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Assistance of Counsel in Texas.

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ASSISTANCE OF COUNSEL IN TEXAS

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AUTHOR'S NOTE

After this article went to press the Supreme Court of the United States delivered its opinion in *Cuyler v. Sullivan*.¹ Deciding whether conduct of retained counsel involves state action as a basis for a federal writ of habeas corpus, the Supreme Court presages abolition of the generally perceived distinction between retained attorney and appointed lawyer in formulating standards of competent performance by counsel. Additionally, this opinion speaks to the issue of conflict of interest arising from multiple representation and how the conflict is to be detected.

In *Cuyler* two privately retained lawyers represented the respondent Sullivan and two other persons charged with the same murders. Tried first, Sullivan offered no objection to this multiple representation and was eventually convicted solely on circumstantial evidence presented by the state; the defense elected not to present any evidence. Sullivan's direct appeal and request for collateral relief were rejected by the Pennsylvania courts, the state supreme court finding that there had been no "multiple representation" and that counsels' decision to rest behind the state's case was a reasonable trial tactic. Sullivan then filed a petition for habeas corpus relief in a federal district court; the court, however, rejected his contention, agreeing instead with the Pennsylvania Supreme Court's determination and further finding that no conflict of interest existed. The Court of Appeals for the Third Circuit reversed, holding that the participation of the two lawyers in all three trials established as a matter of law multiple representation and that the possibility of conflict among the interests represented by these lawyers established a violation of Sullivan's sixth amendment right to counsel.²

The Supreme Court, in the opinion delivered by Mr. Justice Powell,³ vacated and remanded the judgment of the Third Cir-

.1. 27 CRIM. L. REP. (BNA) 3100 (May 12, 1980).

.2. *United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512, 519-20 (3d Cir. 1979), vacated and remanded, 27 CRIM. L. REP. (BNA) 3100 (May 12, 1980). Sullivan's co-defendants were acquitted at later trials. *Id.* at 515.

.3. Justices Stewart, White, Blackmun, Rehnquist, and Stevens, and the Chief Justice concurred. Justice Brennan concurred in the result, and Justice Marshall filed an opinion concurring in part and dissenting in part. *Cuyler v. Sullivan*, 27 CRIM. L. REP. (BNA) 3100,

cuit, and reaffirmed that inadequate assistance does not satisfy the sixth amendment right to counsel made applicable to the state through the fourteenth amendment. Rejecting the contention that Sullivan was not entitled to habeas corpus relief because his attorneys were retained, Powell wrote:

A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. We may assume with confidence that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.⁴

The Supreme Court also held that, absent objection, the sixth amendment imposed upon the trial court no affirmative duty to inquire into the potential for conflict of interest and that Sullivan's lawyers had merely a possible conflict of interest; it is only when the trial judge knows or reasonably should know that a particular conflict of interest exists that such an inquiry need be made.⁵ In order for a non-objecting defendant to establish a violation of the sixth amendment, reasoned the Court, he must show that an actual conflict of interest adversely affected his lawyer's performance—the mere possibility of such a conflict is insufficient to impugn a criminal conviction.⁶

“[I]f the right of counsel as 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.”¹

3101 (May 12, 1980).

4. *Id.* at 3103 (emphasis added) (footnotes omitted).

5. *Id.* at 3103-04.

6. *Id.* at 3104.

1. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

I. INTRODUCTION

Long before court-appointed counsel, public defenders, and *pro bono* practitioners became the vogue, the framers of our Constitutions mandated in somewhat different language that, in all criminal prosecutions, an accused shall enjoy the right to "the Assistance of Counsel" and shall have the right of "being heard by himself or counsel, or both," respectively.² Yet, it was not until 1932 that the Supreme Court of the United States held mere appointment of counsel for an accused who is indigent is simply not enough to satisfy the requisites of due process under the fourteenth amendment.³ The duty of appointing counsel, reasoned the Court, is not discharged "by an assignment at such a time or under such circumstances as to preclude the giving of *effective aid* in the preparation and trial of the case."⁴ To hold otherwise, noted Justice Sutherland, "would be to ignore the fundamental postulate . . . 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'"⁵

In the half-century since that seminal decision in *Powell v. Alabama*,⁶ the Supreme Court has come full circle in the area of ineffective assistance of counsel. A unanimous Court only recently held that an appointed attorney sued for malpractice may not, as a matter of federal law, defeat the action by a claim of "absolute immunity."⁷ Though the price paid by an attorney for his incom-

2. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10.

3. *Powell v. Alabama*, 287 U.S. 45, 71 (1932). This is the "Scottsboro Boys" case involving an alleged sexual assault of two young women by seven young black men in a freight car moving through Alabama. Because of manifestly hostile community feelings towards the defendants, it was necessary for the state militia to guard the prisoners and to escort them to and from the courthouse. *Id.* at 51. At arraignment the trial judge appointed local counsel to represent them, but six days later at trial the only attorney to appear was from another state. The lawyer noted that he had not been employed and conceded that he was not familiar with Alabama procedure, but he volunteered his services. *Id.* at 55. The defendants were found guilty, and each was sentenced to death; their convictions were affirmed by the Alabama Supreme Court, its Chief Justice dissenting. See *Powell v. State*, 141 So. 201, 214 (Ala.), *rev'd*, 287 U.S. 45, 71 (1932).

4. *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (emphasis added).

5. *Id.* at 71-72 (quoting *Holding v. Hardy*, 169 U.S. 366, 389-90 (1898)).

6. 287 U.S. 45 (1932).

7. *Ferri v. Ackerman*, ___ U.S. ___, ___, 100 S. Ct. 402, 410, 62 L. Ed. 2d 355, 364 (1979). The Court held the rationale providing absolute immunity to judges, prosecutors, and other public officials does not apply to court-appointed, defense counsel sued for mal-

petency may be high, the consequences faced by a criminal defendant inadequately represented are just as onerous. Yet the defendant who attempts to advance the contention that he has been denied effective assistance of counsel bears a heavy burden as his claim winds its way through Texas and federal courts. Perhaps the major reason has already been suggested: "Whether a licensed member of the bar, authorized to practice law in this state, is competent to do so or has adequately represented and protected the rights of a client is a matter upon which the courts are slow to express an opinion."⁸

This article presents an overview of opinions concerning competency of counsel by the Texas Court of Criminal Appeals, the United States Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States. It will trace the development by the Texas Court of Criminal Appeals and the Fifth Circuit of various competency tests into current standards. The thrust of this article, however, is directed at the specific failings of counsel and the pitfalls characterizing incompetence. "[W]hen from the entire record it is apparent that the accused has not been adequately represented the courts should have no hesitancy in so saying."⁹ Yet, this article will demonstrate that courts have not yet overcome their "hesitancy" to find that an accused has been denied this most basic constitutional guarantee—the right to effective assistance of counsel.

practice by his own client. *See id.* at ___ , 100 S. Ct. at 408-09, 62 L. Ed. 2d at 362-63; *cf.*, *e.g.*, *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) (absolute immunity to prosecutors); *Wood v. Strickland*, 420 U.S. 308, 314 (1975) (absolute immunity to public officials); *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967) (absolute immunity to judges). In contrast to the other officers of the court, the Court noted, the primary office of appointed counsel parallels the duty and function of retained counsel, who does not enjoy a type of immunity from malpractice actions brought by his clients. *Ferri v. Ackerman*, ___ U.S. ___, ___, 100 S. Ct. 402, 409, 62 L. Ed. 2d 355, 363 (1979). Whether empirical data could somehow demonstrate a need for the creation of such an immunity from suit against court-appointed counsel, the Court concluded, would best be left to a legislative body. *Id.* at ___ , 100 S. Ct. at 410, 62 L. Ed. 2d at 364.

8. *Rodriguez v. State*, 340 S.W.2d 61, 63 (Tex. Crim. App. 1960) (Davidson, J.).

9. *Id.* at 63.

II. STANDARDS OF PERFORMANCE

A. *Appointed Counsel*

Historical development of a standard to determine whether counsel performed effectively has been clear—the standard, however, has not. In the 1961 watermark decision of *MacKenna v. Ellis*,¹⁰ the Fifth Circuit held:

We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance. We consider undivided loyalty of appointed counsel to client as essential to due process.¹¹

In 1965, however, a different three-judge panel of the Fifth Circuit seemingly adopted a different standard of competency in *Williams v. Beto*,¹² stating:

It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a *farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation.*¹³

For several years following *Williams* its “farce-mockery” language appeared in a litany of Fifth Circuit decisions,¹⁴ creating confusion over the true standard of competency. Not until 1974 did the Fifth Circuit reconcile this purported conflict in *Herring v. Estelle*.¹⁵ The court pointed out that the *Williams* opinion, after stating the general rule of relief vis a vis the “farce-mockery” test,

10. 280 F.2d 592 (5th Cir.), *modified per curiam*, 289 F.2d 928 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961).

11. *Id.* at 599.

12. 354 F.2d 698, 704 (5th Cir. 1965).

13. *Id.* at 704 (emphasis added).

14. See *Cooks v. United States*, 461 F.2d 530, 532 (5th Cir. 1972); *United States v. Zarzour*, 432 F.2d 1, 6 (5th Cir. 1970); *United States v. Long*, 419 F.2d 91, 94 (5th Cir. 1969); *Foster v. Beto*, 412 F.2d 892, 893 (5th Cir. 1969); *Mosley v. Smith*, 404 F.2d 346, 347 (5th Cir. 1968); *White v. McHan*, 386 F.2d 817, 818 (5th Cir. 1967); *Quarles v. Dutton*, 379 F.2d 934, 936 (5th Cir. 1967); *Odom v. United States*, 377 F.2d 853, 858 (5th Cir. 1967); *Bell v. Alabama*, 367 F.2d 243, 247 (5th Cir. 1966); *Busby v. Holman*, 356 F.2d 75, 79 (5th Cir. 1966).

15. 491 F.2d 125 (5th Cir. 1974).

cited some eleven cases from other circuits as support, but cited no cases from the Fifth Circuit.¹⁶ What the panel in *Williams* was actually holding, reasoned the *Herring* panel, was that a "farce-mockery" test was the general rule in *other* circuits but not in the Fifth Circuit.¹⁷ At no time, noted the panel in *Herring*, was the language in *Williams* ever intended to adopt the "farce-mockery" test in lieu of the reasonably effective assistance standard announced in *MacKenna*.¹⁸

While the Fifth Circuit was struggling to explain its applicable standard of competency, the Court of Criminal Appeals was similarly engaged in settling its own. After the court apparently adopted the "reasonably effective assistance" standard of *MacKenna* in *Caraway v. State*,¹⁹ language tending to adopt the "farce-mockery" test as the true standard crept into a number of its opinions. The authority in support of that language was obviously the earlier rendering in *Williams*. In *Ex parte Gallegos*,²⁰ the court recognized this "inconsistency" and explained it in a manner not totally unlike the Fifth Circuit had in *Herring*.²¹ The court then confirmed its adherence to the "reasonably effective assistance" standard enunciated in *MacKenna*, while indicating disapproval of a measure drawn from the "reasonable competence" language used by the Supreme Court in *McMann v. Richardson*²² regarding advice of counsel to plead guilty.²³ Accordingly, the "reasonably effective assistance" standard apparently remains viable in both the Fifth Circuit and the Court of Criminal Appeals.²⁴

16. *Id.* at 127.

17. *Id.* at 127-28.

18. *Id.* at 127-28.

19. 417 S.W.2d 159 (Tex. Crim. App. 1967), *vacated on other grounds sub nom. Caraway v. Beto*, 421 F.2d 636 (5th Cir. 1970).

20. 511 S.W.2d 510 (Tex. Crim. App. 1974).

21. *Compare* *Herring v. Estelle*, 491 F.2d 125, 127-28 (5th Cir. 1974) *with Ex parte Gallegos*, 511 S.W.2d 510, 512 (Tex. Crim. App. 1974).

22. 397 U.S. 759, 770-71 (1970).

23. *See Ex parte Gallegos*, 511 S.W.2d 510, 512 n.1 (Tex. Crim. App. 1974). Judge Roberts, in a concurring opinion, opted for adoption of still another test: "reasonable competence demanded of attorneys in criminal cases," fashioning it from what was enunciated in *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970). *See Ex parte Gallegos*, 511 S.W.2d 510, 514 (Tex. Crim. App. 1974) (Roberts J., concurring).

24. *See Clark v. United States*, 606 F.2d 550, 551 (5th Cir. 1979); *Salazar v. Estelle*, 547 F.2d 1226, 1227 (5th Cir. 1977); *United States v. Fessel*, 531 F.2d 1275, 1278 (5th Cir. 1976); *United States v. White*, 524 F.2d 1249, 1253 (5th Cir. 1975), *cert. denied*, 426 U.S. 922

In attempting to clarify the "reasonably effective assistance" standard both the Fifth Circuit and the Court of Criminal Appeals have stressed that effective counsel does not mean errorless counsel²⁶ or counsel judged by hindsight,²⁶ but counsel whose services are gauged by the totality of the representation afforded.²⁷ The particular facts of each case determine whether counsel has provided the constitutionally required effective assistance.²⁸ Dissatisfaction of an accused with the results of his attorney's labors is not indicative of ineffective assistance of counsel,²⁹ nor is the ultimate failure by counsel to achieve a favorable verdict.³⁰ "It must be borne in mind that a lawyer cannot be expected to win a hopeless case; nor is he to be adjudged incompetent because he tries to do the impossible and fails."³¹

In evaluating performance, it is well settled that a reviewing court will not attempt to second guess the strategy adopted at trial. Although another lawyer followed a different course in another case, or would have acted differently if serving as trial counsel, the particular performance by the trial counsel is not necessa-

(1976); *Fitzgerald v. Estelle*, 505 F.2d 1334, 1336 (5th Cir. 1974), *cert. denied*, 422 U.S. 1011 (1975); *Flores v. State*, 576 S.W.2d 632, 634 (Tex. Crim. App. 1978); *Ewing v. State*, 549 S.W.2d 392, 395 (Tex. Crim. App. 1977); *Williams v. State*, 549 S.W.2d 183, 189 (Tex. Crim. App. 1977); *Ex parte Prior*, 540 S.W.2d 723, 726 (Tex. Crim. App. 1976); *Ex parte Bratchett*, 513 S.W.2d 851, 853 (Tex. Crim. App. 1974).

25. See *Salazar v. Estelle*, 547 F.2d 1226, 1227 (5th Cir. 1977); *United States v. White*, 524 F.2d 1249, 1253 (5th Cir. 1975), *cert. denied*, 426 U.S. 922 (1976); *Howell v. State*, 563 S.W.2d 933, 937 (Tex. Crim. App. 1978); *Benoit v. State*, 561 S.W.2d 810, 818 (Tex. Crim. App. 1977).

26. See *Moore v. Beto*, 458 F.2d 386, 386 (5th Cir. 1972); *Brooks v. Texas*, 381 F.2d 619, 625 (5th Cir. 1967); *Harrison v. State*, 552 S.W.2d 151, 152 (Tex. Crim. App. 1977); *Duran v. State*, 505 S.W.2d 863, 866 (Tex. Crim. App. 1974).

27. See *Salazar v. Estelle*, 547 F.2d 1226, 1227 (5th Cir. 1977); *Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974); *Howell v. State*, 563 S.W.2d 933, 937 (Tex. Crim. App. 1978); *Williams v. State*, 513 S.W.2d 54, 56-57 (Tex. Crim. App. 1974).

28. *Chalk v. Beto*, 429 F.2d 225, 226 (5th Cir. 1970); *King v. Beto*, 429 F.2d 221, 225 (5th Cir. 1970), *cert. denied*, 401 U.S. 936 (1971); *Benoit v. State*, 561 S.W.2d 810, 818 (Tex. Crim. App. 1977); *Williams v. State*, 549 S.W.2d 183, 189 (Tex. Crim. App. 1977); *Ex parte Prior*, 540 S.W.2d 723, 727 (Tex. Crim. App. 1976).

29. *Loftis v. Estelle*, 515 F.2d 872, 875 (5th Cir. 1975); *Moore v. Beto*, 458 F.2d 386, 386 (5th Cir. 1972); *Loper v. Beto*, 440 F.2d 934, 938 (5th Cir. 1971), *vacated on other grounds*, 405 U.S. 473 (1972).

30. *Williams v. Beto*, 354 F.2d 698, 705 (5th Cir. 1965); *McGarrity v. Beto*, 335 F. Supp. 1186, 1190 (S.D. Tex.), *aff'd*, 452 F.2d 1206 (5th Cir. 1971), *cert. denied*, 406 U.S. 909 (1972); *Smotherman v. Beto*, 276 F. Supp. 579, 586 (N.D. Tex. 1967); *Curtis v. State*, 500 S.W.2d 478, 481 (Tex. Crim. App. 1973).

31. *Williams v. State*, 513 S.W.2d 54, 57 (Tex. Crim. App. 1974).

rily inadequate.³² So long as the accused is represented by competent counsel, the courts have recognized that *counsel* is the manager of the lawsuit, and the accused is bound by his attorney's presumed superior knowledge and informed tactical decisions.³³ If trial strategy and decisions by counsel, viewed in the context employed or made, appear to have been in the best interest of the client, a reviewing court should not and probably will not substitute its collective judgment for that of trial counsel.³⁴

While the Supreme Court has pointed out that appointed counsel must function actively as an advocate, as opposed to *amicus curiae*,³⁵ and that appointed counsel, acting in an appellate capacity, must support the appeal to the best of his ability,³⁶ it has ventured no further than to hold the right to counsel is the right to *effective assistance* of counsel.³⁷ In the context of guilty pleas, however, the Court did elaborate on the "effective assistance" axiom, stating:

a defendant's plea of guilty based on *reasonably competent* advice is an intelligent plea not open to attack on the ground counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable . . . depends . . . not [on] whether a court would retrospectively consider counsel's advice right or wrong, but on whether that advice was *within the range of competence demanded of attorneys in*

32. *E.g.*, *Williams v. Beto*, 354 F.2d 698, 706 (5th Cir. 1965); *Howell v. State*, 563 S.W.2d 933, 937 (Tex. Crim. App. 1978); *Benoit v. State*, 561 S.W.2d 810, 818 (Tex. Crim. App. 1977); *Harrison v. State*, 552 S.W.2d 151, 152 (Tex. Crim. App. 1977); *Ewing v. State*, 549 S.W.2d 392, 395 (Tex. Crim. App. 1977).

33. *Williams v. Beto*, 354 F.2d 698, 705-06 (5th Cir. 1965). The court pointed out that in exchange for the services of appointed counsel, the accused:

agrees that his attorney will be in charge of his defense in the legal battle about to begin. He should know that in the course of a lawsuit there are many critical Rubicons at which the attorney must make finely balanced, often agonizing, decisions. A legal situation frequently presents choices in many directions. Unfortunately for him, the lawyer has to decide, he realizes events may prove his decision not the best, but the merits of the decision are not altogether capable of ascertainment merely by consulting the outcome.

Id. at 706.

34. *Vessels v. Estelle*, 376 F. Supp. 1303, 1308 (S.D. Tex. 1973), *aff'd*, 494 F.2d 1295 (5th Cir. 1974).

35. *Entsminger v. Iowa*, 386 U.S. 748, 751 (1967).

36. *Anders v. California*, 386 U.S. 738, 744 (1967).

37. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

*criminal cases.*³⁸

Whether the last underscored language is to be interpreted as creating a higher standard of competence and, if so, is limited to entry of guilty pleas remains a matter of speculation until the Court, which has only infrequently addressed this issue,³⁹ speaks more definitively.

B. *Retained Counsel*

The Constitution assures an accused the right to effective assistance of counsel whether one of his own choosing or court-appointed.⁴⁰ As courts experimented in formulating a standard to evaluate competency of retained counsel, a conflict not totally unlike the "reasonably effective assistance" and "farce-mockery" conflict, developed in the Fifth Circuit. One line of authority held effectiveness of both retained and appointed counsel must be gauged by the same standard, finding no need for "state involvement."⁴¹ The other line of cases did not discuss any standard for minimum effectiveness inasmuch as their inquiry ceased with a finding that "state action" was not implicated by performance of a retained counsel.⁴² This line of authority, in refusing to attribute deficiencies of retained counsel to the state, required actual or constructive knowledge of ineffectiveness, or participation by the prosecutor or the trial judge, to meet the threshold state action requirement of the fourteenth amendment.⁴³ Absent such a showing, complaint by an accused of improper representation by retained counsel of his own choice could be sustained only where faulted conduct

38. *Id.* at 770-71 (emphasis added).

39. See *United States v. Agurs*, 427 U.S. 97, 114 (1976); *Chambers v. Maroney*, 399 U.S. 42, 54 (1970); *McMann v. Richardson*, 397 U.S. 759, 769-71 (1970); *Entsminger v. Iowa*, 386 U.S. 748, 752 (1967); *Anders v. California*, 386 U.S. 738, 742-43 (1967); *Michel v. Louisiana*, 350 U.S. 91, 100-01 (1955); *Stroble v. California*, 343 U.S. 181, 195-96 (1952).

40. *Porter v. United States*, 298 F.2d 461, 463 (5th Cir. 1962).

41. See *Holland v. Henderson*, 460 F.2d 978, 981 (5th Cir. 1972); *Langford v. Alabama*, 422 F.2d 760, 767 (5th Cir. 1969) (Rives, J., dissenting); *Breedlove v. Beto*, 404 F.2d 1019, 1020 n.1 (5th Cir. 1968); *Bell v. Alabama*, 367 F.2d 243, 247 (5th Cir. 1966); *Porter v. United States*, 298 F.2d 461, 463 (5th Cir. 1962).

42. See, e.g., *Johnson v. Smith*, 447 F.2d 985, 985 (5th Cir. 1971); *Langford v. Alabama*, 422 F.2d 760, 763 (5th Cir. 1969); *Howard v. Beto*, 375 F.2d 441, 442 (5th Cir. 1967).

43. See, e.g., *McGriff v. Wainwright*, 431 F.2d 897, 899 (5th Cir. 1970); *King v. Wainwright*, 368 F.2d 57, 59 (5th Cir. 1966); *Burkett v. Mayo*, 173 F.2d 574, 574 (5th Cir. 1949).

amounted to a breach of a legal duty.⁴⁴

In *Fitzgerald v. Estelle*,⁴⁵ the Fifth Circuit *en banc* noted that "although no attempt at harmonizing these lines [of cases] has been previously made, they are not necessarily at odds."⁴⁶ Comparing and contrasting ineffectiveness of counsel under the fourteenth amendment due process clause⁴⁷ and the sixth amendment right to counsel,⁴⁸ the court pointed out that the standard of reasonably effective assistance of counsel delineated in *Herring* covered a broader range of errors than the fundamental fairness standard of the fourteenth amendment due process concept.⁴⁹ Discarding the "breach of a legal duty" standard for judging effectiveness of retained counsel, the court concluded that "state action" could nonetheless be found where it was demonstrated:

that some responsible state official connected with the criminal proceeding who could have remedied the conduct failed in his duty to accord justice to the accused. That the trial judge and the prosecutor have such a capacity and duty is unquestionable. Therefore, if the trial judge or the prosecutor can be shown to have actually known that a particular defendant is receiving incompetent representation and take no remedial action, the state action requirement is satisfied. If they directly participate in the incompetency, it is even more so.⁵⁰

Accordingly, the threshold examination for demonstrating that retained counsel has failed to provide effective assistance, is whether his incompetency was so obvious that a *reasonably attentive* state official should have been aware of it and could have taken corrective action, but did not.⁵¹

The Court of Criminal Appeals, as the Fifth Circuit, had traditionally held the standard of ineffectiveness for retained counsel

44. See *Popeko v. United States*, 294 F.2d 168, 171 (5th Cir. 1961); *Alexander v. United States*, 290 F.2d 252, 254 (5th Cir. 1961).

45. 505 F.2d 1334 (5th Cir. 1974) (*en banc*).

46. *Id.* at 1336.

47. See *Porter v. United States*, 298 F.2d 461, 463 (5th Cir. 1962) (allegiance of counsel divided by his attempt to protect adverse witness in collateral proceeding).

48. See *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963).

49. *Fitzgerald v. Estelle*, 505 F.2d 1334, 1336 (5th Cir. 1975) (*en banc*).

50. *Id.* at 1337.

51. *United States v. Guerra*, 588 F.2d 519, 521 (5th Cir. 1979); *United States v. Garza*, 563 F.2d 1164, 1166 (5th Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978); *Maxon v. Estelle*, 558 F.2d 306, 307 (5th Cir. 1977).

was whether, without knowledge of his client, counsel had engaged in willful conduct constituting breach of a legal duty.⁵² In *Ex parte Ewing*,⁵³ however, the court reviewed effectiveness of retained counsel pursuant to the twofold test of *Fitzgerald v. Estelle*.⁵⁴ This standard requires performance less than the sixth amendment mandate and state action to justify a finding of ineffective assistance of counsel.⁵⁵ The court proceeded to adopt the *Fitzgerald* test that the accused had to show state action by demonstrating that a responsible state official connected with the criminal proceeding failed to take corrective action when that official had actual or constructive knowledge of retained counsel's failure to deliver reasonably effective assistance.⁵⁶

The court pointed out that the trial judge, as a "responsible state official," must inquire into trial counsel's strategy and tactics.

Such an inquiry should be made only if from all appearances *there could be no plausible basis in strategy or tactics for counsel's actions*, and then the inquiry should be made out of the presence of the jury and of the prosecutor. A reply by counsel that his actions are based on strategic or tactical considerations that will become apparent later in the trial should satisfy the court's inquiry, and counsel should not be required to reveal his strategy and tactics at that time.⁵⁷

The American Bar Association has stated that, ethically, counsel owes "entire devotion to the interest of his client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability."⁵⁸ If the spirit of this ethical canon is observed by defense counsel, there should be no occasion for post-conviction inquiries into his performance. As the remainder of this article aptly illustrates, for whatever reason or reasons, the spirit and tenor of this ethical consideration is lost or misplaced when counsel is unable or unwilling to render requisite effective assis-

52. See, e.g., *Howell v. State*, 563 S.W.2d 933, 937 (Tex. Crim. App. 1978); *Harrison v. State*, 552 S.W.2d 151, 152 (Tex. Crim. App. 1977); *Hunnicut v. State*, 531 S.W.2d 618, 626 (Tex. Crim. App. 1976).

53. 570 S.W.2d 941 (Tex. Crim. App. 1978).

54. *Id.* at 944; see *Fitzgerald v. Estelle*, 505 F.2d 1334, 1337 (5th Cir. 1975) (en banc).

55. *Ex parte Ewing*, 570 S.W.2d 941, 944 (Tex. Crim. App. 1978).

56. *Id.* at 944-45.

57. *Id.* at 945 (emphasis added).

58. ABA CODE OF PROFESSIONAL RESPONSIBILITIES, CANON 15.

tance. The net result of such a failing is that due process is denied because the criminal justice system has failed.⁵⁹

III. CIRCUMSTANCES CONSTITUTING INEFFECTIVE ASSISTANCE

A. *Failure to Investigate Facts*

It is fundamental that counsel must command not only the law but also the facts of the case before he can render reasonably effective assistance.⁶⁰ In *Powell v. Alabama*,⁶¹ the Supreme Court recognized that a thorough factual investigation is the cornerstone upon which effective assistance of counsel is built. "It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts."⁶² An American Bar Association Project echoes these sentiments in proposing:

Defense counsel has the responsibility to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. *The duty to investigate exists regardless of the accused's information or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.*⁶³

The burden on counsel to acquaint himself with the facts of the case will vary according to its complexity, but this responsibility may not be relegated to an investigator.⁶⁴ The Texas Court of

59. *Cf. Fitzgerald v. Estelle*, 505 F.2d 1334, 1336 (5th Cir. 1975) (en banc) (conviction of defendant after fundamentally unfair trial, resulting from ineffective counsel, violates fourteenth amendment due process).

60. *See Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974); *Caraway v. Beto*, 421 F.2d 636, 637 (5th Cir. 1970); *Williams v. Beto*, 354 F.2d 698, 705 (5th Cir. 1965); *Flores v. State*, 576 S.W.2d 632, 634 (Tex. Crim. App. 1978); *Ex parte Ewing*, 570 S.W.2d 941, 947 (Tex. Crim. App. 1978).

61. 287 U.S. 45 (1932).

62. *Id.* at 58.

63. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4.1 (Approved Draft 1971) (emphasis added).

64. *Flores v. State*, 576 S.W.2d 632, 634 (Tex. Crim. App. 1978).

Criminal Appeals has held that regardless of complications in a case, a lawyer is charged with making an *independent* investigation of the facts, notwithstanding his belief in the veracity of his client's story.⁶⁵ The Fifth Circuit is in harmony with this rationale, stressing that counsel has a duty to interview potential witnesses and "make an independent examination of the facts, circumstances, pleadings and laws involved."⁶⁶

Though neglecting pretrial investigation, which would have uncovered the prior criminal record of a murder victim and arguably buttressed a contention that the accused acted in self defense, has been held harmless error,⁶⁷ the Fifth Circuit has found that failure to investigate facts tending to support the *only* possible defense constitutes ineffective assistance of counsel.⁶⁸ In *Brooks v. Texas*,⁶⁹ defense counsel failed to discover that his client had been committed to at least three different mental institutions and had attempted suicide on two occasions.⁷⁰ Insanity was the only viable defense; yet, inexplicably, it was not advanced.⁷¹ Counsel also failed to request an independent psychiatric examination of his client⁷² and did not study a report of the psychiatrist for the prosecution who *had* examined the defendant.⁷³ Labeling the trial "no more than a mockery of justice,"⁷⁴ the court found the accused was

65. *Ex parte Ewing*, 570 S.W.2d 941, 947 (Tex. Crim. App. 1978).

66. *Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir. 1979), *aff'd*, ___ U.S. ___, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980).

67. *United States v. Agurs*, 427 U.S. 97, 113-14 (1976). The Supreme Court agreed with a determination by a trial judge that the victim's prior criminal record did not contradict the state's evidence and was largely cumulative. When viewed in the context of the complete trial record, reasoned the Court, failure of defense counsel to request or failure of the prosecutor to tender the victim's prior criminal record did not constitute ineffective counsel on the one hand or prosecutorial misconduct on the other. *Id.* at 113-14.

68. *See Brooks v. Texas*, 381 F.2d 619, 625 (5th Cir. 1967).

69. 381 F.2d 619 (5th Cir. 1967).

70. *Id.* at 622.

71. *See id.* at 623. After waiting until Friday before the Monday on which the case was set for trial to interview his client, and therefore waiving whatever attempt might have been made to advance the insanity defense, counsel, "in utter desperation and apparent remorse," took the stand himself and attempted to convince the trial court that his client was "possibly or probably insane." *Id.* at 623. The trial court allowed defense counsel to give his own personal diagnosis of the mental condition of his client, but refused to permit anything more. *Id.* at 623.

72. *See id.* at 622-23; *cf. TEX. CODE CRIM. PRO. ANN.* art. 46.02, § 3a (Vernon 1979) (providing for appointment of psychiatrist by independent expert if issue timely raised).

73. *Brooks v. Texas*, 381 F.2d 619, 623 (5th Cir. 1967).

74. *Id.* at 625.

denied effective assistance of counsel.⁷⁵

Similarly, if nonfeasance in investigating the facts of the case results in admission of a confession exacted from an accused after five days of custodial interrogation, and the only defense proffered is a *pro forma* insanity claim, the accused has not been afforded effective assistance of counsel.⁷⁶ In *Smotherman v. Beto*,⁷⁷ apparent ineptness of trial counsel in failing to discover his client's "confession" was compounded by lack of experience,⁷⁸ as reflected in his own assertion that he did not know of the confession because his client never told him about it.⁷⁹ The court rejected this "explanation" and tersely noted:

It would indeed be an anomaly of the Sixth Amendment were this court to hold that what a defendant did or did not relate to his attorney concerning the facts of his case was to be in any manner determinative of the question of that lawyer's effective representation of the defendant. A lawyer attends a professional school for 3 years; he is instructed in a myriad of legal theories, rules and rationales, all of which are designed to achieve but one end: the development of a searching, inquisitive and analytical mind. . . . The lawyer who does not probe, does not inquire, and does not seek out all the facts relevant to his client's cause is prepared to do little more than stand still at the time of trial.⁸⁰

The Court of Criminal Appeals has, however, commiserated with defense counsel who accepted as true a client's inaccurate assertion that he had no prior arrest record, then was accused of rendering ineffective legal assistance when the prosecution disclosed the criminal history at trial.⁸¹ In *Ex parte Ewing*,⁸² the accused informed his counsel that he had never been arrested or the subject of police investigation. In addition, the accused claimed his automobile had been stolen from him several days before being used in the robbery and was subsequently recovered by him.⁸³ On the basis

75. *Id.* at 625.

76. *See Smotherman v. Beto*, 276 F. Supp. 579, 590 (N.D. Tex. 1967).

77. 276 F. Supp. 579 (N.D. Tex. 1967).

78. *See id.* at 583, 589.

79. *Id.* at 588.

80. *Id.* at 588.

81. *Ex parte Ewing*, 570 S.W.2d 941, 947 (Tex. Crim. App. 1978).

82. 570 S.W.2d 941 (Tex. Crim. App. 1978).

83. *Id.* at 947.

of these representations, counsel attempted to elicit from an investigating officer that the automobile had been located near the scene of a different offense, that the accused was not in the vehicle, and that he was questioned but not arrested.⁸⁴ Inexorably, the officer testified, much to the surprise and chagrin of defense counsel, that the accused *had* been arrested in connection with an earlier, unrelated burglary.⁸⁵ Finding a failure properly to investigate the facts surrounding an offense distinguishable from investigating a client's false statement that he has no prior police record, the court held:

If the client falsely tells his attorney he has no record, he may not later claim that his own lies have caused him to suffer ineffective assistance of counsel. He may not set up counsel for later attack by such device. To hold otherwise would reward those who frustrate the attempts to render them assistance, and discourage the open and honest communication that is necessary if counsel is to have the information necessary to defend.⁸⁶

A corollary of the notion that an attorney has a responsibility thoroughly to investigate the facts of the case is the duty to seek out and interview potential witnesses.⁸⁷ When it is not demonstrated, however, that claimed witnesses would have testified favorably for the accused, counsel is not prejudiced by neglecting that duty.⁸⁸ This is especially so when it is uncontradicted that defense counsel and his partner, in conjunction with the accused, determined that calling un interviewed witnesses would surely contribute to an eventual conviction.⁸⁹

84. *Id.* at 946-47.

85. *Id.* at 946-47.

86. *Id.* at 947.

87. *See, e.g.,* *Davis v. Alabama*, 596 F.2d 1214, 1217 (5th Cir. 1979); *Harris v. Estelle*, 487 F.2d 1293, 1299 (5th Cir. 1974); *Williams v. Beto*, 354 F.2d 698, 702-03 (5th Cir. 1965).

88. *Thomas v. Estelle*, 588 F.2d 170, 171 (5th Cir. 1979).

89. *Williams v. Beto*, 354 F.2d 698, 702-03 (5th Cir. 1965); *see Thomas v. Estelle*, 588 F.2d 170, 171 (5th Cir. 1979) (purported alibi witnesses could not account for defendant's activities at time of offense and therefore could not have aided him if called at trial); *Harris v. Estelle*, 487 F.2d 1293, 1299 (5th Cir. 1973) (alibi witness could not account for defendant's whereabouts at time of offense); *Fitts v. United States*, 406 F.2d 518, 519 (5th Cir. 1969) (witnesses indicated they could not testify to fact which defendant had said they would).

B. Ignorance of Law

An attorney unfamiliar with the law relevant to his client's case cannot meet the level of competence required by the sixth amendment.⁹⁰ Although counsel is not deemed incompetent because he is unaware of a state appellate court decision not appearing in an advance sheet until a short time before trial,⁹¹ he is expected to keep sufficiently abreast of developments in the criminal law.⁹² The advice he gives concerning the law applicable to his client's case must be "within the range of competence demanded of attorneys in criminal cases"—at least if the plea is guilty.⁹³ When counsel, apparently unaware that robbery by assault requires intent to deprive the complainant of property taken, mistakenly advised his client to plead guilty, the accused was deprived of effective assistance of counsel.⁹⁴ Similarly, ignorance of the law that robbery requires an intent to retain appropriated property justifies a finding of ineffective assistance.⁹⁵

A striking example of ignorance of law, in a context no less compelling than a capital murder case, is found in *Jurek v. Estelle*.⁹⁶ Convicted of murder committed during the course of kidnapping,⁹⁷

90. See *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974).

91. *Hernandez v. Beto*, 443 F.2d 634, 635 (5th Cir. 1971).

92. *Ex parte Greer*, 505 S.W.2d 295, 295 (Tex. Crim. App. 1974).

93. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

94. *Ex parte Rogers*, 519 S.W.2d 861, 863 (Tex. Crim. App. 1975).

95. *Ex parte Gallegos*, 511 S.W.2d 510, 511 (Tex. Crim. App. 1974); *Herring v. Estelle*, 491 F.2d 125, 129 (5th Cir. 1974). *Gallegos* and *Herring* were companion cases, both involving an escape from the Tom Green County Jail; the defendants used a set of jail keys taken from their jailer and fled, but left the keys in a back door to the jail. See *Ex parte Gallegos*, 511 S.W.2d 510, 511 (Tex. Crim. App. 1974). Both the Fifth Circuit and the Texas Court of Criminal Appeals noted that reasonably effective counsel would have been cognizant of the holdings in *Bailey v. State*, 139 Tex. Crim. 260, 139 S.W.2d 599 (1940) and *Fitzgerald v. State*, 160 Tex. Crim. 414, 271 S.W.2d 428 (1954), both of which involved taking jail keys, and would have known that robbery in Texas requires an intent to appropriate permanently the property and deprive the owner of its value. See *Herring v. Estelle*, 491 F.2d 125, 129 (5th Cir. 1974); *Ex parte Gallegos*, 511 S.W.2d 510, 511 (Tex. Crim. App. 1974). Both courts then concluded, with the above in mind, that a strong case could have been made that having left the keys in the back door, the accused demonstrated their intent *not* to keep them permanently, thereby falling short of the conduct proscribed by the Texas robbery statute. See *Herring v. Estelle*, 491 F.2d 125, 129 (5th Cir. 1974); *Ex parte Gallegos*, 511 S.W.2d 510, 511 (Tex. Crim. App. 1974).

96. 593 F.2d 672 (5th Cir.), *rehearing en banc granted*, 597 F.2d 590 (5th Cir. 1979); *Ex parte Gallegos*, 511 S.W.2d 510, 511 (Tex. Crim. App. 1974).

97. *Jurek v. Estelle*, 593 F.2d 672, 674 (5th Cir.), *rehearing en banc granted*, 597 F.2d 590 (5th Cir. 1979); see TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 1974).

Jurek challenged the constitutionality of the Texas death penalty statute,⁹⁸ but his conviction and sentence were affirmed by both the Court of Criminal Appeals and the Supreme Court.⁹⁹ Denied habeas corpus relief in the federal district court,¹⁰⁰ Jurek finally received relief, over a rigorous dissent,¹⁰¹ on the strength of his claim that his written confessions were not voluntary.¹⁰² The Fifth Circuit panel majority also held Jurek was not barred from asserting that his death sentence was inconsistent with the decision in *Witherspoon v. Illinois*,¹⁰³ despite the failure of his trial counsel to preserve such a claim.¹⁰⁴ Though the panel declined to hold that failure to preserve the *Witherspoon* issue constituted ineffective assistance of counsel,¹⁰⁵ it did hold that his ignorance or complete misunderstanding of the *Witherspoon* doctrine constituted sufficient "cause" under *Wainwright v. Sykes*¹⁰⁶ to explain absence of

98. *Jurek v. Estelle*, 593 F.2d 672, 685 n.26 (5th Cir.), *rehearing en banc granted*, 597 F.2d 590 (5th Cir. 1979); see TEX. PENAL CODE ANN. § 19.03 (Vernon 1974); TEX. CODE CRIM. PRO. ANN. art. 37.071 (Vernon Supp. 1980).

99. *Jurek v. State*, 522 S.W.2d 934, 943 (Tex. Crim. App. 1975), *aff'd*, 428 U.S. 262, 277 (1976).

100. See *Jurek v. Estelle*, 593 F.2d 672, 674 (5th Cir.), *rehearing en banc granted*, 597 F.2d 590 (5th Cir. 1979).

101. *Jurek v. Estelle*, 593 F.2d 672, 685 (5th Cir.), *rehearing en banc granted*, 597 F.2d 590 (5th Cir. 1979). Judge Goldberg authored the majority opinion, joined by Judge Gewin. Judge Coleman strongly dissented on grounds that the Texas Court of Criminal Appeals was correct in its determination that Jurek's confession was knowingly, voluntarily, and intelligently given. See *id.* at 685-86 (Coleman, J., dissenting).

102. *Id.* at 676-79.

103. 391 U.S. 510 (1968). *Witherspoon* held that a death sentence "cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or . . . religious scruples against its infliction." *Id.* at 522. The Court went on to hold that a state may exclude only those prospective jurors who make it "unmistakably clear . . . that they would automatically vote against" the death penalty "without regard to any evidence that might be developed at the trial," or whose "attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." *Id.* at 522 n.21.

104. *Jurek v. Estelle*, 593 F.2d 672, 680-85 (5th Cir.), *rehearing en banc granted*, 597 F.2d 590 (5th Cir. 1979).

105. *Id.* at 682. The Court pointed out that misfeasance of an attorney in a case such as this need not amount to a denial of the constitutional right to counsel. If it did, noted the Court, "it would be an independently sufficient reason to grant relief and would make it immaterial whether other constitutional claims had been forfeited." *Id.* at 638 n.19 (citing *Sincox v. United States*, 571 F.2d 876, 879 n.3 (5th Cir. 1978)).

106. 433 U.S. 72, 90 (1977) (Florida procedural rule requiring contemporaneous objection at trial precludes federal habeas corpus review on grounds accused did not understand *Miranda* warnings where trial counsel fails to advance such an objection, absent a showing of prejudice and cause); see *Jurek v. Estelle*, 593 F.2d 672, 682-83 (5th Cir.), *rehearing en*

an objection in the trial court.¹⁰⁷ The court characterizes former counsel's ignorance of a landmark constitutional decision as misfeasance:

Jurek's appointed trial counsel, was [either] ignorant of the *Witherspoon* decision (then five years old) or completely misunderstood it. . . . Indeed his testimony at the habeas [corpus] hearing suggests that he thought *Witherspoon* required all jurors strongly opposed to capital punishment to be excluded almost the contradictory of the actual holding of the case. . . . Jurek's attorney's apparent ignorance of a significant constitutional right is a serious form of misfeasance. . . . Jurek's trial attorney's abdication, through ignorance, of his client's constitutional right is the antithesis of a considered tactical choice.¹⁰⁸

Those instances where it is demonstrated that counsel is ignorant of applicable law are not limited to prior appellate decisions but occasionally encompass pivotal statutory provisions as well.¹⁰⁹ In *Santillan v. Beto*,¹¹⁰ an appointed attorney advised his client not to testify because he was afraid the prosecutor could and would impeach him with a record showing that the defendant had been indicted previously for burglary and theft, as well as tried and acquitted of murder.¹¹¹ Unbeknownst to defense counsel, such evidence was clearly inadmissible pursuant to a provision of the Texas Code of Criminal Procedure.¹¹² Noting that the jury deliberated only eleven minutes before returning a verdict of guilty and

banc granted, 597 F.2d 590 (5th Cir. 1979).

107. *Jurek v. Estelle*, 593 F.2d 672, 683-84 (5th Cir.), *rehearing en banc granted*, 597 F.2d 590 (5th Cir. 1979).

108. *Id.* at 682-83.

109. *Santillan v. Beto*, 371 F. Supp. 194, 197 (S.D. Tex. 1974).

110. 371 F. Supp. 194 (S.D. Tex. 1974).

111. *Id.* at 196.

112. *Id.* at 196; *see* TEX. CODE CRIM. PRO. ANN. art. 38.29 (Vernon 1979). Article 38.29 provides in pertinent part:

The fact that a defendant in a criminal case, or a witness in a criminal case, is or has been, charged by indictment, information or complaint, with the commission of an offense against the criminal laws of this State, of the United States, or an other State shall not be admissible in evidence on the trial of any criminal case for the purpose of impeaching any person as a witness unless on trial under such indictment, information or complaint a final conviction has resulted, or a suspended sentence has been given and has not been set aside, or such person has been placed on probation and the period of probation has not expired.

TEX. CODE CRIM. PRO. ANN. art. 38.29 (Vernon 1979).

conferred but twenty-six minutes before assessing punishment at life imprisonment for possession of heroin, the court detailed other instances of ineffectiveness.¹¹³ Notwithstanding that the Court of Criminal Appeals had denied relief upon the claimed ineffective assistance of counsel,¹¹⁴ the federal district court granted the relief sought.¹¹⁵

The Fifth Circuit has held, however, that not every ignorance of law compels a finding of incompetency. When ignorance or misunderstanding of federal sentencing procedure resulted in advice that the client was subject to imprisonment for fifty years on two counts of bank robbery, when in reality his maximum punishment could well have been only half that, the defendant still was not denied effective assistance of counsel.¹¹⁶ The court held that indictment on *two* counts of robbery, where it was apparent that only *one* robbery had been committed, subjecting the defendant to fifty years imprisonment, depended on development of the facts attending the offense.¹¹⁷ Defendant's plea of guilty to *one* count of robbery upon counsel's erroneous advice did not warrant finding counsel's assistance ineffective.¹¹⁸

Similarly, when an accused pled guilty to one count of murder and was given an additional twenty-five years for assaulting a peace officer subsequent to the murder, counsel's mistaken advice to the accused that the latter sentence was legal did not constitute ineffective assistance.¹¹⁹ The court noted that it had previously vacated the illegal twenty-five year consecutive sentence and a third count in the indictment had been dismissed, so that *even if* counsel had been ignorant of the law: "He should be thankful that shooting a man in the back and killing him in the course of a bank

113. *Santillan v. Beto*, 371 F. Supp. 194, 197 (S.D. Tex. 1974). Counsel "made no effort to and did not investigate the scene of the offense, interviewed none of the witnesses given him by . . . [defendant], and never talked with any member of . . . [defendant's] family, even though one . . . arrested at the scene of the offense but not charged was . . . [defendant's] wife." *Id.* at 197. Additionally, counsel did not inform the accused that he qualified for probation nor did he file the required application for probation mandated by TEX. CODE CRIM. PRO. ANN. art. 42.12, § 3a (Vernon 1979). See *Santillan v. Beto*, 371 F. Supp. 194, 197 (S.D. Tex. 1974).

114. *Satillan v. State*, 470 S.W.2d 677, 679 (Tex. Crim. App. 1971).

115. *Santillan v. Beto*, 371 F. Supp. 194, 198 (S.D. Tex. 1974).

116. *Johnson v. United States*, 480 F.2d 142, 143-44 (5th Cir. 1973).

117. *Id.* at 144.

118. *Id.* at 144.

119. *Garza v. United States*, 530 F.2d 1208, 1209-10 (5th Cir. 1976).

robbery was not punishable by death under the applicable jurisprudence prevailing at the time he committed this heinous crime."¹²⁰

C. *Guilty Pleas*

"The decision to plead guilty before the evidence is in frequently involves the making of difficult judgments . . . yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be."¹²¹ So long as advice of counsel remains within the range of competence demanded of attorneys in criminal cases, a plea of guilty is not unintelligently entered merely because a court, in retrospect, might consider such advice erroneous.¹²²

The Fifth Circuit has stated that, if a plea of guilty is entered, counsel has the duty to ensure it is made knowingly and voluntarily, actually and substantially assisting his client in this critical decision.¹²³ Counsel must provide an understanding of law applicable to the facts of the case and, though his advice need not be perfect, it must be reasonably competent to permit an accused to make an informed and conscious choice.¹²⁴ Unless and until counsel is cognizant of both the facts in and the law applicable to his client's case, a plea of guilty is not knowingly and intelligently entered. As discussed previously, the attorney's ignorance of law or facts or both affords the criminal defendant a primary avenue of attacking the validity of his guilty plea.¹²⁵ Failure to advise his client of a meritorious defense prior to the entry of a plea of guilty has been held to constitute ineffective assistance of counsel,¹²⁶ though failure to inform an accused who pleads guilty of an arguable defense which is later proven invalid does not indicate incompetent

120. *Id.* at 1209.

121. *Brady v. United States*, 397 U.S. 742, 756-57 (1970).

122. *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970). *McMann* and *Brady* are two-thirds of the so-called "*Brady*-trilogy" relating to the voluntary nature of guilty pleas as they relate to the effective assistance of counsel in determining whether such a plea should be entered. The third case in the trilogy is *Parker v. North Carolina*, 397 U.S. 790 (1970).

123. *Edwards v. Estelle*, 541 F.2d 1162, 1163 (5th Cir. 1976); *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974).

124. *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974).

125. *See, e.g., id.* at 126; *Ex parte Rogers*, 519 S.W.2d 861, 863 (Tex. Crim. App. 1975); *Ex parte Gallegos*, 511 S.W.2d 510, 513 (Tex. Crim. App. 1974).

126. *See United States v. Fessel*, 531 F.2d 1275, 1279 (5th Cir. 1976) (insanity defense); *Gomez v. Beto*, 462 F.2d 596, 597 (5th Cir. 1972) (alibi defense).

counsel.¹²⁷

A plea of guilty resulting in a favorable plea bargain is not vulnerable because counsel, as part of his strategy, failed to assert an insanity defense when the psychiatric opinion relied on for such defense was inconsistent with an earlier opinion by the same psychiatrist.¹²⁸ Negotiation of a plea bargain to avoid prosecution and possible punishment as an habitual offender does not render advice or assistance of counsel ineffective.¹²⁹ Similarly, counsel may properly advise his client to enter a plea of guilty to three indictments without any assurance of less than the maximum punishment allowed by law.¹³⁰ However, a lawyer who assures his client of a more lenient sentence than will be imposed in exchange for a guilty plea is providing ineffective assistance.¹³¹

A more common situation in Texas, at least prior to the amendment of article 26.13 of the Code of Criminal Procedure, is illustrated by *Gibson v. State*.¹³² In *Gibson*, the prosecutor, the two defendants, and their lawyer entered what seemed an ironclad agreement for probated sentences in exchange for pleas of guilty.¹³³ The evidence was uncontradicted that the sole reason for the change of pleas to guilty was assurance by the prosecutor that he would recommend, and the trial court likely would grant, probation.¹³⁴ The trial court, however, refused to probate the punishment and further refused to permit the defendants to withdraw their pleas. The Court of Criminal Appeals held, over a vigorous

127. See *Sand v. Estelle*, 551 F.2d 49, 51 (5th Cir. 1977).

128. See *Faz v. State*, 510 S.W.2d 922, 926 (Tex. Crim. App. 1974). If counsel is, in fact, engaging in a strategic move, he should make sure that the record adequately reflects his ploy. Cf. *Ex parte Ewing*, 570 S.W.2d 941, 943-47 (Tex. Crim. App. 1978) (sufficient for counsel to reply to court that trial strategy will become apparent later in trial).

129. See, e.g., *Jones v. Estelle*, 584 F.2d 687, 689-90 (5th Cir. 1978) (after self-defense theory destroyed, counsel not ineffective for recommending defendant consider state's plea bargain); *Cavett v. United States*, 545 F.2d 486, 487 (5th Cir. 1977) (counsel's advice within range of competence); *Bullard v. State*, 548 S.W.2d 13, 21 (Tex. Crim. App. 1977) (counsel not ineffective where he advises accused to enter guilty plea to avoid punishment as habitual offender but prosecution fails to prosecute on that basis).

130. See *Lee v. State*, 505 S.W.2d 816, 818-19 (Tex. Crim. App. 1974).

131. See generally *Finer, Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1083 (1973); *Gard, Ineffective Assistance of Counsel—Standards and Remedies*, 41 MO. L. REV. 483, 487-88 (1976). One example is the assessment of a jail term by a court despite an attorney's promise to his client of a probated sentence.

132. 532 S.W.2d 69 (Tex. Crim. App. 1975).

133. *Id.* at 71-72.

134. *Id.* at 72.

dissent, that the pleas were not induced by a guarantee of probation.¹³⁵ Though the contention was not advanced that trial counsel was incompetent in advising his clients to accept such a plea agreement, the defendants might justifiably complain of their "assistance" of counsel, as well as the entire criminal justice system.¹³⁶

It is, of course, well settled that a guilty plea is not subject to attack if entry was motivated by a desire to limit the possible penalty.¹³⁷ Further, counsel is not incompetent merely because he did not anticipate a judicial decision striking down or otherwise diminishing the maximum punishment the guilty plea was intended to avoid.¹³⁸ As the Supreme Court has noted:

We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.¹³⁹

A guilty plea constitutes a "grave and solemn act to be accepted only with care and discernment."¹⁴⁰ Accordingly, counsel who enters plea negotiations without understanding the facts and law applicable to the case is no less incompetent than counsel who, though equally ignorant of the law and facts of his case, stakes his client's liberty on an ill-fated attempt to try the case, not realizing

135. *Id.* at 72-74. Judge Roberts, in a strenuous dissent, urged the legislature to amend article 26.13 of the Code of Criminal Procedure to permit the withdrawal of guilty pleas, upon timely request, when the trial court rejects a plea bargain. *Id.* at 78-79 (Roberts, J., dissenting). The legislature apparently heard this plea for it amended the statute in exactly the manner Judge Roberts proposed. See 1979 Tex. Gen. Laws, ch. 524, § 1, at 1108; 1977 Tex. Gen. Laws, ch. 280, § 1, at 748.

136. Although misled by the prosecutor's fervent assurances of a probated sentence, trial counsel in this case arguably could be considered ineffective because he was unaware that, by law, a prosecutor's recommendations for punishment are not binding upon a trial court. *Cf. Hilliard v. Beto*, 465 F.2d 829, 832 (5th Cir. 1972) (defendant entitled to hearing on whether prosecution promised to recommend five years imprisonment and then stood silently as trial judge imposed life sentence).

137. See *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Brady v. United States*, 397 U.S. 742, 747 (1970); *Jones v. Estelle*, 584 F.2d 687, 689 (5th Cir. 1978); *Weaver v. Texas*, 474 F.2d 1135, 1138 (5th Cir.), *cert. denied*, 414 U.S. 1064 (1973).

138. *Brady v. United States*, 397 U.S. 742, 756-58 (1970).

139. *Id.* at 757.

140. *Id.* at 748.

that his own fatuity has already sealed the fate of his client.

D. *Particular Failings at Trial*

Appellate courts quickly point out that an accused is entitled to a "tolerably" fair trial, not a perfect one. Therefore, isolated failures to object or other acts within the realm of "trial strategy," which are later proven ill-advised, do not warrant a *per se* finding of incompetence.¹⁴¹ The appellate attitude has been succinctly stated by one jurist:

Trial lawyers occupy the realm of the here and now; they do not possess the luxury of a record to review, nor are they given time to formulate solutions to complex procedural or evidentiary issues in the midst of trial. The fact that another attorney may have pursued a different tactical course of trial is insufficient to support a finding of ineffective assistance of counsel.¹⁴²

Seldom, if ever, has an appellate court based a finding of incompetency upon a single, specific failing of trial counsel such as cross-examination of a witness or requesting a particular instruction. Only when a "dangerous combination" of such inactions demonstrates that an accused has suffered manifest prejudice will a reviewing court vitiate a conviction on the basis of incompetent management and control of the defense.

1. *Pretrial Motions*. "In a system of criminal justice in which the loser is the one who makes the most mistakes, a thorough knowledge of [pretrial] motion practice is required."¹⁴³ The same writer also insists that "effective discovery practice is a must."¹⁴⁴ Certainly, fruits of pretrial advocacy contribute significantly to preparation for trial. Neglecting an opportunity to stock the larder may well presage deficient representation at trial. Nevertheless, effective pretrial practice is rarely encouraged through judicial determination that faulty preparation was harmful to an accused.

The failure to file a motion to quash,¹⁴⁵ a motion to sever,¹⁴⁶ a

141. See *Goodrum v. Beto*, 296 F. Supp. 710, 714 (S.D. Tex. 1969); *Ewing v. State*, 549 S.W.2d 392, 395 (Tex. Crim. App. 1977).

142. *Ewing v. State*, 549 S.W.2d 392, 395 (Tex. Crim. App. 1977) (Odom, J.).

143. R. MOSES, *CRIMINAL DEFENSE SOURCEBOOK* § 12.01, at 335 (1974).

144. *Id.* § 7.01, at 175.

145. See *Coble v. State*, 501 S.W.2d 344, 345 (Tex. Crim. App. 1973) (ineffectiveness not shown—no error in indictment shown by defendant); *Hayes v. State*, 484 S.W.2d 922,

motion for continuance,¹⁴⁷ a motion for an examining trial,¹⁴⁸ a motion to transcribe the voir dire examination and jury arguments,¹⁴⁹ or a motion to contest the reliability of an in court identification¹⁵⁰ have all been held, without more, to be insufficient to support a finding of ineffective assistance of counsel. Though greater significance is attached to absence of a motion to suppress, especially when the evidence at issue is a confession,¹⁵¹ the Supreme Court has held that if such a motion would have been fruitless, given the patent admissibility of the questioned evidence, failure to file it does not constitute ineffective assistance of counsel.¹⁵² Court-appointed counsel is ineffective if he does not file the required motion for probation, then compounds that shortcoming by not presenting a motion to suppress when there is an extremely close question on admissibility of contraband.¹⁵³ Similarly, an inexplicable failure to move to suppress a quantity of heroin that the evidence shows the accused never handled, combined with a general lack of pretrial preparation, reflects incompetence.¹⁵⁴ An obvi-

925 (Tex. Crim. App. 1972) ("accused did not point out in what respect the indictment was faulty and therefore subject to attack"); *cf.* *Williams v. Beto*, 354 F.2d 698, 703 (5th Cir. 1965) (if indictment was fatally defective it could have been raised on appeal to the great advantage of defendant who waived appeal).

146. *See United States v. Garza*, 563 F.2d 1164, 1166 (5th Cir. 1977) (when severance is not required as a matter of law, failure to seek such relief no more than a mistaken tactical decision); *Wages v. State*, 573 S.W.2d 804, 806 (Tex. Crim. App. 1978) (aggregation of offenses created one offense not subject to severance).

147. *See Boykin v. State*, 487 S.W.2d 128, 130-31 (Tex. Crim. App. 1972) (failure to advise accused that motion for continuance had to be sworn to was harmless where trial court nonetheless considered motion on its merits).

148. *See Erdelyan v. State*, 481 S.W.2d 843, 846 (Tex. Crim. App. 1972).

149. *See Boykin v. State*, 487 S.W.2d 128, 131 (Tex. Crim. App. 1972) (accused may not complain when he makes no timely request for a transcription although such a request is primarily counsel's duty); *Hayes v. State*, 484 S.W.2d 922, 925 (Tex. Crim. App. 1972) (no showing of any improper jury argument).

150. *See, e.g., Boykin v. State*, 487 S.W.2d 128, 131 (Tex. Crim. App. 1972) (harmless error where there is uncontradicted eye-witness testimony on accused's participation in the offense); *Long v. State*, 502 S.W.2d 139, 141 (Tex. Crim. App. 1973) (no indication that photographic identification was suggestive); *Jones v. State*, 458 S.W.2d 62, 63 (Tex. Crim. App. 1970) ("evidence clearly showed pretrial identification was not suggestive").

151. *See, e.g., Smotherman v. Beto*, 276 F. Supp. 579, 587 (N.D. Tex. 1967); *Hunnicut v. State*, 531 S.W.2d 618, 624 (Tex. Crim. App. 1976); *Nichols v. State*, 500 S.W.2d 158, 159 (Tex. Crim. App. 1973).

152. *Chambers v. Maroney*, 399 U.S. 42, 54 (1970).

153. *Santillan v. Beto*, 371 F. Supp. 194, 196-97 (S.D. Tex. 1974).

154. *King v. Beto*, 305 F. Supp. 636, 637 (S.D. Tex. 1969), *aff'd*, 429 F.2d 221 (5th Cir. 1970).

ous handicap for an appellant advancing the contention that his attorney was negligent in failing to suppress incompetent evidence is the notion that admitting such evidence may very well have been harmless in light of other evidence introduced establishing his guilt.¹⁵⁵

2. *Failure to Make an Opening Statement.* The opening statement creates a first impression in the minds of the judge and the jury which may be difficult, if not impossible, to dispel at a later time. "It is a rare case, indeed, where the defendant may feel that it is to his advantage not to speak at this crucial point of the case."¹⁵⁶ In spite of the tactical significance of making an opening statement, failure of counsel to do so generally has been held not to indicate incompetence.¹⁵⁷ The rationale for so holding appears to be that an opening statement is an inopportune time for defense counsel "to reveal the weak hand that he ha[s] to play."¹⁵⁸

3. *Failure to Cross-Examine Adverse Witnesses.* One thoughtful scholar has underscored the importance of cross-examination: "There is never a cause contested, the result of which is not mainly dependent upon the skill with which the advocate conducts his cross-examination."¹⁵⁹ Almost always an integral element of defense, cross-examination in many cases constitutes the only defensive mechanism. Yet, despite the critical nature of cross-examination, courts have generally found that pretermittting it is, without more, insufficient to indicate incompetence.¹⁶⁰ It has been held, however, that where failure to cross-examine adverse witnesses is part and parcel of a lackluster performance, the accused was without competent counsel.¹⁶¹

Appellate courts are reluctant to measure performance by extent

155. See *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970). See generally *Harrington v. California*, 395 U.S. 250, 254 (1969); *Chapman v. California*, 386 U.S. 18, 22 (1967).

156. F. BAILEY & H. ROTHBLATT, *SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS* § 112, at 113 (1971).

157. See *Williams v. Beto*, 354 F.2d 698, 703 (5th Cir. 1965).

158. *Id.* at 703.

159. H. REED, *CONDUCT OF LAWSUITS* 277 (2d ed. 1912); cf. F. BAILEY & H. ROTHBLATT, *SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS* § 167 (1971) (general objectives of cross-examination).

160. See, e.g., *Rockwood v. State*, 524 S.W.2d 292, 293 (Tex. Crim. App. 1975); *Long v. State*, 502 S.W.2d 139, 141-42 (Tex. Crim. App. 1973); *Chatman v. State*, 478 S.W.2d 91, 92 (Tex. Crim. App. 1972).

161. *Ex parte Stauts*, 482 S.W.2d 638, 640 (Tex. Crim. App. 1972).

of cross-examination because strategic considerations often militate its scope. "It is hard for a cross-examiner to win his case on cross-examination; it is easy for him to lose it," one distinguished commentator has noted.¹⁶² Consequently, where the defense is alibi, trial counsel is wise in not cross-examining a witness who had not identified the defendant as being at the scene of the crime, thereby possibly running the risk of eliciting incriminating evidence.¹⁶³ Another tactical consideration in not cross-examining adverse witnesses is endemic to sex offense trials. The rationale advanced by criminal defense lawyers and sanctioned by appellate courts is that a vigorous cross-examination of the prosecutrix often antagonizes the jury and creates undue sympathy for the victim.¹⁶⁴ This view, however, ignores a fundamental postulate that defense counsel is bound by professional duty to present all available evidence supportive of his client's position and to contest with vigor all adverse evidence and views.¹⁶⁵ Thus, counsel who foregoes the one, and very likely only, opportunity to challenge credibility of an adverse witness, whose testimony has damaged his client, may do more to ease the prosecution's burden than to advance the cause of his client.¹⁶⁶ Given stoutly competing considerations, hindsight judgment as to effectiveness of counsel on the basis of his cross-examination of adverse witnesses is risky business.

4. *Failure to Object to Incompetent Evidence.* While an isolated failure to object to inadmissible evidence does not ordinarily reveal ineffectiveness,¹⁶⁷ a finding of incompetency has been pre-

162. C. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 30, at 61 (2d ed. 1972). As one jurist has noted somewhat humorously, "More cross-examinations are suicidal than homicidal." F. WELLMAN, *THE ART OF CROSS-EXAMINATION* 216 (4th ed. 1978).

163. *Long v. State*, 502 S.W.2d 139, 141-42 (Tex. Crim. App. 1973).

164. *See Rockwood v. State*, 524 S.W.2d 292, 293 (Tex. Crim. App. 1975). *See generally* F. BAILEY & H. ROTHBLATT, *SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS* § 205, at 190 (1971).

165. *See Thomas v. State*, 550 S.W.2d 64, 68 (Tex. Crim. App. 1977), *quoting* *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973). *See generally* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION* (Approved Draft 1971).

166. *Cf.* A. CORNELIUS, *CROSS-EXAMINATION OF WITNESSES* 38-39 (1929) ("cross-examination is like a game of chess; you cannot hope to win it unless you understand the full value of every move").

167. *See, e.g., Salinas v. United States*, 439 F.2d 376, 381 (5th Cir. 1971); *Ewing v. State*, 549 S.W.2d 392, 395 (Tex. Crim. App. 1977); *Long v. State*, 502 S.W.2d 139, 141 (Tex. Crim. App. 1973).

mised on failure to object to repeated instances of improper jury argument,¹⁶⁸ reiterated references to extraneous offenses¹⁶⁹ or juvenile offenses,¹⁷⁰ patently coerced confessions,¹⁷¹ and evidence seized pursuant to a warrantless search.¹⁷² Similarly, failure to object to the introduction of prior, void or otherwise irregular, felony convictions in a habitual criminal prosecution has been held incompetence.¹⁷³

Callaway v. State,¹⁷⁴ a recent decision from the Court of Criminal Appeals, depicts the havoc wreaked upon a defendant during his competency hearing by court-appointed counsel's almost total failure to object to constant instances of improper argument and highly incompetent and prejudicial testimony.¹⁷⁵ Recognizing his own inexperience, defense counsel requested, on at least two separate occasions, that the trial court appoint a more qualified attorney to assist him.¹⁷⁶ Although the prosecution joined in the request, the trial court inexplicably denied it, implicitly sanctioning both obvious incompetence and improper prosecutorial conduct.¹⁷⁷

Though it is well settled that an untimely protest to improper admission of extraneous offenses waives such objection¹⁷⁸ and will

168. See *Callaway v. State*, 594 S.W.2d 440, 444-45 (Tex. Crim. App. 1980).

169. See *Cude v. State*, 588 S.W.2d 895, 897-98 (Tex. Crim. App. 1979).

170. See *Ruth v. State*, 522 S.W.2d 517, 519 (Tex. Crim. App. 1975) (Morrison, J., concurring).

171. See *Smotherman v. Beto*, 276 F. Supp. 579, 589 (N.D. Tex. 1967).

172. See *Ex parte Stauts*, 482 S.W.2d 638, 639 (Tex. Crim. App. 1972).

173. See *McDonald v. Estelle*, 536 F.2d 667, 670 (5th Cir. 1976) (per curiam) (prior conviction void given lack of counsel at that trial); *Ex parte Scott*, 581 S.W.2d 181, 182 (Tex. Crim. App. 1979) (one prior felony conviction not final).

174. 594 S.W.2d 440 (Tex. Crim. App. 1980).

175. *Id.* at 441-43. The following excerpt from the prosecutor's closing argument amply reveals its objectionable quality:

In fact, he does not have to stand trial if the accused is found to be incompetent. He does not have to go back down to Huntsville again, he doesn't have to even go to a hospital, despite the fact that he says that he probably does. He has had good results there before, he has been able to escape before, for example, and I think you have heard testimony concerning what kind of psychiatry we have got there.

Id. at 441.

176. *Id.* at 444.

177. *Id.* at 444; cf. *Fitzgerald v. Estelle*, 505 F.2d 1334, 1337 (5th Cir. 1975) (en banc) (sufficient state action for federal habeas corpus if trial judge or prosecutor knows counsel incompetent and fails to remedy).

178. *Ex parte Ewing*, 570 S.W.2d 941, 948 (Tex. Crim. App. 1978); see *Hanney v. State*, 472 S.W.2d 776, 777-78 (Tex. Crim. App. 1971); *Boatwright v. State*, 472 S.W.2d 765, 770 (Tex. Crim. App. 1971).

not, without more, support a finding of ineffectiveness,¹⁷⁹ exceptions do exist. In *Cude v. State*¹⁸⁰ the prosecutor was permitted, without objection, to cross-examine the accused's mother regarding a trio of extraneous offenses as well as evidence of past robberies and arrests and planned future robberies.¹⁸¹ After comparing the number of extraneous and prejudicial references made before the jury in this case to an even greater number in *Ruth v. State*,¹⁸² the court noted that "it would be bad law to construe the high water mark of an extreme fact situation to be the minimum threshold for reversible error."¹⁸³

Abject failure of counsel to ascertain the facts surrounding his client's "confession" and his silent acquiescence to its admission impelled a finding of manifest incompetence in *Smotherman v. Beto*.¹⁸⁴ The defendant was subjected to intensive interrogation by law enforcement officers for a five day period, physically assaulted by at least one officer, prohibited from washing, shaving, or taking his emphysema and asthma medication, and was not brought before a magistrate.¹⁸⁵ Although the accused eventually furnished authorities with a confession only because of his weakened condition and desire to get out of jail, counsel never objected to the confession nor inquired of the officer who took it about the circumstances.¹⁸⁶ Counsel admitted he did not challenge the confession because he was unaware of its existence and the circumstances surrounding its acquisition because the accused failed to inform him of them.¹⁸⁷ Seemingly commiserating with counsel for his marked inexperience at the time of trial, the court found that he was prepared to do little more than "stand still" given his utter lack of preparation for trial of the case.¹⁸⁸

179. See *Ex parte Ewing*, 570 S.W.2d 941, 948 (Tex. Crim. App. 1978).

180. 588 S.W.2d 895 (Tex. Crim. App. 1979).

181. *Id.* at 897.

182. 522 S.W.2d 517, 519 (Tex. Crim. App. 1975) (repeated references to record as juvenile without objection).

183. *Cude v. State*, 588 S.W.2d 895, 897-98 (Tex. Crim. App. 1979).

184. 276 F. Supp. 579, 590 (N.D. Tex. 1967).

185. *Id.* at 582; cf. TEX. CODE CRIM. PRO. ANN. art. 15.17 (Vernon Supp. 1980) (arresting officer shall bring accused before magistrate "without unnecessary delay").

186. *Smotherman v. Beto*, 276 F. Supp. 579, 584, 588 (N.D. Tex. 1967).

187. *Id.* at 588. Counsel apparently did not question the confession since the defense was insanity which meant that accused did not dispute that the act alleged did in fact take place and only challenged penal responsibility for its commission. *Id.* at 584.

188. *Id.* at 588.

Though counsel has been found ineffective for failing to object to fruits of a warrantless search of his client's residence,¹⁸⁹ or to the admission of heroin not shown to have been handled by his client,¹⁹⁰ improper admission of tangible evidence is often found harmless when there is no objection¹⁹¹ or objection is incorrect or imprecise.¹⁹² Courts quickly discount a lack of objection at trial, attributing it to "trial strategy" or other esoteric motives.¹⁹³ One court has even gone as far as to praise passivity: "Defense counsel is to be complimented for remembering that he who often objects, only to have his objections over-ruled, risks alienating the jury even if he does not test the patience of the presiding judge."¹⁹⁴ Regardless of the "benefits" of standing mute while objectionable evidence is offered, a lawyer who fails to make timely and precise objection when a prosecutor is running roughshod over his client's rights may be laying groundwork for a claim of incompetency. Even if inaction does not amount to ineffectiveness at trial, his entitlement on appeal will be met with a staid pronouncement that "nothing is preserved for review."¹⁹⁵ Absent fundamental error,

189. See *Ex parte* Stauts, 482 S.W.2d 638, 640 (Tex. Crim. App. 1972).

190. *King v. Beto*, 305 F. Supp. 636, 638 (S.D. Tex. 1969), *aff'd*, 429 F.2d 221 (5th Cir. 1970).

191. See *Loftis v. Estelle*, 515 F.2d 872, 875-76 (5th Cir. 1975); *cf. Miller v. State*, 458 S.W.2d 680, 684 n.3 (Tex. Crim. App. 1970) (prior objection, hearing, and counsel's exception to the court sufficient).

192. See *Hunnicut v. State*, 531 S.W.2d 618, 625 (Tex. Crim. App. 1976) (general objection to legality of search); *Gondek v. State*, 491 S.W.2d 676, 677 (Tex. Crim. App. 1973) (incorrect objection to material found in defendant's wallet).

193. See, e.g., *Williams v. Beto*, 354 F.2d 698, 703 (5th Cir. 1965); *Ex parte Ewing*, 570 S.W.2d 941, 945 (Tex. Crim. App. 1978); *Paul v. State*, 544 S.W.2d 668, 672 (Tex. Crim. App. 1976).

194. *Williams v. Beto*, 354 F.2d 698, 703 (5th Cir. 1965).

195. The Texas Court of Criminal Appeals has developed its own "check-list" regarding preservation of error in the trial court. Failure to adhere to an obligatory litany of procedural steps will result in summary disposition of a ground of error, regardless of its intrinsic merit.

1. The objection, to be considered timely must be made at the first opportunity, as soon as the ground of objection becomes apparent. *Garcia v. State*, 573 S.W.2d 12, 16 (Tex. Crim. App. 1978).

2. The objection must be specific enough to inform the trial court of its basis and allow the court an opportunity to rule on it as well as affording opposing counsel an opportunity to remove the objection or supply other testimony. *Zillender v. State*, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977).

3. After an objection is proffered, defense counsel must press the court to an adverse conclusory ruling or nothing is preserved for review. *Cain v. State*, 549 S.W.2d 707, 716 (Tex. Crim. App. 1977).

success on appeal can hardly be expected.¹⁹⁶

5. *Failure to Raise Defenses.* An attorney has a professional duty to present all available evidence and arguments to support the defense of his client and to contest with vigor all adverse evidence and views.¹⁹⁷ It follows, then, that courts view failure of counsel to raise any and all valid defenses as a most serious shortcoming, tending to support a finding of incompetency.¹⁹⁸ Two most common examples are defenses of insanity¹⁹⁹ and alibi.²⁰⁰

4. If the objection is sustained, defense counsel must ask for an instruction to disregard the inadmissible evidence or the reviewing court will find that counsel received all the relief he requested. *Broussard v. State*, 505 S.W.2d 282, 286 (Tex. Crim. App. 1974).

5. If the objection is sustained and a curative instruction is given, defense counsel must ask for a mistrial or again he will be deemed to have received all of the relief requested. *Gleff v. State*, 509 S.W.2d 323, 325 (Tex. Crim. App. 1974).

6. If an objection is overruled, it must be renewed whenever the prosecution continues to introduce similar inadmissible evidence or the initial objection might be deemed to have been waived. *Jackson v. State*, 548 S.W.2d 685, 694 (Tex. Crim. App. 1977).

196. Article 40.09(13) of the Texas Code of Criminal Procedure, authorizing the Court of Criminal Appeals to review unassigned error "in the interest of justice," expands the former self-imposed rule that only unassigned error which is "fundamental" may be considered. See *Green v. State*, 490 S.W.2d 826, 827 (Tex. Crim. App. 1973) (applying article 40.09(13)); *Bush v. Partlow*, 258 S.W. 509, 515 (Tex. Civ. App.—Beaumont 1924, no writ) (applying former rule); TEX. CODE CRIM. PRO. ANN. art. 40.09(13) (Vernon 1979). At best an amorphous concept, it was susceptible to discretionary application, see *Stephens v. State*, 145 Tex. Crim. 100, 106-07, 165 S.W.2d 721, 725 (1942) (on motion for rehearing), and still is. See *Cleland v. State*, 575 S.W.2d 296, 299-300 (Tex. Crim. App. 1978) (Douglas, J., dissenting on rehearing). Thus, in *Ritchy v. State*, 407 S.W.2d 506 (Tex. Crim. App. 1966), the court considered as unassigned error a trial objection to certain testimony but found that admitting it was not error, fundamental or otherwise. *Id.* at 506-07.

197. *Thomas v. State*, 550 S.W.2d 64, 68 (Tex. Crim. App. 1977), quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973).

198. The failure, however, to inform an accused who pleads guilty of an arguable defense, which is later proven invalid, does not constitute ineffective assistance of counsel. See *Sand v. Estelle*, 551 F.2d 49, 51 (5th Cir. 1977).

199. See *United States v. Fessel*, 531 F.2d 1275, 1279 (5th Cir. 1976); *Brooks v. Texas*, 381 F.2d 619, 620, 622 (5th Cir. 1967); cf. *Hintz v. Beto*, 379 F.2d 937, 941-42 (5th Cir. 1967) (court refusal to grant continuance to obtain psychiatric testimony held to render counsel "ineffective"). But see *Hogan v. Estelle*, 417 F. Supp. 9, 11 (N.D. Tex. 1975), *aff'd*, 537 F.2d 238 (5th Cir. 1976); *Vessels v. Estelle*, 376 F. Supp. 1303, 1308 (S.D. Tex. 1973), *aff'd*, 494 F.2d 1295 (5th Cir. 1974); *Faz v. State*, 510 S.W.2d 922, 926 (Tex. Crim. App. 1974); *Coble v. State*, 501 S.W.2d 344, 345 (Tex. Crim. App. 1973).

200. See *Gomez v. Beto*, 462 F.2d 596, 597 (5th Cir. 1972). But see *Thomas v. Estelle*, 588 F.2d 170, 171 (5th Cir. 1979); *Harris v. Estelle*, 487 F.2d 1293, 1299 (5th Cir. 1974); *Fitts v. United States*, 406 F.2d 518, 519 (5th Cir. 1959); *Green v. Beto*, 324 F. Supp. 797, 799 (N.D. Tex. 1971); *Davis v. State*, 505 S.W.2d 800, 802 (Tex. Crim. App. 1974); *Reed v. State*, 477 S.W.2d 904, 905 (Tex. Crim. App. 1972); *Martin v. State*, 460 S.W.2d 919, 921 (Tex.

The Fifth Circuit has repeatedly stressed the "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel."²⁰¹ Often a failure to raise an insanity defense, indeed any viable defense, is caused by unfamiliarity with or inability adequately to investigate the facts of the case.²⁰² Yet it is clear that when an insanity defense is appropriate and the accused lacks funds to secure private psychiatric assistance, it is the duty of counsel to seek such services at public expense.²⁰³ Neglecting to seek a court-appointed psychiatrist, as reflected in the holding of *United States v. Fessel*,²⁰⁴ will support a finding of ineffectiveness, especially when evidence of guilt is virtually uncontested and the only issue for consideration is sanity of the accused at the time of the offense.²⁰⁵

When an insanity defense is not asserted because the trial court did not give counsel adequate time to study results of an examination conducted by a court-appointed psychiatrist, an accused has been denied his right to effective assistance of counsel.²⁰⁶ In *Hintz v. Beto*²⁰⁷ the trial court denied a continuance although defense counsel did not receive results of a psychiatric examination of the defendant, who had a long history of mental instability, until the trial was about to commence.²⁰⁸ The absence of an issue on insanity was attributed to an utter lack of time adequately to prepare and assert an insanity defense:

Time for preparation, where mental competency is in question and there is a fair factual basis as here for the question, would at least include a reasonable time within which to have a defendant examined, and for preparation of such defense as might be based on the facts developed by the examination.²⁰⁹

Crim. App. 1970); *Ballew v. State*, 451 S.W.2d 916, 917 (Tex. Crim. App. 1970).

201. *United States v. Fessel*, 531 F.2d 1275, 1279 (5th Cir. 1976) (quoting *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974)).

202. See notes 61-89 *supra* and accompanying text.

203. *United States v. Fessel*, 531 F.2d 1275, 1279 (5th Cir. 1976); see *United States v. Edwards*, 488 F.2d 1154, 1162 n.6 (5th Cir. 1974) (citing *United States v. Chavis*, 476 F.2d 1137, 1141-42 (D.C. Cir. 1973)).

204. 531 F.2d 1275 (5th Cir. 1976).

205. *Id.* at 1279.

206. See *Hintz v. Beto*, 379 F.2d 937, 941-42 (5th Cir. 1967).

207. 379 F.2d 937 (5th Cir. 1967).

208. *Id.* at 939, 941-42.

209. *Id.* at 941.

Though an insanity defense may well be suggested by the facts of the case, competency of counsel who does not raise it is not implicated when the accused specifically requests that it not be presented.²¹⁰ Similarly, ineffectiveness is not shown if non-assertion of the defense is a strategical move after counsel forms an impression that it would hurt his client's case much more than help it.²¹¹

Ignoring a defense of alibi has, in some instances, been found to indicate incompetence of counsel,²¹² but the incidence is not as high as failure to assert an insanity defense. Appellate courts are much more amenable to finding that failure to subpoena and call alibi witnesses to the stand is a question of trial strategy.²¹³ As one jurist has pointed out: "the 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."²¹⁴ Thus, failure to subpoena purported alibi witnesses does not impugn otherwise competent counsel when the witnesses have advised him that they could not account for the whereabouts of the accused at the time of the offense or in any way support an alibi defense,²¹⁵ or when the accused admits that he did not know the location of the witnesses at the time of trial.²¹⁶

*Gomez v. Beto*²¹⁷ amply illustrates how incompetence may be found because a defense of alibi was not asserted. The accused testified at an evidentiary hearing in federal district court that he was in San Antonio on the day he was alleged to have committed an

210. See *Hogan v. Estelle*, 417 F. Supp. 9, 11 (N.D. Tex. 1975), *aff'd*, 537 F.2d 238 (5th Cir. 1976).

211. See *Daugherty v. Beto*, 388 F.2d 810, 813 (5th Cir. 1967); *Vessels v. Estelle*, 376 F. Supp. 1303, 1308 (S.D. Tex. 1973), *aff'd*, 494 F.2d 1295 (5th Cir. 1974); *Faz v. State*, 510 S.W.2d 922, 926 (Tex. Crim. App. 1974); *Coble v. State*, 501 S.W.2d 344, 345 (Tex. Crim. App. 1973); *Ex parte Parker*, 485 S.W.2d 585, 588 (Tex. Crim. App. 1972).

212. See *Gomez v. Beto*, 462 F.2d 596, 597 (5th Cir. 1972).

213. *Green v. Beto*, 324 F. Supp. 797, 799 (N.D. Tex. 1971); see *Davis v. State*, 505 S.W.2d 800, 802 (Tex. Crim. App. 1974).

214. *Green v. Beto*, 324 F. Supp. 797, 799 (N.D. Tex. 1971).

215. See, e.g., *Thomas v. Estelle*, 588 F.2d 170, 171 (5th Cir. 1979); *Harris v. Estelle*, 487 F.2d 1293, 1299 (5th Cir. 1974); *Fitts v. United States*, 406 F.2d 518, 519 (5th Cir. 1969); *Green v. Beto*, 324 F. Supp. 797, 799 (N.D. Tex. 1971); *Davis v. State*, 505 S.W.2d 800, 802 (Tex. Crim. App. 1974).

216. See *Martin v. State*, 460 S.W.2d 919, 921 (Tex. Crim. App. 1970).

217. 426 F.2d 596 (5th Cir. 1972).

offense in Houston.²¹⁸ Though he gave one of his lawyers names of alibi witnesses who lived in San Antonio, counsel not only refused to subpoena them but also failed even to investigate an alibi defense, although his client was facing a mandatory sentence of life imprisonment as an habitual criminal.²¹⁹ Three alibi witnesses, including the defendant's father, testified that the accused was in San Antonio on the date of the offense.²²⁰ The Fifth Circuit tersely noted alibi was the *only* possible defense and trial counsel's failure even to investigate the facts of the defense.²²¹ Predictably, the court remarked that "it can hardly be said that [this] defendant has had the effective assistance of counsel."²²²

Trial counsel is not deemed ineffective for failing to assert the invalidity of a statute previously held constitutional²²³ or for not having defendant testify in order to claim lack of intent to commit a given offense.²²⁴ Counsel is not ineffective for employing trial strategy subsequently precluding his client from defense of entrapment,²²⁵ or for failing to raise an issue of self-defense when the accused had not demonstrated there were any witnesses prepared to support his position, and the evidence did not otherwise raise the issue.²²⁶

6. *Failure to Present Closing Argument.* "There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial."²²⁷ As one noted commentator has opined:

Summation is the finishing touch, your final opportunity to convince the jury of your client's innocence. A well-presented case can be lost by a listless summation. A spirited, effective summation can change a lost cause into an acquittal. You must make the most of this opportunity—your case might well depend upon it.²²⁸

218. *Id.* at 597.

219. *Id.* at 597.

220. *Id.* at 597.

221. *Id.* at 597.

222. *Id.* at 597.

223. *Lee v. State*, 505 S.W.2d 816, 818 (Tex. Crim. App. 1974) (sodomy statute).

224. *United States v. Kelley*, 559 F.2d 399, 400 (5th Cir. 1977).

225. *See United States v. Rodriguez*, 498 F.2d 302, 309 (5th Cir. 1974).

226. *See Patton v. State*, 489 S.W.2d 906, 907 (Tex. Crim. App. 1973); *Williams v. State*, 477 S.W.2d 24, 27 (Tex. Crim. App. 1972).

227. *Herring v. New York*, 422 U.S. 853, 858 (1975).

228. F. BAILEY & H. ROTHBLATT, *SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS* § 263, at

The manifest importance of defense counsel seizing the opportunity to address the jury or the judge at the close of the evidence, tactically and otherwise, is reflected in a holding by the Supreme Court that a New York statute purporting to grant a judge in a nonjury trial the power to deny the right to make a summation is unconstitutional.²²⁹ The Court of Criminal Appeals has echoed this sentiment only recently by holding that the refusal of a trial judge to permit closing argument on the defendant's guilt of a burglary charge and whether to revoke probation denies a defendant the effective assistance of counsel.²³⁰ Nevertheless, neither the Court of Criminal Appeals nor the Fifth Circuit has found counsel incompetent for merely failing to present closing argument on behalf of his client. In one such case the Court of Criminal Appeals paused only to note that a review of the record demonstrated that premitting a closing argument was simply "trial strategy."²³¹

7. *Failure to Request Instructions.* Another specific dereliction, which so far has not produced a finding of incompetency, is acquiescence of trial counsel, by neither requesting particular instructions nor voicing objection to those instructions given, in the charge of the trial court to the jury. The reasoning employed in dismissing such claims of ineffectiveness is that failure to request instructions or offer objections is, again, a matter of trial strategy which the appellate court will not examine in hindsight.²³² Another

229 (1971).

229. *Herring v. New York*, 422 U.S. 853, 858 n.8 (1975). The Court stressed the importance of closing argument in a criminal proceeding by elucidating just what purposes it serves.

It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.

Id. at 862.

230. *Ruedas v. State*, 586 S.W.2d 520, 523-24 (Tex. Crim. App. 1979). In Texas the rule is longstanding. See *Anselin v. State*, 72 Tex. Crim. 17, 18, 160 S.W. 713, 714 (1913).

231. *Ransonette v. State*, 550 S.W.2d 36, 41 (Tex. Crim. App. 1976). Indeed, there appears to be no instance other than *Ransonette* in which counsel elected not to make a closing argument, at least where such a waiver was assigned as evidence of ineffective assistance of counsel.

232. See, e.g., *United States v. Mancusco*, 423 F.2d 23, 29 (5th Cir. 1970) (insanity instruction); *Jackson v. State*, 491 S.W.2d 155, 156 (Tex. Crim. App. 1973) (self-defense in-

school of thought finds that in the absence of fundamental error, failure to request a particular charge or to object to one that is given waives any error that is later claimed.²³³ It has been suggested that failing to request a charge on a lesser included offense should support a finding of ineffectiveness if there is evidence that would justify a conviction for the lesser included offense had it been submitted on timely request.²³⁴ It is doubtful, however, that the Court of Criminal Appeals or the Fifth Circuit would subscribe to this notion, given their demonstrated unwillingness to grant such relief.

8. *Conflicts of Interest.* If an appointed counsel has an actual conflict of interest, a defendant is denied his right to the effective assistance of counsel without a showing of specific prejudice.²³⁵ But when counsel is retained there is no ineffectiveness on such grounds unless his representation is fettered or restrained by his commitments to others, and such commitments were unknown to the defendant.²³⁶ As the Fifth Circuit has pointed out:

The Constitution assures a defendant effective representation by counsel whether the attorney is one of his own choosing or court-appointed. Such representation is lacking, however, if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents—as a vigorous advocate having the single aim of acquittal by all means fair and honorable—are hobbled or fettered or restrained by commitments to others.²³⁷

struction); *Fuller v. State*, 423 S.W.2d 924, 927 (Tex. Crim. App. 1968) (insanity instruction).

233. See *Williams v. State*, 535 S.W.2d 352, 354 (Tex. Crim. App. 1976) (charge authorized alternative mode of conviction); *Hunnicut v. State*, 531 S.W.2d 618, 625 (Tex. Crim. App. 1976); *Thompson v. State*, 493 S.W.2d 913, 917 (Tex. Crim. App. 1971), *vacated on other grounds*, 410 U.S. 950 (1973); *Trotter v. State*, 471 S.W.2d 822, 824 (Tex. Crim. App. 1971); *Valdez v. State*, 450 S.W.2d 624, 625 (Tex. Crim. App. 1970).

234. See *Finer, Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1108 (1973).

235. See *Glasser v. United States*, 315 U.S. 60, 76 (1942); *Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974); *Porter v. United States*, 298 F.2d 461, 463-64 (5th Cir. 1962); *Ex parte Spain*, 589 S.W.2d 132, 134 (Tex. Crim. App. 1979); *Harrison v. State*, 552 S.W.2d 151, 153 (Tex. Crim. App. 1977); *Stutes v. State*, 530 S.W.2d 309, 313 (Tex. Crim. App. 1975).

236. See *Randazzo v. United States*, 339 F.2d 79, 81 (5th Cir. 1965); *Ex parte Alaniz*, 583 S.W.2d 380, 383 (Tex. Crim. App. 1979); *Pete v. State*, 533 S.W.2d 808, 811 (Tex. Crim. App. 1976); *Stutes v. State*, 530 S.W.2d 309, 313 (Tex. Crim. App. 1975).

237. *Porter v. United States*, 298 F.2d 461, 463 (5th Cir. 1962).

The seminal opinion in this area is *Glasser v. United States*,²³⁸ which involved a conspiracy trial of three defendants, two of whom were represented by the same counsel.²³⁹ Defendant Glasser contended that because of this dual representation his counsel not only declined to cross-examine a witness adverse to Glasser in order to protect his other client, but also failed to object to hearsay testimony for fear it would leave the jury with an impression that the testimony was true as to the other codefendant.²⁴⁰ The Court found that joint representation deprived Glasser of effective assistance of counsel even without demonstration of any specific prejudice flowing from the dual representation: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."²⁴¹ Concomitantly, an accused is denied effective assistance of counsel when his court-appointed attorney, in unrelated civil litigation, was also representing a principal witness for the prosecution who happened to be the victim of the offense for which the accused stood indicted.²⁴² Similarly, a defendant is denied not only his sixth amendment right to effective assistance of counsel but also due process where the prosecutor who filed a motion to revoke probation and who represented the State at the revocation hearing had initially represented the accused when he pleaded guilty to the primary offense.²⁴³ A conflict of interest has also been held to warrant striking the appearance of counsel on appeal when prejudice might otherwise result to the accused.²⁴⁴

In *Ex parte Alaniz*²⁴⁵ the Court of Criminal Appeals pointed out that in the context of a potential conflict of interest there can be no strategic or tactical benefit in withholding exculpatory evidence from a jury when counsel represents two defendants.²⁴⁶ Though the defendant in *Alaniz* was indicted for and convicted of unlawful possession of marihuana, his codefendant had written an exculpa-

238. 315 U.S. 60 (1942).

239. *See id.* at 68-70.

240. *Id.* at 72-73.

241. *Id.* at 76.

242. *Castillo v. Estelle*, 504 F.2d 1243, 1244 (5th Cir. 1974).

243. *Ex parte Spain*, 589 S.W.2d 132, 134 (Tex. Crim. App. 1979).

244. *Randazzo v. United States*, 339 F.2d 79, 81 (5th Cir. 1964).

245. 583 S.W.2d 380 (Tex. Crim. App. 1979).

246. *Id.* at 384.

tory letter to the prosecutor absolving Alaniz from any complicity in this offense.²⁴⁷ Alaniz' counsel was well aware of this letter but did not call or subpoena the codefendant who authored the letter.²⁴⁸ Finding that the accused was denied effective assistance of counsel, the court was satisfied that a conflict of interest stemming from dual representation of both defendants by the same counsel enjoined him from placing the letter in evidence or otherwise having his other fee-paying client testify for Alaniz.²⁴⁹ Counsel was, therefore, laboring under a conflict of interest hindering discharge of his legal obligations to his client to the extent that Alaniz was denied both due process of law and effective assistance of counsel.²⁵⁰

The Supreme Court addressed this issue recently and held that an attorney's request for appointment of separate counsel for multiple defendants, based upon his representations regarding a conflict of interest, should be granted, considering that he is in the best position professionally and ethically to determine when such a conflict exists or will probably develop at trial.²⁵¹ The American Bar Association in *Standards Relating to the Prosecution and Defense Function* had previously voiced these sentiments.²⁵²

9. *Other Potential Failings of Counsel.* The Fifth Circuit has held that ineffectiveness was evident when counsel did not object to his client being tried in handcuffs and jail whites; he was totally unprepared to present the only defense that could have been advanced.²⁵³ But the Supreme Court, in speaking to the handcuff/jail whites issue, held that a failure to object to being tried in jail garb or manacles waived any constitutional error in the absence of showing that the accused was compelled to stand trial so attired.²⁵⁴

In Texas the only time counsel is deemed to be incompetent as a matter of law is when he has been finally convicted and dis-

247. *Id.* at 381.

248. *Id.* at 381, 383.

249. *Id.* at 383.

250. *Id.* at 385.

251. *Holloway v. Arkansas*, 435 U.S. 475, 485 (1978).

252. See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION AND DEFENSE FUNCTION § 3.5, at 213-14 (Approved Draft 1971).

253. *Hernandez v. Beto*, 443 F.2d 634, 637 (5th Cir. 1971); *Brooks v. Texas*, 381 F.2d 619, 624-25 (5th Cir. 1967).

254. *Estelle v. Williams*, 425 U.S. 501, 512-13 (1976); *cf. Thomas v. Beto*, 474 F.2d 981, 983 (5th Cir. 1973) (jail garb at trial held harmless error in light of totality of evidence).

barred.²⁵⁵ Counsel whose felony conviction is on appeal and not under disbarment at the time he acts as attorney of record in a criminal proceeding is capable of rendering effective assistance of counsel to an accused who claims no other grounds for ineffectiveness.²⁵⁶ Concomitantly, under Texas law lawyers delinquent in paying their bar dues are still "practicing attorneys"; delinquency does not translate into deprivation of effective assistance of counsel.²⁵⁷ Though it might not be the wisest tactical choice available to counsel, the fact that his client underwent heroin withdrawal in the presence of the jury did not, without more, reflect incompetence.²⁵⁸

E. Appellate Incompetence

Professionally, a criminal defense lawyer is required to support his client's appeal to the best of his ability,²⁵⁹ vigorously acting as an advocate—not merely as *amicus curiae*.²⁶⁰ The watermark decision of *Anders v. California*²⁶¹ addressed the duty of court-appointed counsel to prosecute a first appeal from a criminal conviction, when that attorney had conscientiously determined that there was no merit to an indigent's appeal.²⁶² Court-appointed counsel in *Anders*, after examining the record on appeal, wrote the California district court of appeals, stating: "I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him. [H]e wishes to file a brief in this matter on his own behalf."²⁶³ The Supreme Court concluded that such a procedure "cannot be an adequate substitute for the right to full appellate review,"²⁶⁴ inasmuch as it does not provide full consideration and resolution of the matter by counsel acting in the role of

255. See *Curry v. Estelle*, 412 F. Supp. 198, 200 (S.D. Tex. 1975), *aff'd*, 531 F.2d 1260 (5th Cir. 1976).

256. *Id.* at 200.

257. *Beto v. Barfield*, 391 F.2d 275, 276 (5th Cir. 1968); see *Hill v. State*, 393 S.W.2d 901, 904-05 (Tex. Crim. App. 1965).

258. *Loftis v. Estelle*, 515 F.2d 872, 876 (5th Cir. 1975).

259. *Anders v. California*, 386 U.S. 738, 744 (1967).

260. *Entsminger v. Iowa*, 386 U.S. 748, 751 (1967).

261. 386 U.S. 738 (1967).

262. *Id.* at 744-45.

263. *Id.* at 742.

264. *Id.* at 742 (citing *Eskridge v. Washington State Board*, 357 U.S. 215, 216 (1958)).

an advocate.²⁶⁵ The Court pointed out that if appointed counsel, after a thorough examination of the appellate record, finds his client's appeal to be wholly frivolous, he should so advise the appellate court and request permission to withdraw.²⁶⁶ That request must be accompanied by a brief referring to anything in the record arguably supporting the appeal.²⁶⁷ A copy of counsel's brief should be furnished the indigent, and time allowed him to raise any points he chooses; the appellate court—and not counsel—then determines, after a detailed examination of the record, whether the appeal is in fact and law wholly frivolous.²⁶⁸

The Fifth Circuit²⁶⁹ and the Court of Criminal Appeals²⁷⁰ have developed their own internal operating procedures regarding frivolous appeals, designed to comport with the requisites of *Anders v. California*.²⁷¹ Writing in *High v. State*,²⁷² Judge Onion discussed the duty of both court-appointed appellate counsel and judges of the trial courts of Texas to ensure that the spirit and tenor of *Anders* are honored.

We now hold that in contested cases where "frivolous appeal" briefs are filed by court-appointed counsel the trial court should not accept and this court will not accept such briefs unless they discuss the evidence adduced at the trial, point out where pertinent testimony may be found in the record, refer to pages in the record where objections were made, the nature of the objection, the trial court's ruling, and discuss either why the trial court's ruling was correct or why the appellant was not harmed by the ruling of the court.²⁷³

It has been stated that the duty of a court-appointed attorney "does not stop when his client is found guilty or when sentence is pronounced. If the right to counsel is to have substance, it must extend to the defendant at the one stage of the criminal proceed-

265. *Id.* at 743.

266. *Id.* at 744-45.

267. *Id.* at 744.

268. *Id.* at 744.

269. *See Jones v. Estelle*, 584 F.2d 687, 691 (5th Cir. 1978).

270. *See, e.g., High v. State*, 573 S.W.2d 807, 808-13 (Tex. Crim. App. 1978); *Currie v. State*, 516 S.W.2d 684, 684 (Tex. Crim. App. 1974); *Gainous v. State*, 436 S.W.2d 137, 138 (Tex. Crim. App. 1969).

271. 386 U.S. 738, 744-45 (1967).

272. 573 S.W.2d 807 (Tex. Crim. App. 1978).

273. *Id.* at 813.

ings when he is least capable of standing on his own."²⁷⁴ The most common ineffectiveness at this point is rudely to abandon a convicted client without fully informing him of all rights on appeal, including the right to appointed counsel if the accused is indigent.²⁷⁵ A corollary is the failure of trial counsel actually to give notice of appeal, thereby putting at risk an orderly appeal from an adverse determination in the trial court.²⁷⁶ Both the Fifth Circuit and the Court of Criminal Appeals have held that, to remedy such a situation, the accused must be afforded an out-of-time appeal or, in the alternative, his conviction must be set aside and a new trial granted.²⁷⁷

The second major area of appellate ineffectiveness is neglecting to file a brief or, occasionally, to slap together one that is so maladroit as to run afoul of the due process clause in the fourteenth amendment.²⁷⁸ In *Passmore v. Estelle*,²⁷⁹ a sort of hybrid was presented when *retained* appellate counsel submitted a one-sentence brief that merely recited a general prayer for relief.²⁸⁰ Labeling that submission "tantamount to abandonment of representation," the court repeated its earlier caution that appellate counsel "may not abandon representation on his own *ipse dixit*."²⁸¹ The court compared the one-sentence brief to the no-merit letter con-

274. *Smotherman v. Beto*, 276 F. Supp. 579, 584-85 (N.D. Tex. 1967).

275. *Id.* at 585; see *Thomas v. Beto*, 423 F.2d 642, 643 (5th Cir. 1970); *Woods v. Beto*, 348 F. Supp. 573, 576 (N.D. Tex. 1972).

276. See, e.g., *Thomas v. Beto*, 423 F.2d 642, 643 (5th Cir. 1970); *Merkel v. Beto*, 387 F.2d 854, 854 (5th Cir. 1968); *Woods v. Beto*, 348 F. Supp. 573, 575 (N.D. Tex. 1972).

277. See, e.g., *Thomas v. Beto*, 423 F.2d 642, 643 (5th Cir. 1970); *Woods v. Beto*, 348 F. Supp. 573, 576 (N.D. Tex. 1972); *Ex parte Smith*, 519 S.W.2d 432, 432 (Tex. Crim. App. 1975).

278. See *Passmore v. Estelle*, 594 F.2d 115, 117-18 (5th Cir. 1979), *cert. denied*, 27 CRIM. L. REP. (BNA) 4050 (May 14, 1980).

279. 594 F.2d 115 (5th Cir. 1979), *cert. denied*, 27 CRIM. L. REP. (BNA) 4050 (May 14, 1980). The question presented is whether the Supreme Court's decision in *Anders v. California*, 386 U.S. 738, 744 (1967) should be applied to retained counsel in state criminal appeals.

280. *Passmore v. Estelle*, 594 F.2d 115, 116-17 (5th Cir. 1979), *cert. denied*, 27 CRIM. L. REP. (BNA) 4050 (May 14, 1980). The "brief" consisted of nothing more than a boilerplate prayer for relief which stated in full: "Appellant prays that this case be reversed and remanded for a new trial." *Id.* at 116-17. The Court of Criminal Appeals affirmed the defendant's conviction in an unreported one paragraph *per curiam* opinion, correctly noting that counsel's "brief" "presented nothing for review." *Id.* at 117. Though counsel did in fact file a First Amended Brief before that court, it was not considered because of untimeliness. *Id.* at 117.

281. *Id.* at 118.

demned in *Anders v. California*²⁸² to show that it did not meet the minimum constitutional requirement of effective assistance of appellate counsel, and accordingly found that appellant was entitled to an out-of-time appeal.²⁸³

In another common scenario trial counsel gives notice of appeal, leads the appellant to believe that he is in fact diligently prosecuting an appeal, but does nothing.²⁸⁴ In *Ex parte Raley*,²⁸⁵ retained counsel advised the appellant that "the appeal situation has been completed and forwarded to the Appellate Court," and that he would personally appear to orally argue the appeal.²⁸⁶ Unbeknownst to the appellant, who had already paid for preparation of a transcription of the court reporter's notes, presenting the appellate record to the court without an appellate brief produced a *per curiam* affirmance.²⁸⁷ The court found what amounted to "fraud and deceit" had deprived appellant of any meaningful appeal and constituted a breach of a legal duty of an attorney.²⁸⁸ The accused was therefore returned to the point of notice of appeal so that a meaningful appeal from his conviction could be taken with aid of counsel.²⁸⁹

Failure of counsel, however, to give notice of appeal or to advise his client of his right to appeal is not, in all situations, indicative of ineffective assistance. Two recurring examples in this regard are when the accused is represented by retained counsel at trial and there is no showing of indigency for purposes of appeal,²⁹⁰ and where, indigent or otherwise, the accused enters a plea of guilty in

282. 386 U.S. 738 (1967).

283. *Passmore v. Estelle*, 594 F.2d 115, 118 (5th Cir. 1979), *cert. denied*, 27 CRIM. L. REP. (BNA) 4050 (May 14, 1980).

284. *See, e.g., Ex parte Shields*, 550 S.W.2d 670, 676 (Tex. Crim. App. 1976); *Ex parte Hill*, 528 S.W.2d 259, 260 (Tex. Crim. App. 1975); *Ex parte Raley*, 528 S.W.2d 257, 258-59 (Tex. Crim. App. 1975).

285. 528 S.W.2d 257 (Tex. Crim. App. 1975).

286. *Id.* at 258 n.1. This advice was contained in a letter counsel sent to the appellant ten days before the date on which counsel was supposed to file the appellate brief in the trial court. *Id.* at 258 n.1.

287. *Id.* at 258-59.

288. *Id.* at 259.

289. *Id.* at 259.

290. *See Kallie v. Estelle*, 515 F.2d 588, 589 (5th Cir.), *cert. denied*, 423 U.S. 1019 (1975); *McGarrity v. Beto*, 335 F. Supp. 1186, 1191 (N.D. Tex.), *aff'd*, 452 F.2d 1206 (5th Cir. 1971), *cert. denied*, 406 U.S. 909 (1972).

the trial court.²⁹¹

A striking illustration of the first category is reflected in the Fifth Circuit's disposition of *Kallie v. Estelle*.²⁹² The accused was represented by retained counsel in the trial court and convicted of murder with malice.²⁹³ Although he filed a motion for new trial and thereafter gave notice of appeal in open court, counsel later informed relatives of the accused that he would abandon all efforts on behalf of his client unless he was paid what counsel denominated as a reasonable fee for purposes of appeal.²⁹⁴ A transcription of the court reporter's notes was never ordered nor obtained, and no appellate brief was filed; as a result, the Court of Criminal Appeals summarily affirmed the conviction.²⁹⁵ It was uncontradicted that appellant was indigent for purposes of appeal, that he wanted to appeal his conviction and had no knowledge that necessary steps to perfect an appeal had not been taken, and, most importantly, that counsel failed to inform the accused or the convicting court that he did not intend to prosecute an appeal. Furthermore, counsel failed to inform his client of his right to court-appointed counsel on appeal if financially unable to retain counsel.²⁹⁶ The district court also found the state had no actual knowledge that the accused was indigent or of his desire to appeal, and was never aware of retained counsel's inactions.²⁹⁷ In finding that appellate rights were something less than zealously protected by retained counsel, the court was nonetheless constrained to hold that it was unable to find "state action" based upon the failings of any state official, and relief was accordingly denied.²⁹⁸

The holding in *Kallie v. Estelle*²⁹⁹ is premised on the notion that a state court, unlike its federal counterpart, is not required to ap-

291. *Farmer v. Beto*, 446 F.2d 1357, 1358 (5th Cir. 1971); *Giles v. Beto*, 437 F.2d 192, 194 (5th Cir. 1971).

292. 515 F.2d 588 (5th Cir.), *cert. denied*, 423 U.S. 1019 (1975).

293. *Id.* at 589. The Texas Court of Criminal Appeals denied habeas corpus relief on grounds similar to those advanced by the Fifth Circuit. See *Ex parte Kallie*, 475 S.W.2d 784, 786 (Tex. Crim. App. 1971).

294. *Kallie v. Estelle*, 515 F.2d 588, 589 (5th Cir.), *cert. denied*, 423 U.S. 1019 (1975).

295. *Id.* at 589.

296. *Id.* at 589-90.

297. *Id.* at 589-90.

298. *Id.* at 590-91; *accord*, *Fitzgerald v. Estelle*, 505 F.2d 1334, 1337-38 (5th Cir. 1975). See notes 50-57 *supra* and accompanying text.

299. 515 F.2d 588 (5th Cir.), *cert. denied*, 423 U.S. 1019 (1975).

prise a defendant of his right to appeal or to appoint counsel for the purpose of pursuing an appeal unless that court is aware of his desire to appeal.³⁰⁰ A criminal defendant, who at one time had the ability to and did retain counsel yet became indigent during the appellate process, is nonetheless bound by negligence or unwillingness of his attorney properly to prosecute an appeal, unless he can demonstrate that the state court or some other responsible state official was or should have been cognizant of both his desire to appeal and his inability to do so with retained counsel.³⁰¹ At no point in the criminal justice system is an appellant penalized more for having previously had the ability to retain counsel than when he finally comes to the realization that his right to appeal has been forfeited because his money has run out.

A criminal defendant, regardless of financial status, is not denied effective assistance of counsel when he pleads guilty and his attorney fails to either enter notice of appeal or advise the defendant of his right to appeal, if the defendant does not set forth any grounds upon which an appeal could have been based.³⁰² The rationale is, simply, if the plea of guilty is knowingly and intelligently entered with the effective assistance of counsel,³⁰³ an accused is hard-pressed to demonstrate that he has suffered any prejudice.³⁰⁴

Inasmuch as an appeal is ordinarily the only avenue a convicted defendant has of overturning an adjudication of guilt, the importance of effective assistance of counsel on appeal cannot be understated, especially when defendant had been victimized by an incompetent court-appointed counsel in the trial court. To this end, when the state chooses to provide representation for an indigent defendant, it must assure that the right to counsel remains inviolate at every stage of the criminal justice system, unless an accused

300. *Collier v. Estelle*, 488 F.2d 929, 931 (5th Cir. 1974); see *Giles v. Beto*, 437 F.2d 192, 194 (5th Cir. 1971); *Beto v. Martin*, 396 F.2d 432, 434 (5th Cir. 1968).

301. *Collier v. Estelle*, 488 F.2d 929, 931 (5th Cir. 1974).

302. See *Farmer v. Beto*, 446 F.2d 1357, 1358 (5th Cir. 1971); *Giles v. Beto*, 437 F.2d 192, 194 (5th Cir. 1971).

303. See *Farmer v. Beto*, 446 F.2d 1357, 1358 (5th Cir. 1971); *Giles v. Beto*, 437 F.2d 192, 194 (5th Cir. 1971). Of course, this presumes that counsel has fulfilled his duty of seeing that his client's guilty plea is entered knowingly and voluntarily with counsel "actually and substantially assisting his client" in this critical decision. See *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974).

304. See *Farmer v. Beto*, 446 F.2d 1357, 1358 (5th Cir. 1971).

effectively waives his right to an appeal.³⁰⁵ As one district court succinctly stated in detailing the dilemma of an indigent defendant, the manifest incompetence of whose court-appointed counsel resulted in a ninety-nine year sentence:

The responsibility of court-appointed counsel does not stop when his client is found guilty or when sentence is pronounced. When the back of counsel's guiding hand is slapped by a 99 year jury verdict, it cannot so readily withdraw from its obligation as the testimony of petitioner's attorney indicates was done in this case. If the right to counsel is to have substance, it must extend to the defendant at the one stage of the criminal proceedings when he is least capable of standing on his own.³⁰⁶

IV. CONCLUSION

Some twenty years have come and gone since the Fifth Circuit first enunciated the "reasonably effective" assistance of counsel standard in *MacKenna v. Ellis*.³⁰⁷ During the course of those past two decades, the issue of incompetent counsel somehow emerged from volumes of cases to the front pages of newspapers. Whether because the Chief Justice of the United States maintains that large numbers of lawyers trying lawsuits are unqualified³⁰⁸ or because storied practitioners suffer allegations of incompetence,³⁰⁹ segments of the public have developed an impression that the quality of representation by counsel in criminal cases is not to be taken for

305. *Smotherman v. Beto*, 276 F. Supp. 579, 585 (N.D. Tex. 1967).

306. *Id.* at 584-85. *But see Jones v. Estelle*, 584 F.2d 687, 690-91 (5th Cir. 1978). In *Jones* the Fifth Circuit did not find the assistance ineffective when the court-appointed counsel determined an appeal was frivolous and, given the fact that at least six months of "good time" credit would be lost if his client were not transferred to the Texas Department of Corrections during the pendency of his appeal, advised his client that notice of appeal should be withdrawn. *Id.* at 690-91.

307. 280 F.2d 592 (5th Cir. 1960).

308. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227, 229 (1973).

309. Performance of her lead trial attorney has been assailed by Patty Hearst in a collateral attack on her conviction in federal habeas corpus proceedings now pending in United States District Court for the Northern District of California, San Francisco Division. See *United States v. Hearst*, 563 F.2d 1331, 1352 (9th Cir. 1977) (affirming Hearst's conviction on direct appeal), *cert. denied*, 435 U.S. 1000 (1978); *cf. Ray v. Rose*, 491 F.2d 285, 291-92 (6th Cir.) (convicted killer James Earl Ray entitled to evidentiary hearing on allegation counsel burdened by such a conflict of interest that he did not render effective assistance), *cert. denied*, 417 U.S. 936 (1974).

granted.

The problem of ensuring that competent counsel provide adequate representation for criminal defendants, especially the indigent, has never been simple and remains generally unsolved. Of course, the solution is not a matter for judicial consideration alone, but the judiciary is in position to address the issue and to provide direction for affected interests and parties. Yet, though some courts go to great lengths to stress there is no hesitancy in finding an accused has been denied effective assistance of counsel,³¹⁰ the appellant who seeks to vitiate his conviction on the strength of such a claim faces an onerous task.

One source of judicial reticence may be a feeling, as Justice Frankfurter noted in *Foster v. Illinois*,³¹¹ that if claims of incompetent counsel were too readily upheld, courts would "furnish opportunities hitherto un contemplated for opening wide the prison doors of the land."³¹² The assumption implicit to that notion is, ironically, a recognition of the problem. Another possibility is the sobering thought that sustaining a claim of ineffective assistance of counsel necessarily damages the reputation of the lawyer involved. As the Fifth Circuit has stated: "Attorneys generally are greatly concerned with their professional reputations. They know that to lose a good reputation for faithful adherence to the cause of their client is not only to lose that which they should most highly treasure but is to lose their practice as well."³¹³ Judges, being former practitioners, can emphasize with counsel in distress.

Yet a third likely basis for reluctance of courts to countenance but a fraction of incompetency claims has been suggested by a distinguished jurist of a federal appeals court: "It is the belief—rarely

310. See *Rodriguez v. State*, 340 S.W.2d 61, 63, 65 (Tex. Crim. App. 1960).

311. 332 U.S. 134 (1947).

312. *Id.* at 139.

313. *Williams v. Beto*, 354 F.2d 698, 706 (5th Cir. 1965). Judge Coleman aptly summed up the lot and responsibility of court-appointed counsel when he stated:

Court appointed counsel is no different to [*sic*] any other lawyer. He is still a lawyer, he is still practicing law, and he is no less confronted by difficult decisions of tactics and strategy. He cannot stand still and do nothing. That indeed might be the best evidence of incompetency, or infidelity, or ineffectiveness, or all three. He must decide as his knowledge, experience, and talents best permit, and then move ahead. When he does this, that is all any lawyer can do, and the client has no right to complain of the absence of a miracle.

Id. at 706.

articulated; but I am afraid, widely held—that most criminal defendants are guilty anyway. From this assumption it is a short path to the conclusion that the quality of representation is of small account.”³¹⁴ But there are indications justifying cautious optimistic outlook for future expectations of effective assistance of counsel. As the decade of the seventies came to a close, the Supreme Court, apparently disdaining a carrot, took up the stick. It provided an indigent another means of redress for suffering defective assistance of counsel in *Ferri v. Ackerman*³¹⁵ by unanimously holding that court-appointed counsel is not, as a matter of federal law, entitled to absolute immunity in a state malpractice suit brought by an indigent client claiming ineffective representation. With the possibility of a judgment, indeed just the spectre of a malpractice suit, only a reckless court-appointed counsel, or his retained counterpart, would abdicate his professional responsibility to represent clients, indigent or otherwise, to the best of his ability within the bounds of ethical considerations.³¹⁶ Given the new sense of urgency for effective assistance of counsel in Texas, this article is intended to contribute a better understanding of when and why defense performance has fallen short of the constitutionally required standard of competence and, in some measure, indicate future derelictions.

Almost a quarter of a century ago, Mr. Justice Black insisted that “both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned ‘stand on an equality before the bar of justice in every American court.’”³¹⁷ Unless courts and

314. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 26 (1973).

315. — U.S. —, 100 S. Ct. 402, 62 L. Ed. 2d 355 (1979). In *Ferri* court-appointed counsel neglected to plead the statute of limitations in a prosecution charging a violation of the Internal Revenue Code with the result that his client was subjected to the possibility of an additional ten years imprisonment. *Id.* at —, 100 S. Ct. at 405, 62 L. Ed. 2d at 358.

316. *Id.* at —, 100 S. Ct. at 409, 62 L. Ed. 2d at 363. The Court pointed out that the failure of Congress to provide an immunity for court-appointed counsel in federal criminal cases “is more consistent with the view that Congress intended all defense counsel to satisfy the same standards of professional responsibility and to be subject to the same controls.” *Id.* at —, 100 S. Ct. at 407, 62 L. Ed. 2d at 361; cf. Burger, *Counsel for the Prosecution and Defense—Their Roles Under the Minimum Standards*, 8 AMER. CRIM. LAW. Q. 1, 6 (1969) (“defense counsel who is appointed by the court . . . has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer”).

317. *Griffin v. Illinois*, 351 U.S. 12, 17 (1956). Justice Black also admonished that “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” *Id.* at 19.

the criminal defense bar—indeed, the whole legal profession—take long and hard looks at the poor quality of representation that too many indigent defendants are receiving, the problem of ineffective assistance of counsel will remain unresolved, and the ideal Mr. Justice Black ascertained will remain unfulfilled in the criminal justice system.

For the conscientious lawyer, a regular dose of self-help is prescription enough. To spirit the lesser motivated attorney, the carrot of practical continuing legal education may be adequate. The malpractice stick should goad the cavalier counselor. Sanctions imposed by a grievance committee are punishments with corrective purpose. But, beyond remedies directed to the individual practitioner, if there are broader solutions to an increasing incidence of ineffective assistance of counsel, particularly the appointed one, they must be found and implemented—*now*.