillo v. United States, 395 F.2d 70 (9th Cir. 1968).
63. Id. at 73 (Browning, J., dissenting).
64. Id. at 71. But see Brubaker v. Dickson, 310 F.2d 30, 38-39 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963) (counsel’s failure to prepare rendered trial “fundamentally unfair”).
65. Finer, supra note 25, at 1078.
67. Id. at 378.
68. Id. at 379.
This is the traditional use of the rule as a measure of the burden of proof of prejudice. In a later case, *Grove v. Wilson*, a Ninth Circuit court held: "[a] conviction will not be set aside for ineffective representation of counsel unless the service of counsel was of such a caliber as to amount to a farce or mockery of justice." Here the farce and mockery rule was applied as a standard for the performance of counsel. This case may be contrasted with an earlier decision in the same circuit, *Brubaker v. Dickson*, in which the court stated that a defendant was entitled to counsel "reasonably likely to render" effective assistance, and held that counsel's ineffectiveness rendered the trial "fundamentally unfair."

**Summary**

From a comparison of such cases it is clear that the only consistency in the contemporary use of the farce and mockery rule is that a defendant must bear a great burden of demonstrating ineffectiveness. The lack of uniformity in its application and its use as both a standard of performance for counsel and a measure of the degree to which an appellant must suffer a denial of due process at trial, are the consequence of its ad hoc adoption as a standard under the sixth amendment. It has been held that the rule has no objective intrinsic meaning—that it is a subjective and hence arbitrary standard, as is born out by the contradictory decisions it generates. The rule places a premium upon a showing that counsel's ineffectiveness destroyed the fairness of a defendant's trial which, if historically applied under the fifth amendment guarantee of due process, is insensibly demanded under the sixth amendment guarantee of counsel. It is this confusion of the requirements of due process and the sixth amendment which has led to the abandonment of the farce and mockery rule.

**THE MODERN LAW UNDER THE SIXTH AMENDMENT**

Perhaps the best scholarly criticism of the farce and mockery rule followed upon the decision in *Gideon v. Wainwright*. That opinion was viewed as a culmination of a steady alteration...
of the conceptual basis of the guarantee of counsel flowing from *Powell v. Alabama*, with its holding that no serious criminal trial could be fair without the assistance of counsel. The older view that the sixth amendment raised only a procedural requirement of appointing an attorney was perceived to be untenable in light of earlier cases alluding to the effective assistance of counsel. A guarantee of effective assistance would require that level of advocacy which was necessary in the ordinary case to preserve the integrity of the judicial process, said to depend upon the tripartite system of impartial court, adversary prosecution, and defense counsel. It followed that a standard finding a denigration of the sixth amendment only in the extraordinary circumstance of a mock trial was inadequate as an expression of the requirements of the sixth amendment. Effective counsel was essential to every trial. This criticism went unheeded as the farce and mockery rule continued to be applied in cases arising after *Gideon*. The number of allegations of ineffective assistance increased and the prophylactic utility of the rule reasserted itself. As the Supreme Court continued to expand the scope of the sixth amendment, it became increasingly clear that the conservatism of the farce and mockery rule was out of keeping with the progressive development of the law.

What was ultimately more important for the demise of the farce and mockery rule was that *Gideon* shifted the basis for relief from due process—the “special circumstances” of *Betts v. Brady* under the fourteenth amendment—to the guarantee of counsel. As *Gideon* and later cases made clear, it is the sixth amendment requirement of the assistance of counsel for the defense, and not

---

78. 287 U. S. 45 (1932).
79. *Gideon* was purportedly limited to felony cases. See discussion in Arger-singer v. Hamlin, 407 U. S. 27, 30-33 (1972).
80. Waltz, supra note 6, at 289-90; see Comment, Effective Representation—An Evasive Substantive Notion Masquerading as Procedure, 39 WASH. L. REV. 819 (1964).
81. Waltz, supra note 6, at 293-94; Comment, Effective Representation—An Evasive Substantive Notion Masquerading as Procedure, 39 WASH. L. REV. 819, 822-23 (1964).
82. Craig, supra note 25, at 271; Note, Effective Assistance, supra note 25, at 1435.
84. See Grano, supra note 9, at 1243-44 (citing later cases).
86. 316 U. S. 455, 461-62 (1942).
88. Arger-singer v. Hamlin, 407 U. S. 25, 37 (1972) (“We hold . . . no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial.”); see Anders v. California, 386 U. S. 738, 742 (1967) (guarantee of counsel is incorporated under the fourteenth amendment).
the idiosyncratic circumstances of a given case or defendant, which is controlling. Fundamental fairness to the defendant is involved, but that concept now means that, as a minimum, defense counsel must be provided.\textsuperscript{88} Since the requirement of counsel is a requirement of effective assistance,\textsuperscript{90} the focus of inquiry under the sixth amendment is no longer whether an accused was offered or provided with counsel,\textsuperscript{91} or whether counsel had an opportunity to prepare,\textsuperscript{92} but whether counsel has provided services falling "within the range of competence demanded of attorneys in criminal cases."\textsuperscript{93}

It follows that a mock trial standard which asks no more than whether fundamental due process has been satisfied falls far short of an expression of the content of the sixth amendment guarantee of counsel. If effective assistance in the defense is required at every proceeding in which a penalty of incarceration may be imposed, the exceptional demands of the farce and mockery rule are in conflict with the contemporary construction of the Constitution. A criminal defendant is entitled to the effective assistance of a competent attorney, as much as he is entitled to a fair trial. Precisely because the mock trial standard is anachronistic in placing its sole and incondite emphasis upon due process, and because it is now clear that the sixth amendment requires the effective assistance of competent counsel, the older rule has been abandoned in Alaska,\textsuperscript{94} West Virginia,\textsuperscript{95} Oregon,\textsuperscript{96} and in the Sixth Circuit.\textsuperscript{97} In a series of cases in the District of Columbia, the rationale of \textit{Diggs v. Welch} has been criticized,\textsuperscript{98} dissected,\textsuperscript{99} and overruled\textsuperscript{100} for the same reasons. Although not necessarily recognizing that the farce and mockery rule has lost its constitutional underpinnings, a number of courts\textsuperscript{101} now require that the assistance of counsel be within the range of normal competency,

\begin{itemize}
  \item \textsuperscript{90} See cases cited at note 7 supra.
  \item \textsuperscript{91} Cf. Johnzon v. Zerbst, 304 U.S. 458 (1940).
  \item \textsuperscript{92} Cf. Avery v. Alabama, 308 U.S. 444 (1940).
  \item \textsuperscript{93} Tollett v. Henderson, 411 U.S. 258, 266 (1972); McMann v Richardson, 397 U.S. 759, 771 (1970).
  \item \textsuperscript{95} State v. Thomas, 203 S.E.2d 445, 459-61 (W. Va. 1974).
  \item \textsuperscript{96} Rook v. Cupp, 526 P.2d 605, 606-07 (Ore. Ct. App. 1974).
  \item \textsuperscript{97} Beasley v. United States, 491 F.2d 113 (D.C. Cir. 1974).
  \item \textsuperscript{98} Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967).
  \item \textsuperscript{99} Scott v. United States, 427 F.2d 609 (D.C. Cir. 1970).
  \item \textsuperscript{100} United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973).
\end{itemize}
relying upon a Supreme Court case, *McMann v. Richardson.*\(^\text{102}\) Other courts have adopted the substantially identical standard of reasonably effective assistance of counsel in lieu of the farce and mockery rule.\(^\text{103}\) Despite occasional judicial hesitation,\(^\text{104}\) the older standard is rapidly\(^\text{105}\) being displaced as the law under the Constitution.

*A Precursor: MacKenna v. Ellis*

The progressive innovation of standards of review under the sixth amendment has sometimes developed over time as a countervailing current in the law. In 1960, the Fifth Circuit Court of Appeals held in *MacKenna v. Ellis*\(^\text{106}\) that a defendant is entitled to counsel “reasonably likely to render, and rendering reasonably effective assistance.”\(^\text{107}\) Soon after, this standard was apparently adopted by the Ninth Circuit in *Brubaker v. Dickson.*\(^\text{108}\) The impact of this rule was at first insubstantial. *Brubaker* was not followed for this principle in the Ninth Circuit,\(^\text{109}\) where the farce and mockery rule continues to be applied as the rule of decision in sixth amendment cases. In the Fifth Circuit *MacKenna* received a mixed reaction. Under the stimulus of influential cases such as *Williams v. Beto,*\(^\text{110}\) which subsequently reapplied the farce and mockery rule, the reasonableness standard was sometimes announced in the same decision as the farce and mockery rule.\(^\text{111}\) The resulting confusion was felt in the Texas courts, whose opinions reflected the vacillation of the federal court.\(^\text{112}\)

---

102. 397 U.S. 759 (1970). There is little reason to suppose that the right to the “effective assistance of competent counsel” is confined to the guilty plea context. *See* note 11 *supra.* The right to counsel per se is not so limited, and the defendant’s need for effective assistance is, if anything, more acute where he places his innocence in issue at trial. *See United States v. DeCoster,* 487 F.2d 1197, 1202 (D.C. Cir. 1973).

103. *Herring v. Estelle,* 491 F.2d 125 (5th Cir. 1974); *Moore v. United States,* 432 F.2d 730 (3d Cir. 1970); *People v. White,* 514 P.2d 69 (Colo. 1973); *Ex parte Gallegos,* 511 S.W.2d 510 (Tex. Cr. App. 1974).

104. *E.g., McQueen v. Swenson,* 498 F.2d 207 (8th Cir. 1974).


106. 280 F.2d 592, *modified,* 289 F.2d 928 (5th Cir. 1960).

107. *Id.* at 599 (court’s emphasis).


109. *See United States v. Ortiz,* 488 F.2d 175 (9th Cir. 1973); *United States v. Williams,* 455 F.2d 361 (9th Cir. 1972); *Grove v. Wilson,* 368 F.2d 414 (9th Cir. 1966). *But see Leano v. United States,* 457 F.2d 1208, 1209 (9th Cir.), *cert. denied,* 409 U.S. 889 (1972) (applying both standards).

110. 354 F.2d 698 (5th Cir. 1965).

111. *See, e.g., Brooks v. Texas,* 381 F.2d 619 (5th Cir. 1967).

112. *See Ex parte Gallegos,* 511 S.W.2d 510 (Tex. Cr. App. 1974) (reviewing
In *Herring v. Estelle*, however, the court of appeals undertook a review of its decisions and emphatically reaffirmed the *MacKenna* standard. As the rule has been clarified, a defendant is entitled to "reasonably effective assistance of counsel." The farce and mockery rule is no longer controlling as a rule of decision in the Fifth Circuit. Because the need for a revision of the law has become apparent, the Ninth Circuit court should undertake a similar reevaluation of its decisions.

**The Problem of Inadequate Representation**

An element in the development of the modern law is recognition of the persistent problem of superficial treatment of criminal defendants on the part of the courts and the legal profession. A cornerstone of the decision in *Argersinger v. Hamlin* was the observation that vast numbers of criminal cases are shunted through the courts with only cursory consideration or preparation by defense counsel, the prosecution, and the judge. It has been suggested that the inadequate representation which gives rise to sixth amendment appeals may be traced, in part, to the courts' misplaced attempts to expedite justice. A corollary of this problem is that attorneys themselves often undertake criminal defense work as appointed or private counsel without the requisite skill or knowledge in that specialized area of the law. It is estimated that most indigent defendants appearing before the courts of the District of Columbia are inadequately represented because defense counsel lack experience or expertise in the criminal law. Many of the mistakes of counsel which will result in a reversal of a conviction for ineffective representation are attributable to inexperience in the conduct of criminal trials.

Chief Justice Burger, in a persuasive article, has suggested that the complexity and specialized nature of criminal advocacy may require certification of criminal practitioners to insure adequate representation. In this context, Chief Judge Bazelon of

---

113. *491 F.2d 125 (5th Cir. 1974).*
114. *Id.* at 128. *See Ex parte Gallegos, 511 S.W.2d 510 (Tex. Cr. App. 1974).*
118. *Note, Effective Assistance, supra note 25, at 1451.*
the District of Columbia Circuit has strongly suggested that the farce and mockery rule, by imposing upon criminal defendants an extraordinary burden of proof of their counsel's ineffectiveness, has served to perpetuate substandard representation of criminal defendants. 120

These considerations underscore the Supreme Court's determination that the sixth amendment requires competent assistance. The Court has said, in language found persuasive by the Oregon Court of Appeal, 121 that defendants facing felony charges are entitled to the effective assistance of competent counsel. . . . If the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts. 122

Embodied in this admonition is the principle that individual courts bear the responsibility for the integrity of the criminal proceedings before them. The farce and mockery rule is in large measure a rule of judicial convenience. 123 Where it has been perceived as having failed to serve the interests of justice, the rule has given way to a more exacting standard. 124 That is the force of the change in the law under the sixth amendment.

THE STANDARD OF REASONABLY COMPETENT ASSISTANCE

The courts which have abandoned the farce and mockery rule have tended to adopt a reasonable man approach for evaluating the performance of counsel. That is, in assessing the performance of counsel, "the standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place." 125 This standard indicates that a determination of whether a defendant has been afforded effective assistance turns upon the quality of counsel's performance as measured against the normative level of performance expected of a criminal practitioner. The question is whether counsel has performed "at least as well as a lawyer with ordinary training and skill in the criminal law." 126 This rule

120. Bazelon, supra note 117, at 28.
See note 11 supra.
123. See text accompanying notes 45-56 supra.
is similar to that standard applied in evaluating the performance of professional groups under the law of negligence.\textsuperscript{127} It has been consciously borrowed from that body of law.\textsuperscript{128} One compelling reason for adopting such a standard is that a criminal defendant, at the risk of his life or liberty, should be entitled to services of a quality at least commensurate with that required of civil practitioners of law. Another is that the legal profession cannot require less of itself, where a constitutional guarantee is at issue, than it requires of other professions in their daily practice.\textsuperscript{129}

\textit{Utility of the Reasonably Competent Attorney Standard}

The reasonable man approach allows a greater precision in evaluating claims of ineffective assistance of counsel. As noted earlier,\textsuperscript{130} the phrase "farce and mockery" has no intrinsic meaning. Under the mock trial rule, "[t]he entire area of incompetence of counsel has grown in a rather haphazard fashion with inconsistent holdings, dicta contrary to decisions, and no cohesive line of authority to govern various fact situations. . . ."\textsuperscript{131} The reasonable man approach, however, is familiar to the courts and bar and has long been known to provide consistency to the law.\textsuperscript{132} It provides a means of undertaking a more intensive analysis of the conduct of counsel than the all or nothing approach of the mock trial rule.

It has often been held under the mock trial standard, for example, that mistakes of counsel which can be attributed to trial strategy or tactics will not be reviewed.\textsuperscript{133} The result has been that a denial of effective assistance is not found if counsel's conduct can be said to be a consequence of trial tactics, although the rights or defenses of the defendant may have been affected.\textsuperscript{134} Under the reasonable man approach, decisions which have the appearance of tactical choices are reviewable:

\begin{quote}
Defense strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent deny a criminal defendant of the effective assistance of counsel, if some other action would have better protected a de-
\end{quote}

\begin{footnotes}
\footnote{127. See generally \textit{Restatement (Second) of Torts} § 299A (1965).}
\footnote{128. Moore \textit{v.} United States, 432 F.2d 730, 737 (3d Cir. 1970). \textit{See} Bines, supra note 21, at 937.}
\footnote{129. State \textit{v.} Harper, 57 Wis. 2d 543, 557, 205 N.W.2d 1, 9 (1973).}
\footnote{130. See notes 74-75 and accompanying text supra.}
\footnote{133. \textit{E.g.}, United States \textit{v.} Yanishefsky, 500 F.2d 1327, 1332 (2d Cir. 1974); People \textit{v.} Hill, 70 Cal. 2d 678, 690, 452 P.2d 329, 334, 76 Cal. Rptr. 225, 230 (1969).}
\footnote{134. See Finer, note 25 supra, at 1079.}
\end{footnotes}
fendant and was reasonably foreseeable as such before trial.\textsuperscript{135}

As the foregoing makes clear, the chief virtue of the reasonable man approach is that it provides the courts with a measurable guide for determining difficult questions regarding the quality of counsel's decision making.\textsuperscript{136} One suggested benefit of this approach is that the troublesome process of establishing interpretive guidelines under a prospective new rule of law is avoided, since the courts are familiar with the concept of the reasonable man and (presumably) with the normative levels of criminal advocacy in their jurisdictions.\textsuperscript{137} Another is that the application of such a rule will serve to restrain prosecution misconduct if it is known that exploitation of obvious incompetency will be corrected in subsequent proceedings.\textsuperscript{138}

Several of the courts adopting the competency standard have also provided explicit minimum standards for the performance of counsel.\textsuperscript{139} These rules have tended to encompass the more fundamental duties owed a criminal defendant:

1. Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client.

2. Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. Many rights can only be protected by prompt action. Counsel should also be concerned with the accused's right to be released from custody pending trial, and be prepared, where appropriate, to make motions for a pre-trial psychiatric examination or for the suppression of evidence.

3. Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. This means that in most cases a defense attorney, or his agent, should interview not only his own wit-

\textsuperscript{135} Beasley v. United States, 491 F.2d 667, 696 (6th Cir. 1974).
\textsuperscript{137} Bines, note 21 \textit{supra}, at 937-38.
\textsuperscript{138} Id.
\textsuperscript{139} The American Bar Association Project on Standards for Criminal Justice has recently published a volume of ethical standards for attorneys in criminal practice. \textit{See ABA, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION} (Approved Draft 1971). This work is an exhaustive treatment of the function and ethical duties of defense counsel at the pre-trial, trial and post-conviction stages of criminal process. Several courts have referred to this work as providing an appropriate guide for defense attorneys in providing services to criminal defendants. \textit{See United States v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973); State v. Harper, 57 Wis. 2d 543, 553-57, 205 N.W.2d 1, 6-9 (1973).}
nesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.\textsuperscript{140}

While these guidelines are promulgated as basic requirements for effective representation, the greater volume of cases that have arisen under claims of ineffective assistance have involved the failure of counsel to perform such fundamental duties.\textsuperscript{141} It is to ensure that the representation of counsel reaches a minimum level of competency that explicit rules have been established.\textsuperscript{142}

**Prejudice to the Defendant: Divergence Among the Courts**

In addition to the foregoing rules for the evaluation of the performance of counsel, those courts adopting the competent attorney standard have propounded rules for the determination of the degree of prejudice to the defendant as a result of ineffective assistance. Not every negligent act or omission of defense counsel is tantamount to a denial of substantial justice, and the courts have sought to provide a means of determining whether counsel’s conduct is so incompetent as to require reversal. The basic approach is a two-step analysis which asks first whether counsel’s conduct was within the range of normal competence, and thereafter asks whether there has been prejudice to the defendant.\textsuperscript{143} If the incompetence of counsel has been pervasive and has had an effect upon the guilt determination process at trial,\textsuperscript{144} or if counsel neglected a basic duty owed his client,\textsuperscript{145} then a prima facie case for reversal and a new trial is made out.

There is, however, a divergence of opinion as to who must carry the burden of proof on the issue of prejudice. In those jurisdictions which have adopted specified requirements for the performance of counsel, a finding that counsel has substantially neglected one or more of them shifts the burden of proof to the

\textsuperscript{140} United States v. Decoster, 487 F.2d 1197, 1203-04 (D.C. Cir. 1973).

\textsuperscript{141} See Note, *Effective Assistance*, note 25 supra, 1438-42.

\textsuperscript{142} United States v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973).


\textsuperscript{144} United States *ex rel.* Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970).

prosecution to show a lack of prejudice to the defendant. Elsewhere, the burden falls upon the defendant to show that he has been prejudiced.

Divergence Among the States

There is an apparent split of authority among the states as to the applicability of the rule of Chapman v. California in right to counsel cases. Two state courts have indicated that they will follow Chapman and apply the rule of harmless error to claims of ineffective assistance of counsel. The court in Alaska, however, with reference to the rule adopted in the Third Circuit under the reasonable competence standard, has adopted a different test:

Because effective assistance embodies the concept of materially aiding in the defense, conduct or omissions which do not somehow contribute to a conviction by their failure to aid in the defense cannot constitute a constitutional deprivation of assistance of counsel. There must be a showing [by the defendant] that the lack of competency contributed to the conviction.

Insofar as the Alaska court has said “all that is required additionally is to create a reasonable doubt that the incompetence contributed to the outcome,” this harmless error rule is closely parallel to the Chapman rule, which requires that the prosecution establish that the error did not contribute to the outcome beyond a reasonable doubt.

This divergence seems to be a mere surface conflict since the applicable principles are the same—there must be a showing of an effect upon the outcome (that is, prejudice) as a matter

146. Id.
147. See note 150 infra.
151. Id. at 425.
152. Id.
153. Chapman v. California, 386 U.S. 18, 21-24 (1967). It was held in West Virginia:

If counsel’s error, proven to have occurred, would not have changed the outcome of the case, it will be treated as harmless error. The federal standard in regard to harmless constitutional error was held in Chapman to be that the conviction must fall unless it can be shown that the error was harmless beyond a reasonable doubt.

of reasonable doubt. The significant difference remains that it is the prosecution which must carry the burden of demonstrating harmless error where Chapman is applied.

Divergence Among the Federal Courts

The reasons recently advanced in the federal courts for requiring the government to demonstrate a lack of prejudice resulting to the defendant as a result of defense counsel's error are compelling:

Two factors justify this requirement. First, in our constitutionally prescribed system the burden is on the government to prove guilt. A requirement that the defendant show prejudice, on the other hand, shifts the burden to him and makes him establish the likelihood of his innocence. It is no answer to say that the appellant has already had a trial in which the government was put to its proof because the heart of his complaint is that the absence of the effective assistance of counsel has deprived him of a full adversary trial.

Second, proof of prejudice may well be absent from the record precisely because counsel has been ineffective. For example, when counsel fails to conduct an investigation, the record may not indicate which witnesses he could have called, or defenses he could have raised.154

Under this rationale it is clear that a conviction will not stand where counsel's incompetency results in a failure of effective advocacy. Such a failure is presumed where there is a breach of a fundamental duty owed the defendant.155

Under the Third Circuit's somewhat older rule,156 a different approach is taken. If counsel's errors have had a pervasive effect upon the conduct of the defense at trial, such that the degree of prejudice cannot be accurately determined, a new trial will be granted.157 "In other cases the failure of counsel may be with respect to a narrow issue or area, and it may well be possible . . . to determine whether or not the departure from normal competency was prejudicial. . . ."158 In such a case, the defendant must show that he would have benefited from another course of action.159

---

155. Id.
156. The rule in the Third Circuit was initially formulated in Moore v. United States, 432 F.2d 730 (3d Cir. 1970), perhaps the first case to confirm the reasonably effective assistance test as a rule of decision. Compare notes 106-14 and accompanying text supra.
158. Id.
159. Id.
It is unclear whether these approaches represent an essential divergence among the federal courts. In any event it is the consideration that incompetency of defense counsel may affect the validity of the guilt finding process that is controlling in granting a reversal.

Clearly contrary is the holding in the Sixth Circuit that harmless error tests do not apply to a denial of the effective assistance of counsel. In reaching this conclusion the court of appeals relied upon the decision in Glasser v. United States. In Glasser, the Supreme Court held that "[t]he 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." That case involved the appointment of counsel to represent multiple defendants, and the key to the decision was the fact that counsel had been forced to modify his presentation of Glasser's defense in order to accommodate the presentation of the defense of his fellow defendants. The context in which Glasser was applied in the Sixth Circuit did not involve a conflict of interest. Rather, it was applied in a case where "[p]otentially exonerating defenses were not explored by counsel and were not developed at trial." Apparently because the Glasser case did involve a finding of ineffective assistance, it was taken to express the appropriate rule regarding prejudice and reversal.

This emphasis on the failure of counsel to "explore" defenses seems at the same time to be related to an older doctrine under the farce and mockery rule that made a reversal possible upon a showing of a loss of a dispositive defense. If that is the case, although counsel's conduct was evaluated under the newer competency standard, the rule applied may not indicate the adoption of a per se reversal rule. On facts not constituting an already established ground for reversal, it may be that the rule will be modified. It is clear that the Sixth Circuit has not constructed

161. 315 U.S. 60 (1942).
162. Id. at 76.
163. Id. at 75.
165. Glasser v. United States, 315 U.S. 60, 76 (1942) ("We hold that the court... denied Glasser his right to have the effective assistance of counsel....").
166. The Sixth Circuit court announced a duty to investigate on the part of defense counsel in a paragraph preceding its holding on the harmless error issue. Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). Compare notes 57-65 and accompanying text supra. An inflexible rule regarding reversal may prove disadvantageous; one author has suggested that much of the difficulty of the courts in utilizing the farce and mockery rule is traceable to its per se reversal requirement. See Bines, supra note 21.
a rule for determining prejudice under the competency standard, however, and has not applied the harmless error rule.

**Summary**

The emergence of these several rules is so recent that it is not possible to determine whether a preponderance of authority exists on the question of allocating the burden of proof of prejudice to the defendant as a result of ineffective assistance of counsel. But an application of harmless error principles seems to be the preferred view in ascertaining whether a defendant has been prejudiced. This approach has much to recommend it. It is consistent with the Supreme Court's announced rules for decision in cases involving the right to counsel, and the issue of effective assistance seems to fall within the purview of the federal constitutional errors to which the rule of *Chapman v. California* applies. Moreover, it is the government that is charged with preserving the integrity of the judicial process. If it is true that our system of justice depends upon an adversary confrontation for the ascertainment of truth, then a showing that the defense has been incompetently presented places in issue the quality of the guilt determination process at trial. It follows that the prosecution should carry the burden of demonstrating that it has obtained a valid conviction.

Beyond this, there is agreement that under the sixth amendment a criminal defendant is entitled to reasonably effective assistance of counsel, as measured against normative levels of criminal advocacy. Where the defendant is prejudiced as a result of the incompetence of his counsel, he is entitled to relief.

---


168. The Court in *Chapman v. California*, 386 U.S. 18, at 23 n.8 (1967), referred to *Gideon v. Wainwright*, 372 U.S. 335 (1963), as involving error "requiring the automatic reversal of the conviction." But if the theory in ineffective assistance cases is that incompetence of counsel may affect the guilt determination process, the constitutional error is of a different degree than where counsel is denied outright. An incompetent mistake or omission not affecting the guilt determination process, while a technical denial of effective assistance, is inconsequential. Where counsel is not present, the theory is that the unequal contest between the layman and the state's trained prosecutor is fundamentally unfair, and prejudice is presumed. See *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); cf. United States v. Ash, 413 U.S. 300, 317 (1973). In *Argersinger v. Hamlin*, 407 U.S. 25, 36-37 (1972), the Supreme Court relied upon its finding that misdemeanants are prejudiced by their treatment in the courts, in holding that counsel must be provided in misdemeanor cases. Hence a harmless error approach seems to be appropriate in ineffective assistance cases. *Contra* *Glasser v. United States*, 315 U.S. 60 (1942); *but see* United States v. Robinson, 502 F.2d 894 (7th Cir. 1974).

PERSISTENCE OF THE "SHAM AND FARCE" RULE IN CALIFORNIA

The prevailing rule in California governing claims of ineffective assistance of counsel under the sixth amendment is the farce and mockery standard. A recent statement of the rule, expressed as a requirement that counsel's inadequacy must have reduced the trial to a "sham and farce," appears in People v. Strickland,\(^\text{170}\) relying upon the leading case, People v. Ibarra.\(^\text{171}\)

The "sham and farce" variation of the farce and mockery rule first appears in the law of California as dicta in People v. Wein,\(^\text{172}\) a 1958 case obtaining this language from a federal case, Lunce v. Overlade.\(^\text{173}\) In Overlade, the court relied\(^\text{174}\) upon United States ex rel. Feely v. Ragen\(^\text{175}\) for this expression. Insofar as the Ragen court obtained\(^\text{176}\) this rule directly from Diggs v. Welch,\(^\text{177}\) the California rule is unquestionably counted among Diggs' progeny.

There is some indication that a distinguishable rule free of the due process implications of the farce and mockery standard was applied in the California courts of appeal prior to the decision in Wein.\(^\text{178}\) But at least since the Ibarra court applied the Wein dictum as a rule of decision,\(^\text{179}\) the sham and farce rule has been applied in California in ineffective assistance cases.

As is characteristic of the use of the farce and mockery standard,\(^\text{180}\) in California the "sham and farce" rule is expressive of

\(^{173}\) 244 F.2d 108 (7th Cir. 1957).
\(^{174}\) Id. at 110.
\(^{175}\) 166 F.2d 976 (7th Cir. 1948).
\(^{176}\) Id. at 981.
\(^{180}\) Expressions of judicial disaffection for appeals alleging ineffective assistance appear in California cases from time to time. E.g., People v. Reeves, 64 Cal. 2d 766, 774, 415 P.2d 35, 40, 51 Cal. Rptr. 691, 696, cert. denied, 385 U.S. 952 (1966) ("[I]t is the general rule that 'the right to counsel may not be used
a heavy burden of showing prejudice as a result of ineffective assistance.\textsuperscript{181} The apparent requirement for the performance of counsel is counsel "reasonably likely to render, and rendering reasonably effective assistance," a standard drawn from the Fifth Circuit case of MacKenna v. Ellis\textsuperscript{182} and applied in In re Saunders\textsuperscript{183} and In re Williams.\textsuperscript{184} However, the requirement that a trial be reduced to a sham is controlling in the assessment of counsel's performance. The court in Strickland held:

Defendant has the burden of establishing—as a demonstrable reality—evidence of his attorney's lack of diligence. Such evidence must indicate his trial was reduced to a "farce and a sham" . . . . This court concludes defendant has not satisfied his burden of showing a lack of diligence (on the part of defense counsel) sufficient to reduce the trial to a farce and a sham.\textsuperscript{185}

The issue on appeal, clearly, is whether the defendant has carried his burden of showing a sham trial. The foregoing passage illustrates that it is not the guarantee of counsel which predominates under the sham and farce rule but the fair trial element of the Diggs rationale.

\textbf{The Impact of Brubaker v. Dickson}

The transfer of fifth amendment principles under the sham trial rule has been very direct in California. Reversal is granted only in "extreme" cases involving a loss of a "crucial" defense. This practice derives from the holding in Ibarra that the defendant had been denied a fair trial because his counsel's neglect had re-

---

\textsuperscript{181} See notes 38-44 and accompanying text supra.
\textsuperscript{182} 280 F.2d 592, 599, \textit{modified}, 289 F.2d 928 (5th Cir. 1961) (emphasis omitted). \textit{Compare} notes 106-14 and accompanying text supra.
\textsuperscript{184} 1 Cal. 3d 168, 176, 460 P.2d 984, 989, 81 Cal. Rptr. 784, 789 (1969).
\textsuperscript{185} 11 Cal. 3d 946, 956-57, 523 P.2d 672, 678, 114 Cal. Rptr. 632, 638 (1974) (citations omitted).
resulted in the loss of a defense. As that aspect of Ibarra has been construed,

[i]t is not enough that the defendant alleges omissions of counsel indicating lack of preparation and general incompetence. He must show that such acts or omissions resulted in withdrawal of a crucial defense from the case.

Thus, the kind of extreme case which reduces a trial to a sham or farce has crystallized into a rule that a defendant must have been denied a dispositive defense.

This rule may be traced to the Ibarra court's borrowing from the Ninth Circuit case of Brubaker v. Dickson. One passage taken from Brubaker by the Ibarra court appears in that opinion as follows:

"Upon an examination of the whole record, we conclude that appellant alleged a combination of circumstances, not refuted by the record, which, if true, precluded the presentation of his available defenses to the court and jury through no fault of his own, and thus rendered his trial fundamentally unfair. . . . Such a proceeding would not constitute the fair trial contemplated by the due process clause . . . .[Jones v. Huff . . . .]"

The significant factor here is that the Brubaker court was dealing with due process concepts under the fifth amendment.

Jones v. Huff, discussed earlier, is a case that applied the Diggs rationale that the sixth amendment requires no more than an appointment of counsel, but in which the court remanded the appellant's case on the basis of a denial of "the fair trial contemplated by the due process clause of the fifth amendment." In conformity with this rationale, the court in Brubaker applied the requirement of an extreme case involving the loss of "available defenses" in a case within the fourteenth amendment, since

189. 310 F.2d 30 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963).
191. 152 F.2d 14 (D.C. Cir. 1945).
192. See notes 38-43 and accompanying text supra.
193. 152 F.2d at 15.
The test to be applied in determining the legal adequacy of the allegations of appellant's petition is readily stated: "The requirement of the Fourteenth Amendment is for a fair trial." Thus the court in Brubaker applied to a case arising out of California the principle that a claim of ineffective assistance of counsel constitutes a ground for post-conviction relief only if there has been a denial of a fair trial under fifth amendment standards originated in Diggs v. Welch.

Summary and Criticism

It should be amply clear that the rules under which a claim of ineffective assistance of counsel is evaluated in California have derived expressly from rules initially applicable under the fifth amendment. Because "[t]he Sixth Amendment has overlapping but more stringent standards than the Fifth Amendment," the continued validity of these rules is highly questionable. The year after Brubaker was handed down, the Supreme Court held in Gideon that the fourteenth amendment encompasses the sixth amendment guarantee of counsel. As is now clear, the guarantee of the fourteenth amendment is not limited to the "fair trial" contemplated by the Brubaker court, but includes the guarantee of the assistance of competent counsel. Statements such as, "[i]t is not enough that defendant alleges omissions of counsel indicating lack of preparation and general incompetence," fly in the face of this requirement.

It has been recognized that the requirement of an "extreme" case involving the loss of "defenses" is inextricably tied to the strict evidentiary rules of collateral attack upon a conviction under the fifth amendment. They are held to be inappropriate as applied to sixth amendment appeals. The rationale of Diggs and Jones v. Huff is thoroughly repudiated and with it the basis of the sham and farce rule.

199. See note 187 and accompanying text supra.
201. Id.
Since California has adopted the Fifth Circuit rule of reasonably effective assistance, the California courts should be constrained by the modifying rule recently handed down in that circuit:

The governing standard is reasonably effective assistance. . . . The farce-mockery test is but one criterion for determining if an accused has received the constitutionally required minimum representation (reasonably effective assistance). One may receive ineffective assistance of counsel even though the proceedings have not been a farce or mockery. Other circuits may adhere to the farce-mockery test, but we do not. Our standard is reasonably effective assistance.

Plainly, the farce-mockery standard is no longer controlling as a rule of decision under the reasonably effective assistance standard of the sixth amendment.

The essential wisdom of the competency standard is illustrated by the incongruous results the sham and farce rule generates. In People v. Ibarra, it was held that because counsel was ignorant of certain exclusionary rules of evidence under the fourth amendment, his trial was reduced to a "sham and farce." Yet it appears on the face of that opinion that at trial, when counsel failed to object to the introduction of illegally seized evidence, the court stayed its admission and inquired of counsel (one surmises in disbelief) whether he intended to object. Since counsel failed to object, effectively waiving his client's right to suppression of the evidence, it was admitted. Far from conducting a mock trial, the court demonstrated a jealous regard for the rights of the accused. The basis for the decision in Ibarra was the incompetency of counsel, not the character of the proceeding. A simple recognition of this distinction would go far to bring the law in California into conformity with the current requirements of the sixth amendment.

Conclusion

Diggs v. Welch was an anachronism when handed down.
its conclusion that the sixth amendment did not require effective representation.\textsuperscript{207} The reasons for the widespread adoption of the farce and mockery rule had little to do with the rights of criminal defendants under the sixth amendment, but much to do with judicial restraint and economy.\textsuperscript{208} Whatever justification there may have been for impressing this harsh rule, it has been swept away by progressive developments in the law under the Constitution.\textsuperscript{209} It is clear that the guarantee of counsel assures every defendant who may be incarcerated competent assistance in his defense—not merely that judicially selected few whose trials are denominated a farce and mockery.\textsuperscript{210} If the farce and mockery rule continues in effect, it does so by sheer weight of precedent.

Judicial recognition that the farce and mockery rule "[d]erives from some older doctrine on the content of the due process clause of the Fifth Amendment"\textsuperscript{211} is bringing about its demise. The courts which have abandoned this rule have sought to construct a standard expressing the contemporary requirements of the sixth amendment. That standard is one of reasonably competent assistance of counsel, uniformly measured among these courts as against the normative levels of criminal advocacy.\textsuperscript{212} There is present a divergence of views as to the allocation of the burden of proof under harmless error concepts where counsel's performance is incompetent.\textsuperscript{213} One court has held that harmless error tests do not apply to the sixth amendment guarantee of effective assistance.\textsuperscript{214} This divergence, however, is attributable to the several courts' innovation of prospective rules for the guidance of lower courts under the new standard of reasonable competence. Over time a closer harmony may be expected. What seems certain is that the farce and mockery rule cannot continue to be applied as a rule of decision under the sixth amendment guarantee of counsel.

Judge Bazelon, in a critique of the older rule, has said, "[t]he 'mockery' test requires such a minimal level of performance from counsel that it is itself a mockery of the Sixth Amend-

\begin{itemize}
\item \textsuperscript{207} See, e.g., Glasser v. United States, 315 U.S. 60 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932).
\item \textsuperscript{208} See notes 44-50 and accompanying text supra.
\item \textsuperscript{209} See notes 76-105 and accompanying text supra.
\item \textsuperscript{210} Argersinger v. Hamlin, 407 U.S. 25 (1972); McMann v. Richardson, 397 U.S. 759 (1970).
\item \textsuperscript{211} Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970). See notes 94-105 and accompanying text supra.
\item \textsuperscript{212} See notes 125-38 and accompanying text supra.
\item \textsuperscript{213} See notes 148-59 and accompanying text supra.
\item \textsuperscript{214} Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). See notes 160-66 and accompanying text supra.
\end{itemize}
The American Bar Association has recognized that it is only since claims of ineffective assistance have become widespread that defense attorneys have been held to account for their service in criminal matters. The evolution of a standard of reasonable competence under the sixth amendment is in part the result of a greater awareness of the problem of substandard representation of criminal defendants. It would be risible to suggest that physicians be held to a standard of a "mockery of medicine," and it is past time for the legal profession to take in hand its self-regulatory duty to ensure that criminal defendants are adequately represented. It is the individual attorney accepting an appointment or a fee who by diligent and conscientious service must ensure that defendants are not penalized for reason of a failure of advocacy.

William B. Look, Jr.

216. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 1 (Approved Draft 1971).
217. See notes 115-24 and accompanying text supra.