St. Mary's Law Journal

Volume 13 | Number 1 Article 5

3-1-1981

Reasonably Effective Assistance Standard of Applicable to Both Retained and Appointed Counsel without Distinction.

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CASENOTES

CRIMINAL LAW—Assistance of Counsel—"Reasonably Effective Assistance" Standard is Applicable to Both Retained and Appointed Counsel Without Distinction.

Ex Parte Duffy,
607 S.W.2d. 507 (Tex. Crim. App. 1980).

On January 16, 1976, Harvey Joseph Duffy was arrested for committing murder in the course of robbery.[1] Subsequently he was indicted for capital murder and counsel was appointed to represent him. Shortly thereafter, Joel Conant, an attorney, approached the defendant and persuaded him to agree to retain Conant's services as trial counsel.[2] Conant visited Duffy on only two occasions[3] before the trial began and filed only one pre-trial motion.[4] During the trial, Conant failed to raise any logical defense[5] and called his client as the sole defense witness.[6] The jury returned

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1. *See* Duffy v. State, 567 S.W.2d 197, 199-200 (Tex. Crim. App.), *cert. denied,* 439 U.S. 991 (1978).

2. *See Ex Parte* Duffy, 607 S.W.2d 507, 510 (Tex. Crim. App. 1980). Conant contacted Duffy at the Bexar County Jail upon the advice of a jail guard and later arranged a meeting with Duffy's father, during which he gave Mr. Duffy, "the impression that he was an expert in criminal law and prosecuting [sic] capital murder cases." *Id.* at 510.

3. *See id.* at 511. Conant also conferred with the defendant's father twice. *See id.* at 511. Mr. Duffy told Conant at one of these meetings his son had been under the care of a psychiatrist. *See id.* at 511. The defendant's father informed Conant of two potential witnesses for his son, however, none of these witnesses were called to testify. *See id.* at 511.

4. *See Ex Parte* Duffy, 607 S.W.2d 507, 511 (Tex. Crim. App. 1980); *cf.* TEX. CODE CRIM. PRO. ANN. art. 35.17 (Vernon Supp. 1980-1981) (individual examination of juror on voir dire in capital murder case). Conant failed to move for appointment of a psychiatrist to examine Duffy and did not present any motions for discovery. *See Ex Parte* Duffy, 607 S.W.2d 507, 511 (Tex. Crim. App. 1980). Nor did defense counsel offer the motions previously prepared and filed by the appointed attorneys. *Id.* at 511. Neither did Conant move to suppress his client's confession or evidence from an inventory search of defendant's car. *Id.* at 511.

5. *See id.* at 511.

6. *See id.* at 511. Conant was ignorant of Duffy's inability to distinguish between truth and falsehood. *See id.* at 522, 522 n.25. Additionally, trial counsel was unaware his client was sedated heavily when Conant made the decision to put the defendant on the stand. *See id.* at 521. Further, counsel did not contact three potentially valuable defense witnesses. *See id.* at 517.

a verdict of guilty. During the punishment stage, Conant called Duffy's priest to the stand.[7] On direct examination, the priest testified the defendant would "continue upon a course of violence."[8] The jury assessed the death penalty. After exhausting his avenue of direct appeal, Duffy filed an application for writ of habeas corpus in the 186th District Court of Bexar County, Texas, alleging he was denied effective assistance of counsel at his trial.[9] The district court recommended that relief be denied and on original presentation to the Texas Court of Criminal Appeals, Duffy's application for writ of habeas corpus again was rejected. Duffy filed a motion for rehearing which was granted in light of the United States Supreme Court decision in *Cuyler v. Sullivan*.[10] Held—*Reversed and Remanded*.[11] The "reasonably effective assistance" standard is applicable to both retained and appointed counsel without distinction.[12]

The sixth amendment warrants that a defendant accused of a criminal offense has a right to the assistance of counsel for his defense.[13] The Constitution is silent, however, on whether courts must provide counsel for indigents, as well as on the relative levels of competence required of appointed and retained counsel.[14] The sixth amendment was once viewed as

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7. *See id.* at 511. Conant also allowed Duffy to testify during the punishment phase. *See id.* at 511. Counsel failed to discuss with the priest what his response would be to the questions asked. *See id.* at 524; *cf.* R. MOSES, CRIMINAL DEFENSE SOURCEBOOK § 3.08, at 55 (1974) (witness preparation vital to defense).

8. *See id.* at 511, 523; *cf.* TEX. CODE CRIM. PRO. ANN. art. 37.071(b)(2) (Vernon Supp. 1980-1981) (jury must determine whether defendant would constitute a continuing threat to society).

9. *See Ex Parte* Duffy, 607 S.W.2d 507, 509 (Tex. Crim. App. 1980). Petitioner pointed to twelve major instances of incompetence on the part of trial counsel including failure to interview the State's witnesses, failure to contact potential defense witnesses, failure to prepare defense witnesses, and failure to preserve by objection a single issue for appeal. *See* Brief for Appellant at v., vi., *Ex Parte* Duffy, 607 S.W.2d 507, 512 (Tex. Crim. App. 1980).

10. _ U.S. _, 100 S. Ct. 1708, 1716, 64 L. Ed. 2d 333, 334 (1980). In *Cuyler*, the Supreme Court abolished the traditional differentiation between retained and appointed criminal defense counsel when determining adequacy of representation. *Id.* at _ U.S. _, 100 S. Ct. at 1716, 64 L. Ed. 2d at 344 ("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.").

11. *See Ex Parte* Duffy, 607 S.W.2d 507, 527 (Tex. Crim. App. 1980). In March, 1981, Duffy entered a plea of guilty and received a life sentence. *See* San Antonio Light, Mar. 14, 1981, at 12-A, col. 2.

12. *See Ex Parte* Duffy, 607 S.W.2d 507, 516 (Tex. Crim. App. 1980).

13. *See* U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel for his defense." *Id.*

14. *See id;* Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233, 234 (1979).

only protecting the right to retain counsel.[15] Once the Supreme Court recognized the indigent criminal defendant's need for representation,[16] it also perceived the constitution as requiring something beyond mere presence of a lawyer in the courtroom.[17] The Supreme Court's suggestion in *Powell v. Alabama*,[18] that the appointment of counsel must result in "effective aid,"[19] became the benchmark for judicial determination of whether appointed counsel's representation was constitutionally adequate.[20] Lower courts, thereafter, began making *ad hoc* appraisals of the effectiveness of an appointed attorney's performance.[21] In so doing, some

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15. *See* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27-44 (1955); Bines, *Remedying Ineffective Representation In Criminal Cases: Departures From Habeas Corpus*, 59 VA. L. REV. 927, 934 (1973). At early common law, one accused of a felony was forbidden the assistance of counsel. *See* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 211 (2d ed. 1898). The belief that counsel is necessary to offset the power of the state in a criminal prosecution had its genesis in eighteenth century American jurisprudence. *See* Bines, *Remedying Ineffective Representation In Criminal Cases: Departures From Habeas Corpus*, 59 VA. L. REV. 927, 927 n.1 (1973).

16. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 335 (1963) (indigent defendant's constitutional right in a criminal trial to have assistance of counsel applies to states); Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (criminal defendants in federal court are entitled to assistance of counsel); Powell v. Alabama, 287 U.S. 45, 66-68 (1932) (court has duty to assign counsel to indigent defendant in capital case).

17. *See, e.g.*, Reece v. Georgia, 350 U.S. 85, 90 (1955) (effective assistance of counsel is a constitutional requirement); Glasser v. United States, 315 U.S. 60, 70 (1942) (sixth amendment requires separate counsel for co-defendants with inconsistent interests); Avery v. Alabama, 308 U.S. 444, 446 (1940) (constitutional guarantee not satisfied by mere appointment of counsel).

18. 287 U.S. 45 (1932).

19. *See id.* at 71. Justice Sutherland stated that the duty to appoint counsel "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." *See id.* at 71.

20. *See* Waltz, *Inadequacy Of Trial Defense Representation As A Ground For Post-Conviction Relief In Criminal Cases*, 59 NW. U.L. REV. 289, 293-95 (1964). Some controversy developed over whether the Court intended to set a standard for judging the quality of defense counsel's performance. *Compare* Mitchell v. United States, 259 F.2d 787, 790 (D.C. Cir.) (*Powell* only requires counsel be appointed), *cert. denied*, 358 U.S. 850 (1958) *with* Waltz, *Inadequacy Of Trial Defense Representation As A Ground For Post-Conviction Relief In Criminal Cases*, 59 NW. U.L. REV. 289, 293-95 (1964) (*Powell* mandates effective representation).

21. *See, e.g.*, United States v. Johnston, 318 F.2d 288, 291 (6th Cir. 1963) (defendant's sixth amendment right to adequate assistance not satisfied); Goforth v. United States, 314 F.2d 868, 871-72 (10th Cir. 1963) (attorney's services were not of substandard level); Frand v. United States, 301 F.2d 102, 103 (10th Cir. 1962) (result of attorney's incompetence was not a farcical trial). The course of Supreme Court adjudication subsequent to *Powell* justifies the conclusion that the right to counsel involves a right to adequate representation. *See, e.g.*, White v. Ragen, 324 U.S. 760, 764 (1945) (petitioner had right to effective aid and assistance); Glasser v. United States, 315 U.S. 60, 76 (1942) (petitioner denied effective assistance); Avery v. Alabama, 308 U.S. 444, 446 (1940) (particular circumstances of each case

courts presumed competency by placing the burden of proof upon the claimant to show that his right to effective assistance of counsel was denied and that the denial thereof was prejudicial.[22] Due to a lack of Supreme Court delineation of what constitutes "effective aid,"[23] however, conflicts developed regarding the constitutionally acceptable standard of assistance.[24]

Historically, for assistance of counsel to be considered inadequate, counsel's endeavors must have been so perfunctory as to render the prodeedings a "farce and mockery of justice."[25] This standard was breached only when counsel's nonfeasance or misfeasance was so evident and prejudicial that the court or the prosecution had the duty to correct the misconduct.[26] The Supreme Court's language in *McMann v. Richard-*

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must be considered in determining effectiveness). *See generally* Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 Mo. L. REV. 483, 485 (1976).

22. *See, e.g.*, Matthews v. United States, 518 F.2d 1245, 1246 (7th Cir. 1975) (burden on client); United States v. Baca, 451 F.2d 1112, 1114 (10th Cir. 1971) (burden on appellant); Tyler v. Beto, 391 F.2d 993, 996 (5th Cir. 1968) (petitioner has heavy burden). *But see* United States v. Decoster, 624 F.2d 196, 275 (D.C. Cir. 1976) (Bazelon, J., dissenting) (burden should be on government to demonstrate violation did not prejudice defendant); Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 29 (1973) (emphasis should be on quality of counsel's performance rather than effect of counsel's actions on outcome of case).

23. *See* Powell v. Alabama, 287 U.S. 45, 66-68 (1932) (no definition of "effective aid"); United States v. Decoster, 624 F.2d 196, 247 (D.C. Cir. 1976) (Robinson, J., concurring) (no comprehensive definition of the standard of counsel-aid); Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 450 (1977) (Supreme Court has no particularized standard).

24. *Compare* Moore v. United States, 432 F.2d 730, 735 (3d Cir. 1970) (assistance must be "within the range of competence" demanded of criminal defense attorneys) *and* MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960) (representation must be "reasonably effective"), *cert. denied*, 368 U.S. 877 (1961) *with* Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir.) (defendant must show proceedings were a "farce and a mockery"), *cert. denied*, 325 U.S. 889 (1945). *See also* Maryland v. Marzullo, 435 U.S. 1011, 1011 (1978) (White, J., dissenting) (circuits are in "disarray" over the standard for determining competency).

25. *See* Bell v. Alabama, 367 F.2d 243, 247 (5th Cir. 1966), *cert. denied*, 386 U.S. 916 (1967); Mitchell v. United States, 259 F.2d 787, 788 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945). Under the "farce and mockery" test, courts simply determined whether the trial had been outrageous. *See* Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978) (en banc). In an effort to clarify the meaning of the farce and mockery test, lower courts formulated a variety of descriptive phrases. *See, e.g.*, United States v. Dilella, 354 F.2d. 584, 587 (7th Cir. 1965) (constitutional guarantee of assistance satisfied when trial not a "travesty of justice"); Frand v. United States, 301 F.2d 102, 103 (10th Cir. 1962) (judgment open to attack if trial "farcical"); Hendrickson v. Overlade, 131 F. Supp. 561, 564 (N.D. Ind. 1955) (no showing trial was a "sham").

26. *See, e.g.*, Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir. 1970), (counsel's conduct must shock the conscience of the court), *cert. denied*, 402 U.S. 909 (1971); Williams v. Beto, 454 F.2d 698, 704 (5th Cir. 1965) (representation must be so incompetent court has duty to

son,[27] that an accused has a right to "reasonably competent" advice "within the range of competence demanded of attorneys in criminal cases,"[28] however, prompted lower courts to employ higher levels of scrutiny to measure counsel's competency.[29] Both federal and state courts deviated from the mockery test by adopting the stricter criteria of either requiring counsel to act within the confines of the *McMann* community standards test[30] or to provide "reasonably effective assistance."[31] More-

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correct it); Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.) (representation must be so lacking in competency that it becomes duty of the court to observe and correct it), *cert. denied*, 325 U.S. 889 (1945). For examples of serious errors held not to be ineffective assistance under the "mockery of justice" test, see *Brown v. Swenson*, 487 F.2d 1236, 1240 (8th Cir.) (no ineffectiveness even though defendant's guilty plea led to twenty-five year sentence when he should have received no more than five years), *cert. denied*, 416 U.S. 944 (1974); Daughtery v. Beto, 388 F.2d 810, 812-13 (5th Cir. 1967) (failure to raise only available defense; lawyer only consulted with defendant fifteen minutes before trial), *cert. denied*, 393 U.S. 986 (1968). For one example of a finding of ineffectiveness under the mockery test, see *Cooks v. United States*, 461 F.2d 530 (5th Cir. 1972), where defense counsel advised defendant to accept a sentence six times longer than he could receive as a matter of law. *Id.* at 532. At the heart of judicial support for this severe standard was the fear that courts would be inundated with frivolous claims from "jailhouse attorneys." *See* Comment, *Ineffective Representation As A Basis For Relief From Conviction: Principles For Appellate Review*, 13 COLUM. J. L. & SOC. PROB. 1, 31 (1977). Some courts were reluctant to put defense counsel on trial for fear active review of such claims would deter attorneys from taking criminal cases. *See* Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

27. 397 U.S. 759 (1970).

28. *See id.* at 771. Justice White, speaking for the court, said:

> Waiving trial entails the inherent risk that the good-faith evaluation of a *reasonably competent* attorney will turn out to be mistaken . . . . In our view a defendant's plea of guilty based on *reasonably competent advice* is an intelligent plea. . . . Whether a plea of guilty is unintelligent . . . depends . . . on whether that advice was *within the range of competence demanded of attorneys in criminal cases.*

See id. at 771 (emphasis added).

29. *See* Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233, 239-46 (1979); Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 450 (1977). *McMann's* formulation also has been adhered to by the Supreme Court. *See* Tollett v. Henderson, 411 U.S. 258, 267 (1973). The *McMann* court, however, did not mandate general adherence to any specific standard. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970). The farce and mockery test has been heavily criticized. *See, e.g.*, Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 28 (1973) (mockery test is a mockery of sixth amendment); Bines, *Remedying Ineffective Representation in Criminal Cases: Departures From Habeas Corpus*, 59 VA. L. REV. 927, 928 (1973) (lawyers demand more than a mockery of medicine from doctors); Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233, 238 (1979) (standard inadequate to meet sixth amendment requirements).

30. *See* Cooper v. Fitzharris, 586 F.2d 1325, 1328-29 (9th Cir. 1978); United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978); State v. Killpack, 276 N.W.2d 368, 372 (Iowa 1979). The Third Circuit has adopted a negligence standard requiring customary skill and knowledge. *See* Moore v. United States, 432 F.2d 730, 736-37 (3rd Cir. 1970); *cf.* RESTATEMENT (SECOND) OF TORTS § 299(a) (1977) (professional must exercise customary skill and

over, some courts supplemented their standards with more specific statements of counsel's duties.[32] Examples of such responsibilities included in-

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knowledge normally prevailing at a given time and place). The community standards approach has been criticized on the ground that a community's norm may be constitutionally unacceptable. *See* Alschuler, *The Supreme Court, The Defense Attorney, and The Guilty Plea* 47 COLO. L. REV. 1, 28-29 n.89 (1975).

31. *See, e.g.*, Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) (counsel must offer "reasonably effective assistance"); Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970) ("reasonably likely to render and rendering reasonably effective assistance"); Flores v. State, 576 S.W.2d 632, 634 (Tex. Crim. App. 1978) ("reasonably effective assistance" must be afforded). Fully stated, the test is, "counsel reasonably likely to render and rendering reasonably effective assistance." *Ex Parte* Gallegos, 511 S.W.2d 510, 511 (Tex. Crim. App. 1974) (rejecting prior case law adopting farce and mockery standard). Some commentators have argued the standard based on reasonableness is too vague. *See* Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 820-21 (1976); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1078 (1973). For examples of other standards required, see *United States v. Fleming*, 594 F.2d 598, 606 (7th Cir. 1979) ("minimum professional standard"); *Harris v. State*, 293 A.2d 291, 293 (Del. 1972) ("genuine and effective"); *State v. Kendall*, 167 N.W.2d 909, 910 (Iowa 1969) ("conscientious meaningful representation").

32. *See, e.g.*, Davis v. Alabama, 596 F.2d 1214, 1217-18 (5th Cir. 1979) (counsel must interview potential witnesses); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968) (counsel's duties include investigation of facts and frequent visits with client); People v. Pope, 590 P.2d 859, 866, 153 Cal. Rptr. 732, 739 (Cal. 1979) (counsel should advise client of his rights). Many commentators have advocated reliance on the explicit standards set forth in the AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE. *See* Clark, *The American Bar Association Standards for Criminal Justice: Prescription for an Ailing System*, 47 NOTRE DAME LAWYER 429, 441 (1972); Day, *Appellate Court Use of the American Bar Association Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 415, 420 (1975); Jameson, *The Beginning: Background and Development of the ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 261 (1974); *cf.* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *The Defense Function* 141 (1974) (outline of basic duties defense counsel owes court and client). Some courts have implemented portions of the Defense Function Standards. *See* Holloway v. Arkansas, 435 U.S. 475, 485-86 n.8 (1978) (section 3.5, conflict of interest); State v. Thomas, 232 N.W.2d 766, 768 n.3 (Minn. 1975) (sections 7.8, 7.9, arguments to the jury, and facts outside the record); State v. Harper, 205 N.W.2d 1, 9 n.8 (Wis. 1973) (sections 3.2, 3.6, interviewing client, and prompt action to protect accused). *But see* United States v. Decoster, 624 F.2d 196, 205 (D.C. Cir. 1979) (ABA standards not intended as minimum guidelines or per se rules) (amending Decoster v. United States, 487 F.2d 1197, 1202 (D.C. Cir. 1973) (ABA standards adopted as "minimal components of 'reasonably competent assistance' "); People v. Craig, 361 N.E.2d 736, 742 (Ill. 1977) (substance of ABA standards rejected by majority of jurisdictions); Commonwealth v. Saferian, 315 N.E.2d. 878, 884 n.15 (Mass. 1974) (standards not criteria for judicial evaluation). In Texas the sufficiency of an attorney's effectiveness is gauged by the totality of representation afforded the accused. No Texas appellate court has ever based a finding of incompetency upon a single failing of trial counsel. *See, e.g., Ex Parte* Prior, 540 S.W.2d 723, 727-28 (Tex. Crim. App. 1976) (failure to interview witnesses not prejudicial); Hunnicut v. State, 531 S.W.2d 618, 624 (Tex. Crim. App. 1976) (failure to move to suppress evidence not inadequate assistance); Satillan v. State, 470 S.W.2d 677, 679 (Tex. Crim. App. 1971) (ignorance of law not constitutionally ineffective assistance). For an excellent discussion of the history of the ABA Standards for Criminal Justice, see Jameson, *The Beginning: Back-*

vestigating all material facts,[33] frequently visiting with the client,[34] and interviewing all potential witnesses.[35]

Although the Constitution entitles an accused to effective counsel[36] regardless of whether such counsel is chosen or appointed,[37] Texas courts traditionally have applied dual standards for measuring the effectiveness of retained and appointed counsel.[38] The Texas Court of Criminal Appeals has held the test of competency for assigned counsel to be "reasonably effective assistance."[39] When reviewing the performance of retained

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ground and Development of the ABA Standards for Criminal Justice, 12 AM. CRIM. L. REV. 255 (1974).

33. *See* Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968).

34. *See* Stake v. Harper, 205 N.W.2d 1, 6-7 (Wis. 1973).

35. *See* Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979).

36. Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963) (sixth amendment right to counsel applicable to states through fourteenth amendment); Powell v. Alabama, 287 U.S. 45, 66-69 (1932) (in capital case counsel must be assigned to indigent and indigent provided effective aid); *see* U.S. CONST. amend. VI (accused in criminal prosecutions has right to assistance of defense counsel).

37. *See, e.g.*, Holland v. Henderson, 460 F.2d 978, 981 (5th Cir. 1972) (retained counsel ineffective when conflict of interest found); Bell v. Alabama, 367 F.2d 243, 247 (5th Cir. 1966) (test for incompetency applicable to retained and appointed counsel); Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962) (constitution assures effective representation whether attorney is retained or appointed). *But cf.* Polur, *Retained Counsel, Assigned Counsel: Why the Dichotomy?* 55 A.B.A.J. 254, 255 n.2 (1969) (majority of states granted relief for ineffective assistance only when counsel appointed). Early Fifth Circuit decisions did not establish a test for minimum effectiveness of retained counsel inasmuch as their review terminated with a finding that state action was not involved. *See* 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).

38. *Compare* Howell v. State, 563 S.W.2d 933, 937 (Tex. Crim. App. 1978) ("effectiveness of retained counsel must be gauged by whether or not there was willful conduct without a defendant's knowledge which amounts to a breach of legal duty") *with* Caraway v. State, 417 S.W.2d 159, 162 (Tex. Crim. App. 1967) (appointed counsel must be "reasonably likely to render and rendering reasonably effective assistance") (quoting MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960)), *vacated on other grounds sub nom.* Caraway v. Beto, 421 F.2d 636 (5th Cir. 1970). Judge Roberts, in his dissents, repeatedly had denounced this judicial dichotomy. *See* Harrison v. State, 552 S.W.2d 151, 153 (Tex. Crim. App. 1977) (Roberts, J., dissenting); Ewing v. State, 549 S.W.2d 392, 396 (Tex. Crim. App. 1977) (Roberts, J., dissenting).

39. *Ex Parte* Morse, 591 S.W.2d 904, 905 (Tex. Crim. App. 1980); *Ex Parte* Gallegos, 511 S.W.2d 510, 512 n.1 (Tex. Crim. App. 1974); Caraway v. State, 417 S.W.2d 159, 162 (Tex. Crim. App. 1967), *vacated on other grounds sub nom.* Caraway v. Beto, 421 F.2d 636 (5th Cir. 1970). *But see* Brooks v. State, 473 S.W.2d 30, 31 (Tex. Crim. App. 1971) ("farce and mockery" language used); *Ex Parte* Love, 468 S.W.2d 836, 837 (Tex. Crim. App. 1971) ("farce and mockery" test applied). The "reasonably effective assistance" standard has been followed by the Fifth Circuit since 1960. *See* Fitzgerald v. Estelle, 505 F.2d 1334, 1338 (5th Cir. 1974); Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974); MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), *modified per curiam*, 289 F.2d 928 (5th Cir.), *cert. denied*, 368 U.S.

counsel, however, the court traditionally has looked for willful misconduct of which the client is unaware and which amounts to a breach of a legal duty.[40] In *Ex Parte Ewing*[41] the court of criminal appeals employed a bifurcated test to scrutinize the performance of retained counsel.[42] Although the *Ewing* court held the "reasonably effective assistance" standard applied to both appointed and retained counsel,[43] the court required the accused with retained counsel to also show "state action."[44]

The two-prong test of *Ewing* remained viable[45] until the legitimacy of dual constitutional standards was challenged successfully in *Cuyler v. Sullivan*.[46] In *Cuyler* the United States Supreme Court established that by conducting a criminal trial the state is implicated for fourteenth

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877 (1961). Judge Roberts has opted for adoption of another test, "reasonable competence demanded of attorneys in criminal cases," taken from the language in *McMann*. *See* Harrison v. State, 552 S.W.2d 151, 153 (Tex. Crim. App. 1977) (Roberts, Phillips, J.J., dissenting) (citing *McMann); Ex parte* Gallegos, 511 S.W.2d 510, 513 (Tex. Crim. App. 1974) (Roberts, J., concurring) (quoting *McMann); cf.* McMann v. Richardson, 397 U.S. 759, 770-71 (1970) ("reasonably competent" and "within the range of competence demanded of attorneys in criminal cases").

40. *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); Lawson v. State, 467 S.W.2d 486, 487 (Tex. Crim. App. 1971).

41. 570 S.W.2d 941 (Tex. Crim. App. 1978).

42. *See id.* at 944-45.

43. *See id.* at 944-45.

44. *See id.* at 944-45. The burden of showing state action could be met only if the defendant demonstrated the ineffectiveness was such that a state official should have known of counsel's misconduct and remedied it, thereby imputing the ineffectivensss to the state. *See id.* at 944-45 (quoting *Fitzgerald v. Estelle*, 505 F.2d. 1334, 1337 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 1011 (1975)). The rationale for this distinction was that the alleged ineffectiveness of retained counsel presented no constitutional question because counsel deficiencies could not be imputed to the state for fourteenth amendment purposes without knowledge of ineffectiveness or participation on the part of the judge or prosecutor. *See, e.g.*, Elizalde v. State, 507 S.W.2d 749, 751 (Tex. Crim. App. 1974) ("counsel being retained, any claimed incompetency . . . cannot be imputed to the state"); Kincaid v. State, 500 S.W.2d 487, 490 (Tex. Crim. App. 1973) (lack of effective assistance of counsel cannot be imputed to state when claimed by appellant who retains counsel); Curtis v. State, 500 S.W.2d 478, 481 (Tex. Crim. App. 1973) (ineffectiveness of retained counsel not imputed to state). Attributing the lack of skill or incompetency of the attorney to the client who employed him was based on the assumption that an accused makes an informed and rational choice of counsel when faced with criminal prosecution. *See* Polur, *Retained Counsel, Assigned Counsel: Why The Dichotomy?* 55 A.B.A.J. 254, 255 (1969) (knowledgeable and rational selection of defense counsel is a myth).

45. *See Ex Parte* Burn, 601 S.W.2d 370, 372 (Tex. Crim. App. 1980) (*Ewing* text employed); Simmons v. State, 594 S.W.2d 760, 765 (Tex. Crim. App. 1980) (*Ewing* test approved); Sanchez v. State, 589 S.W.2d 422, 424 (Tex. Crim. App. 1979) (ineffectiveness measured by *Ewing* test). *But see* Earvin v. State, 582 S.W.2d 794, 799 (Tex. Crim. App. 1979) ("breach of legal duty" test applied).

46. _ U.S. _, _, 100 S. Ct. 1708, 1716, 64 L. Ed. 2d 333, 344 (1980).

amendment purposes; therefore, all courts must review ineffectiveness claims by the same standard, regardless of whether counsel is appointed or retained.[47] The Court, however, did not particularize the acceptable standard by which to evaluate an attorney's performance.[48]

In *Ex Parte Duffy*[49] the Texas Court of Criminal Appeals considered whether the petitioner had been denied adequate representation by his retained counsel.[50] The court recognized that *Cuyler* dispensed with the *Ewing* requisite of showing state action.[51] The *Duffy* court, however, queried whether the "reasonably effective assistance" test was still the proper gauge of effective representation.[52] Noting the increasing popularity of the "undifferentiated standard of 'reasonable competence demanded of attorneys in criminal cases' "[53] set out in *McMann*, the court, nevertheless, argued this community standards test lacked appeal because of the narrow context in which the Supreme Court originally employed the

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47. *See id.* at _, 100 S. Ct. at 1716, 64 L. Ed. 2d at 344. In *Cuyler*, the Court considered whether the failings of the petitioner's retained counsel could provide the basis for a writ of habeas corpus which requires state action. *See id.* at _, 100 S. Ct. at 1715, 64 L. Ed. 2d at 343 (1980). The majority emphasized that, under the sixth amendment, defendants who retain their own lawyers are entitled to no less protection than defendants for whom the state appoints counsel. *See id.* at _, 100 S. Ct. at 1716, 64 L. Ed. 2d at 344.

48. *See id.* at ___, 100 S. Ct. at 1715-16, 64 L. Ed. 2d at 344; *cf.* Strazzella, *Ineffective Assistance Of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 450 (1977) (court has not defined standard). *But cf.* Tollett v. Henderson, 411 U.S. 258, 267 (1973) (advice must be within "range of competence" demanded of criminal trial attorneys); McMann v. Richardson 397 U.S. 759, 770-71 (1970) (guilty plea open to attack if counsel did not provide defendant with "reasonably competent advice"); Comment, *Ineffective Assistance of Counsel and Post-Conviction Relief in Criminal Cases: Changing Standards and Practical Consequences*, 7 COLUM. HUMAN RIGHTS L. REV. 427, 433 (1975) (*McMann* urges high standard).

49. 607 S.W.2d 507 (Tex. Crim. App. 1980).

50. *See id.* at 509.

51. *See id.* at 515; Hurley v. State, 606 S.W.2d 887, 889 (Tex. Crim. App. 1980). *Compare* Cuyler v. Sullivan, _ U.S. _, _, 100 S. Ct. 1708, 1716, 64 L. Ed. 2d 333, 344 (1980) (criminal trial itself implicates state in defendant's conviction) *with Ex Parte* Ewing, 570 S.W.2d 941, 944-45 (Tex. Crim. App. 1978) (accused who retains counsel must show state action for relief).

52. *See Ex Parte* Duffy, 607 S.W.2d 507, 515 (Tex. Crim. App. 1980).

53. *Id.* at 515; *see* Cuyler v. Sullivan, _ U.S. _, _, 100 S. Ct. 1708, 1716, 64 L. Ed. 2d 333, 344 (1980) (*McMann* test approved); Tollett v. Henderson, 411 U.S. 258, 267 (1973) (counsel must render "reasonably competent" advice); McMann v. Richardson, 397 U.S. 759, 771 (1970) (advice must be "reasonably competent" and "within the range of competence demanded of attorneys in criminal trials"). Both Judge Roberts and Judge Odom have favored the adoption of the "reasonably competent" test. *See Ex Parte* Duffy, 607 S.W.2d 507, 513 n.10 (Tex. Crim. App. 1980); Harrison v. State, 552 S.W.2d 151, 153 (Tex. Crim. App. 1977) (Roberts, J., dissenting); *Ex Parte* Gallegos, 511 S.W.2d 510, 513 (Tex. Crim. App. 1974) (Roberts, J., concurring).

test.[54] The court pointed out that the facts in *Duffy* more readily lent themselves to application of the "reasonably effective assistance" standard.[55] The court reasoned such a standard was better suited to the task as it encompassed a wider range of counsel errors.[56]

The Texas court explored three aspects of Conant's performance which formed the basis for reversal of the petitioner's conviction.[57] First, trial counsel in a criminal case has a legal and ethical obligation to make an independent investigation of the relevant facts of the case.[58] The court found none of Conant's endeavors met these obligations.[59] Secondly, as a corollary of counsel's duty to investigate the facts of the case, the court urged counsel has the responsibility to search for, and interview, potential witnesses and observed Conant's failure to do so.[60] As a third responsibil-

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54. *See Ex Parte* Duffy, 607 S.W.2d 507, 516 n.17 (Tex. Crim. App. 1980). The language of the Supreme Court in *McMann* indicated concern over counsel's advice that his client enter a guilty plea. *See* Cuyler v. Sullivan, _ U.S. _, _, 100 S. Ct. 1708, 1716, 64 L. Ed. 2d 333, 344 (1980); McMann v. Richardson, 397 U.S. 759, 770-71 (1970).

55. *See Ex Parte* Duffy, 607 S.W.2d 507, 516 (Tex. Crim. App. 1980).

56. *See id.* at 516 n.17. Judge Clinton, speaking for the court, stated: "[W]e must judge a full scope of 'assistance'—representation, performance, delivery—for effectiveness rather than adequacy of ability of capacity to advise. The standard we retain mandates an examination both of competence, 'likely to render' and of assistance, 'and rendering,' in determining effectiveness of counsel." *Id.* at 516 n.17. The state proposed that the standard be "whether counsel, in the course of his representation of a criminal defendant, engages in willful or gross negligence that substantially prejudices the accused's cause." *Id.* at 515. The court found this proposal analogous to the "breach of legal duty" test and, therefore, untenable in light of *Ex Parte Ewing*. *See id.* at 515. *But see* Hurley v. State, 606 S.W.2d 887, 889 (Tex. Crim. App. 1980) (*Ewing* not recognized); Earvin v. State, 582 S.W.2d 794, 799 (Tex. Crim. App. 1979) (breach of duty test used after *Ewing*). The district court concluded that an accused who hires counsel can only complain of ineffective assistance when the trial is a "farce and a total miscarriage of justice." *See Ex Parte* Duffy, 607 S.W.2d 507, 526 (Tex. Crim. App. 1980). This test has never been employed by the court of criminal appeals to evaluate retained counsel. *See id.* at 526.

57. *See Ex Parte* Duffy, 607 S.W.2d 507, 512, 516-24 (Tex. Crim. App. 1980). Although the court did not discuss each failing or instance of misconduct on the part of Conant, they did point to Conant's illicit solicitation of Duffy as the juncture at which their review began. *See id.* at 507 n.16. *See also* Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 461 (1978) (solicitation of client by attorney disapproved).

58. *See Ex Parte* Duffy, 607 S.W.2d 507, 516-17 (Tex. Crim. App. 1980); ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *The Defense Function* § 4.1, at 125 (1974); Clinton & Wice, *Assistance of Counsel in Texas*, 12 ST. MARY'S L.J. 1, 13 (1980).

59. *See Ex Parte* Duffy, 607 S.W.2d 507, 518 (Tex. Crim. App. 1980). At the habeas corpus evidentiary hearing Conant stated he examined the sheriff department's file in preparation for trial. *See id.* at 517 n.18.

60. *See id.* at 518. Three potential defense witnesses were available to testify but were not contacted: Duffy's former psychiatrist, a former fiancee who expressed a willingness to testify on the issue of the voluntariness of Duffy's confession, and a police officer who indicated a willingness to testify favorably regarding Duffy's character. *See id.* at 517-18. None

ity, an attorney has a duty to present all available evidence and arguments supporting the defense of his client.[61] Considering Duffy's psychiatric history, the court found that the defense attorney's failure to assert an insanity defense resulted from his unfamiliarity with the facts,[62] and not, as the state suggested, a tactical or strategical decision.[63] Ultimately, the court found that Conant's failings contributed to the damaging testimony of Duffy and his priest which resulted in Duffy's conviction.[64]

Reaching for an appropriate judicial standard by which to measure the adequacy of counsel,[65] the *Duffy* court sustained a standard which is both ambiguous and of questionable constitutional legitimacy.[66] The "reasonably effective assistance" test provides no substantive guidance as to the level of competency to be maintained by defense counsel, thereby allowing individual courts to apply their own definition of effective representation.[67] Moreover, the express reference to "competence" in recent

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of the twelve state witnesses were interviewed by Conant. *See id.* at 517-18.

61. *See id.* at 518. The defense Conant sought to establish was provocation by the victim striking the defendant with a cane. *See id.* at 511, 522 n.26.

62. *See id.* at 517; *cf.* Sharp v. State, 392 S.W.2d 127, 128 (Tex. Crim. App. 1965) (counsel must use diligence in securing evidence on issue of insanity). The psychiatric evidence could have been considered not only at the trial but also at the punishment stage as a mitigating factor. *See* Brief For Appellant at 37 n.21, *Ex Parte* Duffy, 607 S.W.2d 507 (Tex. Crim. App. 1980).

63. *See Ex Parte* Duffy, 607 S.W.2d 507, 521 (Tex. Crim. App. 1980). The district court concluded as a matter of law that Conant's failings during trial were strategic and tactical. *See id.* at 525. The *Duffy* court retorted that an investigation of relevant facts and law is a prerequisite to any strategic decision. *See id.* at 526.

64. *See id.* at 524; notes 6-7 *supra.*

65. *See Ex Parte* Duffy, 607 S.W.2d 507, 515-16 (Tex. Crim. App. 1980).

66. *Compare* Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (*McMann* community standards test may be required by Supreme Court) *and Ex Parte* Gallegos, 511 S.W.2d 510, 513 (Tex. Crim. App. 1974) (Roberts, J., concurring) (phrase "reasonably effective assistance" is ambiguous) *with Ex Parte* Duffy, 607 S.W.2d 507, 516 (Tex. Crim. App. 1980) (court will "continue to use the standard of 'reasonably effective assistance of counsel' "). *See generally* Balezon, *The Realities of Gideon and Argersinger,* 64 GEO. L.J. 811, 820 (1976) (reasonableness test is less than "meets the eye"); Finer, *Ineffective Assistance of Counsel,* 58 CORNELL L. REV. 1077, 1078 (1973) (test "begs the question" of what is reasonable); Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems,* 19 ARIZ. L. REV. 443, 446-48, 454 (1977) (test is intentionally vague and subjective).

67. *See* Erickson, *Standards Of Competency For Defense Counsel In A Criminal Case,* 17 AM. CRIM. L. REV. 233, 241 (1979). The meaning of the sixth amendment should not "vary with the sensibilities and judgments of various courts. The law demands objective explanation, so as to ensure the even dispensation of justice." Beasley v. United States, 491 F.2d. 687, 692 (6th Cir. 1974). The "reasonably effective assistance" approach arguably is preferable to the "face and mockery" test, as the reviewing court may scrutinize particular acts of the lawyer throughout his representation. *See* Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (reasonableness test focuses on counsel's entire performance rather than outrageous aspects of trial). *Compare* Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.)

Supreme Court decisions indicates a required degree of expertise and experience beyond that demanded by the vague "reasonably effective assistance" standard.[68] The standard of "reasonable competence demanded of attorneys in criminal cases," would have been a preferable choice.[69] This community standard test, which is consistent with Supreme Court language,[70] provides a standard capable of even application by the courts,[71] while recognizing lawyers' talents are distinct.[72] Adoption of such a community standards touchstone would not only provide a measure against

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(trial must be farce and mockery of justice), *cert. denied*, 325 U.S. 889 (1945) *with* Howell v. State, 563 S.W.2d 933, 937 (Tex. Crim. App. 1978) (reasonably effective counsel means counsel gauged by the totality of representation). The reasonably effective assistance test also gives great freedom to trial counsel since the propriety of many acts and omissions may be debated by reasonably skilled lawyers. *See* Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1079 (1973) (defendant received effective assistance if lawyers differ as to correctness of conduct).

68. *See* Cuyler v. Sullivan, _ U.S. _, _, 100 S. Ct. 1708, 1716, 64 L. Ed. 2d 333, 344 (1980) (*McMann* standard approved); Tollett v. Henderson, 411 U.S. 258, 267 (1973) (*McMann* language used); McMann v. Richardson, 397 U.S. 759, 771 (1970) ("reasonably competent" and "within the range of competence demanded of attorneys at criminal cases"); Comment, *Ineffective Assistance of Counsel and Post-Conviction Relief in Criminal Cases: Changing Standards and Practical Consequences*, 7 COLUM. HUMAN RIGHTS L. REV. 427, 433 (1975) (*McMann* urges higher standard than reasonably effective assistance). Voting for adoption of the *McMann* formula, Judge Roberts noted the following regarding the ambiquity inherent in the phrase "reasonably effective assistance": "[T]he word 'effective' is burdened with the usual connotation of success or desired result. Such is not the test meant to be established. To rely on this ambiguous phrase is to invite confusion and require clarification in the future." *Ex Parte* Gallegos, 511 S.W.2d 510, 513 (Tex. Crim. App. 1974) (Roberts, J., concurring).

69. *See Ex Parte* Duffy, 607 S.W.2d 507, 513 n.10 (Tex. Crim. App. 1980); Harrison v. State, 552 S.W.2d 151, 153 (Tex. Crim. App. 1977) (Roberts, J., dissenting); *Ex Parte* Gallegos, 511 S.W.2d 510, 513 (Tex. Crim. App. 1974) (Roberts, J., concurring). The court in *Duffy* also referred to the *McMann* formula as the "reasonable competency by community standards" test. *See Ex Parte* Duffy, 607 S.W.2d 507, 515 (Tex. Crim. App. 1980).

70. *See* Tollett v. Henderson, 411 U.S. 258, 266 (1973) (advice "within the range of competence demanded of attorneys in criminal cases"); McMann v. Richardson, 397 U.S. 759, 771 (1970) ("reasonably competent [advice] within the range of competence demanded of attorneys in criminal cases"), *quoted in Ex Parte* Gallegos, 511 S.W.2d 510, 513 (Tex. Crim. App. 1974) (Roberts, J., concurring).

71. *See* Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1079-80 (1973). A major flaw in such a community standards approach, however, is that a lawyer may engage in a practice that is of questionable constitutionality but be condoned by his community. *See* Alschuler, *The Supreme Court, The Defense Attorney, And The Guilty Plea*, 47 COLO. L. REV. 1, 28-29 n.89 (1975).

72. *See* Moore v. United States, 432 F.2d 730, 736-37 (3d Cir. 1970); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1079 (1973). A criminal defendant is entitled to better assistance than an attorney who is competent in corporate matters, with only a minimal exposure to criminal law. *See* Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1079-80 (1973).

which counsel's conduct could be analyzed more objectively,[73] but could give criminal defendants a realistic right to representation and not simply a hopeful dependency on the legal profession's aspirations.[74]

Absent specified duties, neither the reasonably effective assistance test nor the *McMann* community standards test offer a workable standard to measure attorney conduct against the constitutional requirement for effective counsel.[75] A checklist of basic principles could provide concrete

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73. *See* Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir. 1977), *cert. denied,* 435 U.S. 1011 (1978); Bazelon, *The Defective Assistance Of Counsel,* 42 U. CIN. L. REV. 1, 31-32 (1973) (measure is objective). Lawyers apparently demand more of other professions, by way of legal standards, than they do of themselves. *Compare* RESTATEMENT (SECOND) OF TORTS § 299(a) (1977) (professional must exercise customary skill and knowledge normally prevailing at a given time and place) *with Ex Parte* Duffy, 607 S.W.2d 507, 514 n.14 (Tex. Crim. App. 1980) (lawyer must be reasonably likely to render and rendering reasonably effective assistance). *See generally* Moore v. United States, 432 F.2d 730, 736-37 (3rd Cir. 1970). The approach to measure the competency of counsel, however, must be flexible. The fact that another attorney would have acted differently should not be a ground for finding incompetence under any standard. *See Ex Parte* Gallegos, 511 S.W.2d 510, 513 (Tex. Crim. App. 1974) (Roberts, J., concurring); Comment, *Ineffective Assistance of Counsel and Post-Conviction Relief in Criminal Cases: Changing Standards and Practical Consequences,* 7 COLUM. HUMAN RIGHTS L. REV. 427, 434-35 n.50 (1975).

74. *See* Bines, *Remedying Ineffective Representation In Criminal Cases: Departures From Habeas Corpus,* 59 VA. L. REV. 927, 932 (1973).

75. *See* United States v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973) (competence standard is mere "shorthand label and not subject to ready application"), *amended,* 624 F.2d 196 (D.C. Cir. 1979); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968) (principles must be enumerated), *cert. denied,* 393 U.S. 849 (1968); People v. Pope, 590 P.2d 859, 865-66, 153 Cal. Rptr. 732, 739-40 (1979) (reasonably competent attorney must perform basic duties to render effective assistance); Erickson, *Standards Of Competency For Defense Counsel In A Criminal Case,* 17 AM. CRIM. L. REV. 233, 242 (1979) (duties must be enumerated to make standards meaningful). *Duffy* illustrates the attempt by the Texas court to detail affirmative duties required of every attorney in his role as defense counsel. *See Ex Parte* Duffy, 607 S.W.2d 507, 516-17 (Tex. Crim. App. 1980) (duty to investigate facts, present all available evidence and arguments for defense); *Ex Parte* Greer, 505 S.W.2d 295, 295 (Tex. Crim. App. 1974) (duty to investigate law). *See also* Clinton & Wice, *Assistance of Counsel in Texas,* 12 ST. MARY'S L.J. 1, 13-45 (1980) (discussing circumstances found to constitute ineffective assistance in Texas). Failure to satisfy a specific obligation has seldom, if ever, constituted ineffective assistance without a showing that such neglect prejudiced counsel's entire representation. *See, e.g., Ex parte* Ewing, 570 S.W.2d 941, 947 (Tex. Crim. App. 1978) (nonfeasance in investigating facts not grounds for reversal); *Ex Parte* Prior, 540 S.W.2d 723, 727 (Tex. Crim. App. 1976) (failure to interview witnesses not prejudicial); Satillan v. State, 470 S.W.2d 677, 678-79 (Tex. Crim. App. 1971) (ignorance of applicable law does not constitute ineffective assistance). Only when a combination of inactions demonstrate an accused has suffered manifest prejudice will the court vitiate a conviction. *See* Clinton & Wice, *Assistance Of Counsel in Texas,* 12 ST. MARY'S L.J. 1, 24 (1980). One commentator has proposed that the burden of showing the absence of prejudice be on the prosecution when it is shown a duty has not been satisfied. *See* Bazelon, *The Defective Assistance Of Counsel,* 42 U. CIN. L. REV. 1, 32-33 (1973).

criteria against which an attorney can judge his performance.[76] Such a list could also require courts to look to the specific requirements demanded, rather than simply engaging in an *ad hoc* analysis of the lawyer's practice.[77] At a minimum, such guidelines should insist counsel confer with the client as early and often as necessary; advise the client of his rights; conduct all necessary investigations; ascertain and develop all available and appropriate defenses; and make appropriate pre-trial motions.[78]

The concept of effectiveness, however, is not static.[79] Courts, after adopting a minimum checklist, must expand and refine these standards as new resources are developed and new obligations are recognized.[80] To meet this challenge Texas courts should further implement the provisions of the ABA Defense Function Standards.[81] The Defense Function Standards outline the duties of a criminal defense lawyer from pre-arraignment to post-conviction.[82] The standards provide concepts of professional ethics as well as specific procedures designed to notify the attorney of what is expected of him.[83] Used as guidelines for judicial evaluation and

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76. *See* Bazelon, *The Defective Assistance Of Counsel*, 42 U. CIN. L. REV. 1, 32-33 (1973); Erickson, *Standards Of Competency For Defense Counsel In A Criminal Case*, 17 AM. CRIM. L. REV. 233, 242 (1979).

77. *See* Bazelon, *The Defective Assistance Of Counsel*, 42 U. CIN. L. REV. 1, 32-33 (1973) (standards should focus on lawyer's performance rather than on his ability or skill). Relief should also be afforded when counsel, although not in violation of any particular duty, renders assistance below normal and customary quality for a reasonably competent attorney. *See id.* at 32.

78. *See* Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968); People v. Pope, 590 P.2d 859, 865-66, 153 Cal. Rptr. 732, 739 (1979). *See generally* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 31-33, (1973) (discussing *Peyton*); Erickson, *Standards Of Competency For Defense Counsel In A Criminal Case*, 17 AM. CRIM. L. REV. 233, 242 (1979) (urging adoption of ABA Defense Function Standards).

79. *See* Bazelon, *The Defective Assistance Of Counsel*, 42 U. CIN. L. REV. 1, 33 (1973).

80. *See id.* at 33.

81. *See* Burger, *Introduction: The ABA Standards For Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251 (1974); Clark, *The American Bar Association Standards For Criminal Justice: Prescription For An Ailing System*, 47 NOTRE DAME LAWYER 429, 441 (1972); Erickson, *Standards Of Competency for Defense Counsel In A Criminal Case*, 17 AM. CRIM. L. REV. 233, 243 (1979).

82. *See* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *The Defense Function*, §§ 4.1-.5, at 125-27 (1974) (investigation and preparation); *id.* §§ 5.1-.3, at 127-28 (control and litigation); *id.* §§ 6.1-.2, at 128-29 (disposition without trial); *id.* §§ 7.1-.10, at 129-34 (trial); *id.* §§ 8.1-.15, at 134-36 (post-conviction). Formulation of the standards was in response to lack of authority on the subject of defense responsibility and the increasing complexity of criminal practice. *See* Jameson, *The Beginning: Background And Development Of The ABA Standards For Criminal Justice*, 12 AM. CRIM. L. REV. 255, 256-57 (1974).

83. *Compare* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *The Defense Function*, § 1.5, at 119 (1974) (trial lawyer's responsibility to the administration of justice) *with id.* § 4.1, at 125 (attorney has duty to investigate facts).

not as rigid criteria,[84] the Defense Function Standards will help resolve difficulties created by the *Duffy* court's commitment to examination of defense counsel conduct.[85]

The court in *Duffy* neglected to take advantage of several opportunities to prescribe specific guidelines encouraging effective pre-trial practice.[86] Faced with the fact that trial counsel conferred with his client only twice during his four month tenure as retained counsel,[87] the court simply observed Conant had not conferred with his client in a manner consistent with the seriousness of the case.[88] The court's opinion would have been more illuminating if it had referred to part III of the Defense Function Standards, which provides that counsel must establish a relationship of trust with the accused, keep the client informed of the case's progress, and determine all relevant facts known to the accused.[89] Furthermore, the court did not elaborate on the impropriety of Conant's failure to utilize available discovery procedures.[90] Since effective discovery practice is essential to a properly managed criminal defense,[91] the *Duffy* court should have required "good faith" compliance with discovery procedures as

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84. *See, e.g.*, Decoster v. United States., 624 F.2d 196, 305 (D.C. Cir. 1979) (Bazelon, J., dissenting) (standards are not to be applied rigidly); Bazelon, *The Defective Assistance Of Counsel*, 42 U. CIN. L. REV. 1, 33 (1973) (rules should be applied flexibly); ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *The Defense Function*, § 1.1(f), at 117 (1974) (standards should be used only as a guide).

85. *See Ex Parte* Duffy, 607 S.W.2d 507, 516 n.17 (Tex. Crim. App. 1980) (court concerned with "full scope of 'assistance' "); Erickson, *Standards Of Competency For Defense Counsel In A Criminal Case*, 17 AM. CRIM. L. REV. 233, 251 (1979) (legal profession has responsibility under new tests to determine standards for counsel).

86. *See Ex Parte* Duffy, 607 S.W.2d 507 (Tex. Crim. App. 1980) (requirements for client consultation, motion for discovery, and motion to suppress not addressed). Apparently, effective pre-trial procedure has not been encouraged in Texas through a judicial finding that faulty preparation was harmful. *See* Clinton & Wice, *Assistance Of Counsel in Texas*, 12 ST. MARY'S L.J. 1, 24 (1980).

87. *See Ex Parte* Duffy, 607 S.W.2d 507, 518 (Tex. Crim. App. 1980).

88. *See id.* at 518. The court stated that although the infrequency of consultation was another shortcoming of counsel, it could not be a ground for ineffectiveness because the record did not bear out the content of the consultations. *See id.* at 518 n.20.

89. *See* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *The Defense Function*, §§ 3.1(a), .2(a), .8, at 121, 122, 125 (1974). *See also* Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.) (attorney should consult with client as often as necessary), *cert. denied*, 393 U.S. 849 (1968). Duffy's irritation with the infrequent visits with his attorney is documented. *See Ex Parte* Duffy, 607 S.W.2d 507, 510 (Tex. Crim. App. 1980) (letter from Duffy to trial judge).

90. *See Ex Parte* Duffy, 607 S.W.2d 507, 511 (Tex. Crim. App. 1980).

91. *See* R. MOSES, CRIMINAL DEFENSE SOURCEBOOK § 12.01, at 335 (1974). *But cf.* Hayes v. State, 484 S.W.2d 922, 925 (Tex. Crim. App. 1972) (filing of pre-trial motions would not have aided the accused).

urged in section 4.5 of the Defense Function Standards.[92] Moreover, when confronted with trial counsel's disregard of the pre-trial motion to suppress,[93] the court should have instructed that pursuant to Defense Function Standards section 3.6(a), defense counsel must take all necessary steps to vindicate rights which may be protected and preserved only by prompt legal action.[94]

Duffy provided a timely vehicle for the Texas Court of Criminal Appeals to abolish the dual standards concept for gauging the competency of defense counsel. The propriety of the "reasonably effective assistance" standard employed by the court to determine constitutionally objectionable representation, however, remains uncertain. Requiring "reasonable competence demanded of attorneys in criminal cases"[95] may prove the better standard since it provides greater objectivity than the "reasonably effective assistance" standard, while conforming with recent Supreme Court language. Regardless of the test ultimately employed, the role of the defense lawyer must be clarified by the court. Further articulation of the specific duties of counsel, such as those enumerated in the Defense Function Standards, will assure the accused of the quality of assistance he can expect to receive, while informing the practicing attorney of what is expected of him.

John H. Cayce

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92. *See* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *The Defense Function*, § 4.5, at 127 (1974).

93. *See Ex Parte* Duffy, 607 S.W.2d 507, 511 (Tex Crim. App. 1980).

94. *See* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *The Defense Function*, § 3.6(a), at 124 (1974). *But see* Hunnicut v. State, 531 S.W.2d 618, 624 (Tex. Crim. App. 1978) (failure to file motion to suppress does not reflect ineffective assistance without a showing of illegality) (citing *Nichols v. State*, 500 S.W.2d 158, 160 (Tex. Crim. App. 1973)).

95. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970), *quoted in* Tollett v. Henderson, 411 U.S. 258, 267 (1973); *Ex Parte* Gallegos, 511 S.W.2d 510, 513 (Tex. Crim. App. 1974) (Roberts, J., concurring) (urging adoption of *McMann* standard).