June 1983

Effective Assistance of Counsel in Illinois: The Guiding Hand of Counsel

Joel Skinner

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation


Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol59/iss3/6

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
EFFECTIVE ASSISTANCE OF COUNSEL IN ILLINOIS: “THE GUIDING HAND OF COUNSEL”?

JOEL SKINNER*

TABLE OF CONTENTS

I. INTRODUCTION ............................................ 901
II. THE EVOLUTION OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN THE CIRCUIT COURTS OF APPEALS. 904
III. EVOLUTION OF THE ILLINOIS STANDARDS .................. 906
   A. The “Farce or Sham” Test ............................... 906
   B. Early Approaches to Appointed Counsel Ineffectiveness 910
   C. The “Actual Incompetence” Standard ........................ 911
IV. INEFFECTIVE ASSISTANCE OF COUNSEL IN ILLINOIS: THE CURRENT DEBATE ........................................ 913
   A. The Dual Standard and the Inadequacy of the “Farce or Sham” Test ............................................. 913
   B. Current Disarray In Illinois Courts Over the Applicable Standard ...................................................... 919
   C. Abolition of the Dual Standard and the “Farce or Sham” Test .............................................................. 922
V. RECOMMENDATIONS FOR A NEW APPROACH TO THE LAW OF INEFFECTIVE ASSISTANCE OF COUNSEL IN ILLINOIS .... 929
   A. A Standard Based upon Enumeration of Specific Minimum Duties ............................................................. 929
   B. Harmless Error Approach ........................................ 934
VI. CONCLUSION .............................................. 938

I. INTRODUCTION

The sixth amendment to the United States Constitution guarantees assistance of counsel to all criminal defendants.¹ The question of how

* B.A. 1979, University of Illinois at Champaign-Urbana. Candidate for J.D., 1984 IIT/Chicago-Kent College of Law. The author gratefully acknowledges the assistance of Professor Marc Kadish in commenting on the final draft of this article.

¹ U.S. CONST. amend. VI provides, in part:
   In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defense.

See also ILL. CONST., art. I, § 8, which provides, in part:
   In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel. ...
effective\textsuperscript{2} the assistance must be has generated controversy in the courts\textsuperscript{3} and in the literature.\textsuperscript{4} Unfortunately, the closest the United


2. The phrase "effective assistance of counsel" has its genesis in Powell v. Alabama, 287 U.S. 45 (1932). Justice Sutherland stated that the duty to appoint counsel "[i]s 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." Id. at 71. (emphasis added). Accord McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel.") (emphasis added).


EFFECTIVE ASSISTANCE OF COUNSEL

States Supreme Court has come to defining a minimum standard of competence for criminal defense counsel has been to insist that representation be "within the range of competence demanded of attorneys in criminal cases." The hollowness of the Supreme Court's standard has left the federal and state appellate courts groping for workable standards by which to evaluate defendants' claims of ineffective assistance of counsel.

This note will begin with a review of the history of the right to effective assistance of counsel. Next, the myriad standards currently employed by the federal and state courts in evaluating claims of the ineffectiveness of counsel will be discussed. The various standards will be considered in light of recent developments in the Illinois Appellate Court, the United States Court of Appeals for the Seventh Circuit,

6. The Court has never defined effective assistance of counsel as it pertains to standards of attorney performance. This provoked a strong reaction from Justice White in Maryland v. Marzullo:

[It is this Court's responsibility to determine what level of competence satisfies the constitutional imperative. It also follows that we should attempt to eliminate disparities in the minimum quality of representation required to be provided to indigent defendants. In refusing to review a case which so clearly frames an issue that has divided the Courts of Appeals, the Court shirks its central responsibility as the court of last resort, particularly its function in the administration of criminal justice under a Constitution such as ours.]

435 U.S. 1011, 1012-13 (1978) (White, J., dissenting from denial of certiorari). The Court's unwillingness to address this issue is ironic in light of Chief Justice Burger's often quoted criticism of the bar, that "from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation." Burger, supra note 4, at 234.

7. In Maryland v. Marzullo, Justice White said about ineffectiveness standards in the federal courts: "Despite the clear significance of this question, the Federal Courts of Appeals are in disarray." 435 U.S. at 1011-12 (White, J., dissenting from denial of certiorari).

8. For a comprehensive listing of the myriad standards utilized by the states, see, Comment, Defects in Standards, supra note 4, at 400-08.

9. An increasing number of aggrieved defendants are attacking their convictions on the basis that their defense counsel was ineffective. An Illinois prisoner may seek review of his or her conviction through four different review procedures: (1) motion for a new trial, ILL. REV. STAT. ch. 38 § 116-1 (1981); (2) direct appeal ILL. REV. STAT. ch. 110A §§ 602-608 (1981); FED. RULE APP. P. 3-12; (3) motion for post-conviction relief pursuant to state and federal statutes authorizing collateral attack upon convictions, Illinois Post Conviction Hearing Act, ILL. REV. STAT. ch. 38 §§ 122-1 to 122-7 (1981); 28 U.S.C. § 2255; and (4) petition for a writ of habeas corpus presented to the appropriate federal district court, 28 U.S.C. §§ 2241-2254 (1980).


11. See United States ex rel. Cosey v. Wolff, 682 F.2d 691 (7th Cir. 1982); Wade v. Franzen, 678 F.2d 56 (7th Cir. 1982).
and the United States District Court for the Northern District of Illinois, which may portend adoption of a new test for deciding such cases in Illinois. Finally, this note will propose that Illinois should adopt a standard for evaluating claims of the ineffectiveness of counsel based upon minimum criminal defense duties suggested by the American Bar Association.

II. THE EVOLUTION OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN THE CIRCUIT COURTS OF APPEALS

Lacking a clear mandate from the Supreme Court, the federal courts of appeals have designed disparate tests for assessing claims of ineffective assistance of counsel. Beginning in the 1940's, the courts used the “farce and mockery” test: a criminal defendant could get relief from his lawyer's failings only if counsel's incompetence was so pervasive as to turn the trial into a “farce and mockery of justice.” The realization by one commentator that the “farce and mockery” standard was “itself a mockery of the sixth amendment,” and the Supreme Court's indication that counsel's assistance must be effective, eventually precipitated a shift away from the “farce and mockery” standard. Eleven circuits have expressly rejected the “farce and mockery” test and have embraced a form of “reasonable competence” or

15. Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir.). cert. denied, 325 U.S. 889 (1945). Diggs alleged that he was coerced by his appointed lawyer into pleading guilty to a grand larceny charge. He asserted that his attorney's negligence or lack of knowledge with respect to pleading denied him effective assistance of counsel. Id. at 668.
16. Defective Assistance, supra note 4, at 28. See cases cited infra note 175 for examples of gross misconduct by attorneys which has been held not to be ineffective assistance under the "farce and mockery" standard.
"customary skill" standard. Only the Second Circuit still employs the "farce and mockery" approach. Even the courts using a competence test have not established a clear line between effective and ineffective assistance of counsel.

Moreover, most federal courts of appeals have held that, even if counsel performs ineffectively, the defendant must prove that his case was prejudiced by counsel's inadequacy in order to establish an infringement of his sixth amendment rights. A variety of paths have been taken by the First, Third, Fourth, Sixth, Seventh and District of Columbia Circuits in handling the prejudice issue. The District of Columbia Circuit has held that "[o]nce the defendant has demonstrated a denial of effective assistance resulting in likely prejudice, the government has an opportunity to prove beyond a reasonable doubt that counsel's deficiencies were harmless." The First, Third, Fourth and Seventh Circuits have adopted the harmless error test espoused in *Chapman v. California.* This approach places the burden on the gov-
The Sixth Circuit has held that the defendant need not demonstrate an adverse impact on his interests, and has further held that reversal is automatic upon the defendant's proof of ineffective assistance of counsel.

Illinois courts have long struggled to define their ineffectiveness standards. Recent conflicting cases have fueled the fire of controversy, hinting that the winds of change may bring new standards.

III. EVOLUTION OF THE ILLINOIS STANDARDS

A. The "Farce or Sham" Test

In the 1950's, Illinois courts moved from a rule that a defendant who employed his own lawyer could never obtain relief on the ground of his attorney's inadequacy to a position that there could be relief under very limited circumstances. The first case to apply the new test to a claimant who hired his own counsel was People v. Heirens.

out proof of prejudice. Id. at 23. However, if the government could demonstrate that a federal constitutional error was harmless (that is, did not "contribute to the verdict obtained") beyond a reasonable doubt, the resulting infringement of a constitutional right would not mandate reversal. Id. at 24. In Chapman, the harmless error rule was invoked when the prosecutor commented on the failure of the defendants to testify, in violation of Griffin v. California, 380 U.S. 609 (1965).

25. See Wade v. Franzen, 678 F.2d 56, 59 (7th Cir. 1982) (by implication); United States v. Bosch, 584 F.2d 1113, 1123 (1st Cir. 1978); United States v. Crowley, 529 F.2d 1066, 1069 (3d Cir. 1976); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968). See also Hawkman v. Parratt, 661 F.2d 1161, 1169 (8th Cir. 1981); Thomas v. Wyrick, 535 F.2d 414, 416-417 (8th Cir. 1976). In both Hawkman and Thomas, the Eighth Circuit approved the Chapman test without explicitly adopting it.


In Beasley, the Sixth Circuit found that the defendant was denied effective assistance on the ground that "[p]otentially exonerating defenses were not explored by counsel and were not developed at trial." 491 F.2d at 696. The court held that the defendant need not show that he received an unwarranted conviction or an unduly harsh sentence as a result of counsel's ineffectiveness:

Because Petitioner was represented by incompetent and ineffective counsel, his conviction cannot stand. Harmless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel. Id. at 695-696 (citations omitted).


28. A search of the Illinois cases revealed that accused persons who retained their own lawyers prevailed on claims of ineffective assistance only once from the late nineteenth century through 1966. That case is People v. Nitti, 312 Ill. 111, 143 N.E. 448 (1924).

The prospect of obtaining post conviction relief based upon retained counsel ineffectiveness has not improved appreciably since 1966. Only three post-1966 Illinois cases were found in which retained counsel inadequacy was a ground of relief. See People v. Redmond, 50 Ill. 2d 313, 278 N.E.2d 766 (1972); People v. Corder, 103 Ill. App. 3d 434, 431 N.E.2d 701 (1982); People v. McCoy, 80 Ill. App. 2d 257, 225 N.E.2d 123 (1967).
William Heirens, a University of Chicago student was found guilty of three murders and was sentenced to life imprisonment. During his arrest, a Chicago police officer broke three flower pots over Heirens' head, injuring him severely. During his second day in the hospital, the youth was questioned all night long by police and an assistant state's attorney. Heirens "[f]ailed to respond coherently, but stared with a vacant expression and behaved in an irrational manner throughout the interrogation." The next day, the defendant was examined by a psychiatrist, who later testified at the post-conviction hearing that Heirens was suffering from a severe psychiatric disorder.

A second psychiatrist, who had never examined the youth, told Heirens' retained lawyer that Heirens' illness did not render him unable to distinguish between right and wrong. Defense counsel decided to forego a possible insanity defense, and to have his client plead guilty in exchange for life imprisonment. The young man confessed and pled guilty to the offenses charged, after his lawyer told him that the death penalty would likely be imposed if he did not confess.

Before sentencing, the defendant's lawyer said to the court: "I must confess that at this time there exists in my mind many doubts as to this defendant's mental capacity for crime . . . [the State's Attorney and I] agreed that any course on our part which would assist in having [the defendant] returned to society would be . . . unfair." In his post-conviction petition, Heirens alleged that his lawyer decided not to mount an insanity defense out of a misguided sense of public duty.

The Illinois Supreme Court acknowledged that the police search of defendant's apartment, the interminable interrogation of him while hospitalized, the unauthorized use of sodium pentothal and a lie detector during questioning "[were] flagrant violations of his rights." Yet, because the behavior of the police and assistant state's attorney did not have a substantial nexus with Heirens' guilty plea, denial of the post-conviction petition was affirmed. The court noted that the evidence

30. Id. at 134, 122 N.E.2d at 234.
31. Id. at 135, 122 N.E.2d at 236.
33. 4 Ill. 2d at 136, 122 N.E.2d at 234-35.
34. Id. at 137, 122 N.E.2d at 235. The defendant's ability to distinguish between right and wrong was the test for determining legal insanity in Illinois at the time of the Heirens case.
35. Id. at 137-38, 122 N.E.2d at 235-36.
36. Id. at 140, 122 N.E.2d at 237.
37. Id. at 141, 122 N.E.2d at 237.
38. Id.
39. Id. at 141-42, 122 N.E.2d at 237-38.
suggested that Heirens was not legally responsible for his conduct at the time of the offenses, but even if counsel erred by not preparing an insanity defense, the mistake did not amount to ineffective representation.\textsuperscript{40} The court then applied a new test for resolving ineffective assistance claims against retained counsel: "[m]istakes of counsel will not amount to a denial of due process unless on the whole the representation is of such low caliber as to be equivalent to \textit{no representation at all}, and to reduce the proceedings to a \textit{farce or sham}."\textsuperscript{41}

Although Heirens was unable to obtain post-conviction relief, his case occasioned a departure from the former rule that defendants could never bring claims against incompetent retained counsel. After \textit{Heirens}, if a privately represented defendant could show that his trial was reduced to a "farce or sham" by counsel's poor performance, post-conviction relief might be granted.

Nonetheless, \textit{People v. Heirens} clearly shows that even serious errors by counsel will not support a finding of ineffective representation under the "farce or sham" standard. Mistakes such as failure to assert a crucial defense do not imply inadequate assistance under the "farce or sham" test, because the entire trial proceedings might be so poor as to manifest no representation at all. Proving that counsel's inadequacy made a farce or sham of the trial is almost impossible:\textsuperscript{42} less than one percent of defendants bringing claims of ineffectiveness of counsel in Illinois between 1954 and 1983 obtained post-trial relief.\textsuperscript{43}

\textsuperscript{40} \textit{Id.} at 143, 122 N.E.2d at 238.

\textsuperscript{41} \textit{Id.} at 144, 122 N.E.2d at 238 (emphasis added). Although \textit{Heirens} was the first time the "farce or sham" test was applied in an Illinois case involving retained counsel, the formulation had previously been adopted in a case where counsel was appointed. \textit{See People v. Reeves, 412 Ill. 555, 107 N.E.2d 861 (1952).}

\textit{In Reeves,} appointed defense counsel neglected to (1) present to the jury a previous adjudication of insanity, (2) object to introduction in evidence of a confession obtained while the defendant was insane, (3) object to the prosecutor's statements regarding a previous conviction. \textit{Id.} at 558, 107 N.E.2d at 863. Moreover, the defendant made a sworn statement that counsel did not consult with the accused until trial day. \textit{Id.} at 564, 107 N.E.2d at 866. The court held that these facts reduced the trial to a "farce and a sham" and remanded the case for further proceedings on defendant's post-conviction petition. \textit{Id.}

\textsuperscript{42} The following are just a few of the many Illinois cases wherein privately represented defendants were denied relief under the "farce or sham" test: People v. Steel, 52 Ill. 2d 442, 288 N.E.2d 355 (1972); People v. Stanley, 50 Ill. 2d 320, 278 N.E.2d 792 (1972); People v. Fleming, 50 Ill. 2d 141, 277 N.E.2d 872 (1972); People v. Nelson, 42 Ill. 2d 172, 246 N.E.2d 244 (1969); People v. Ortiz, 22 Ill. App. 3d 788, 317 N.E.2d 763 (1974).

\textsuperscript{43} 50 Ill. 2d 313, 278 N.E.2d 766 (1972). \textit{See also People v. McCoy, 80 Ill. App. 2d 257, 225 N.E.2d 123 (1967), where the court reversed a conviction because: (a) defendant's retained attorney introduced evidence substantially different from defendant's theory of the case; (b) defense counsel favorably read the state's evidence to the jury and; (c) the lawyer failed to move for a mistrial when incompetent and highly prejudicial evidence was presented to the jury. The court employed a formulation very similar to the "farce or sham" test: counsel's performance was of
In *People v. Redmond*, the defendant was convicted of murder, and he appealed directly to the Illinois Supreme Court. In reviewing the trial record, Justice Schaefer found serious blunders by retained trial counsel which amounted to "[a] complete failure to represent the defendant," reducing the trial to a "farce or sham."

First, defense counsel did not object to the prosecution's elicitation of incompetent testimony from defendant's mother on cross-examination. Second, counsel abandoned his client's defense that the killing had been unintentional, and admitted defendant's guilt during closing argument, although the accused had never admitted guilt in his testimony. The court reversed Redmond's conviction and remanded the cause for a new trial based upon retained counsel's ineffectiveness as measured by the "farce or sham" yardstick.

Thus, a privately represented defendant could obtain post trial relief based upon his lawyer's incompetence, only if he could prove that counsel's defense amounted to no representation at all. By contrast, Illinois courts developed a different standard for evaluating ineffectiveness of appointed counsel.

such poor quality as to "deprive the defendant of any chance of being found not guilty... [and] amount[ed] to no representation at all." *Id.* at 263-64, 225 N.E.2d at 126.

44. 50 Ill. 2d 313, 278 N.E.2d 766 (1972).

45. In a 1956 law review article, Justice Schaefer had written that "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, supra note 4, at 8.

46. 50 Ill. 2d at 315, 278 N.E.2d at 767.

47. Defense counsel failed to object when the State's Attorney asked the following questions of defendant's mother:

"Do you have personal knowledge that he struck a teacher at that school?"
"Was he, in fact, expelled from that school?"
"Now, as a matter of fact this boy has always been rather lazy around the house, has he not?"
"And, as a matter of fact, this boy was sort of shiftless, was he not?"
"Now are you going to tell the jury that you did not know about your son's conduct in school?"

*Id.* at 315, 278 N.E.2d at 768.

48. Counsel made these remarks during final argument:

Well, am I selling someone the defendant's guilt? I think so. Guilty, yes. Sure, guilty. He wasn't faking when he—when he wouldn't aim that weapon at—well, Parrish [an Assistant State's Attorney]. He wasn't kidding. That wasn't—that was inside out. I am crying for myself. I like being in a one man office, but I am getting off the point. You have no idea how much a win, this win, means to me because I don't think it was murder. I will tell you what murder is. Actually, I am not real sure. I don't think anybody is a murderer. Some of this is just to save a boy from whatever they have in store for him. And I am not crying, he is on a murder indictment. They won't talk anything else, murder or nothing, because that is the kind of a case we got.

*Id.* at 316-17, 278 N.E.2d at 768.

49. *Id.* at 315-17, 278 N.E.2d at 768-69.
B. Early Approaches To Appointed Counsel Ineffectiveness

The early case of *People v. Blevins* defined competence of counsel as "[c]ounsel . . . having sufficient ability and experience to fairly represent the defendant, present his defense, and protect him from undue oppression." In *Blevins*, a murder conviction was reversed because appointed counsel failed to object to incompetent, highly prejudicial evidence of the defendant's prior criminal record. In two similar decisions, counsel's failure to lay a proper foundation for the introduction of crucial impeachment evidence, and failure to object to prejudicial hearsay evidence, triggered reversals of convictions under the *Blevins* standard.

Another approach to appointed counsel's incompetence used during the 1920's and 1930's is illustrated in *People v. Francis*. In *Francis*, a public defender had one five-minute consultation with his client before trial. The Illinois Supreme Court denied the defendant's ineffectiveness assistance claim, holding that "[t]he question whether a defendant was adequately represented by able counsel must be answered solely from the circumstances of each particular case.”

Another example of this approach is *People v. Gardiner*. Gardiner's appointed attorney did not object to improper cross examination and argument at trial. In reversing the conviction, the court found that, in a close case, ineffective representation may warrant post-conviction relief.

A growing realization that the right to effective assistance of counsel was too important to be subject to a case-by-case approach led to dissatisfaction with the older standards. When *People v. Morris* came before the Illinois Supreme Court in 1954, it was time for a change, and

---

50. 251 Ill. 381, 390, 96 N.E. 214, 218 (1911).
51. *Id*.
54. 356 Ill. 74, 190 N.E. 106 (1934).
55. *Id*. at 76-77, 190 N.E. at 107.
56. *Id*. at 77, 190 N.E. at 107.
57. 303 Ill. 204, 135 N.E. 422 (1922).
58. The court articulated its rule as follows: The fact that a person charged with a crime is poorly defended will not justify a reversal of the judgment where it is reasonably supported by the evidence . . . , but where the evidence is close, as it is in this case, and it is clear that the prosecuting attorney has taken advantage of the accused because he was poorly represented, and the trial court has permitted such advantage to be taken, then we will consider the errors, notwithstanding the failure to properly preserve the questions for review.
59. 3 Ill. 2d 437, 121 N.E.2d 810 (1954).
the modern-day standard for evaluating appointed counsel ineffectiveness was born.

C. The "Actual Incompetence" Standard

The court in *Morris* noted that many early ineffectiveness cases were direct appeals, and that the decisions did not rest on constitutional grounds. By contrast, recent ineffectiveness cases had been decided "[i]n relation to the expanding concept of due process of law under the fourteenth amendment." Because violation of a constitutional right is involved, claims of incompetence of counsel were now being raised more often in collateral proceedings under the Post Conviction Hearing Act. Yet, the *Morris* court said that, because the federal courts did not clarify the mandate of federal due process in this area, "[i]t is difficult to formulate a standard by which this type of case can be judged."

Sensing the need to establish a new standard for deciding appointed counsel cases, the *Morris* court said:

> [I]n order to [receive relief based upon ineffective assistance of appointed counsel] the defendant must clearly establish: (1) actual incompetence of counsel, as reflected by the manner of carrying out his duties as a trial attorney; and (2) substantial prejudice resulting therefrom, without which the outcome would probably have been different.

Applying the new test, the court reversed Morris' convictions for assault to commit robbery and assault to commit murder. The *Morris* court found that the following actions by the public defender amounted to ineffective assistance of counsel:

1. **Before trial, the defendant was entitled to be discharged for want of prosecution pursuant to the speedy trial statute.** Counsel was apparently unaware of this statutory provision, however, and he failed to examine available records to ascertain the length of Morris' pretrial confinement. Consequently, the public defender did not make the appropriate motion for discharge before trial.

2. **Counsel spoke with the defendant only once—on the day of**

---

60. *Id.* at 448, 121 N.E.2d at 817.
63. *Id.* The *Morris* court's standard set forth in the text will hereinafter be referred to as the "actual incompetence" standard.
64. ILL. REV. STAT. ch. 38, § 748 (1951). Morris had been held in continuous custody for more than four months before trial, in violation of the statute.
65. 3 Ill. 2d at 452-53, 121 N.E.2d at 819.
trial.\textsuperscript{66}

(3) Counsel never discussed the merits of the case with Morris. When asked for advice on selection of a jury or bench trial, the public defender replied, "It's up to you."\textsuperscript{67}

(4) Defense counsel told Morris on the day of trial that "everything was useless" and did not offer a plan for defending the case.\textsuperscript{68}

The court held that the public defender's ignorance of a criminal statute which had long been on the books in some form coupled with "meagre preparation and scant attention to the case" amounted to "actual incompetence."\textsuperscript{69} The court found "substantial prejudice . . . without which the result would probably have been different"; specifically, Morris would have been entitled to his release prior to trial if the public defender had made the appropriate motion for discharge.\textsuperscript{70} Despite the public defender's errors, Morris probably would not have secured reversal of his convictions if he were represented by counsel of his own choice, because there was no showing that the trial itself was reduced to a "farce or sham."\textsuperscript{71}

Defendants seeking relief from ineffective appointed counsel under the "actual incompetence" standard bear a heavy burden. Actual incompetence may be shown by, for example, a failure to conduct an investigation and interview witnesses,\textsuperscript{72} but showing extreme dereliction on the part of counsel is necessary to meet the requirement of "substantial prejudice . . . without which the result would probably have been different."\textsuperscript{73}

Two examples of substantial prejudice under the "actual incompetence" test illuminate the burden defendants confront. As shown above, the claimant in \textit{Morris} was required to show that he would

\begin{itemize}
\item \textsuperscript{66} Id. at 450, 121 N.E.2d at 818.
\item \textsuperscript{67} Id. at 452, 121 N.E.2d at 818.
\item \textsuperscript{68} Id. at 452, 121 N.E.2d at 819.
\item \textsuperscript{69} Id. at 452-53, 121 N.E.2d at 819.
\item \textsuperscript{70} Id. The court noted that Morris' co-defendant was discharged under the statute. 3 Ill. 2d at 453, 121 N.E.2d 819.
\item \textsuperscript{71} Id. The "farce or sham" test is used to determine retained counsel ineffectiveness. \textit{See supra text accompanying notes} 29-49.
\item \textsuperscript{72} People v. Stepheny, 46 Ill. 2d 153, 263 N.E.2d 83 (1970).
\item \textsuperscript{73} The burden confronting defendants under the "actual incompetence" test is illustrated by the fact that, out of approximately 100 Illinois cases decided between 1954 and 1983 in which the "actual incompetence" test was applied to appointed counsel ineffectiveness, claimants were granted relief in only 4 cases. \textit{See} People v. Stepheny, 46 Ill. 2d 153, 263 N.E.2d 83 (1970) (defendant entitled to evidentiary hearing on adequacy of representation); People v. Morris, 3 Ill. 2d 437, 121 N.E.2d 810 (1954) (conviction reversed; case remanded for new trial); People v. Ford, 99 Ill. App. 3d 973, 246 N.E.2d 340 (1981) (case remanded for evidentiary hearing on ineffective representation); People v. Clark, 42 Ill. App. 3d 472, 355 N.E.2d 619 (1976) (conviction reversed; case remanded for new trial).
\end{itemize}
never have been tried for two felony offenses if his lawyer had made the appropriate motion for discharge.

Another example is *People v. Stepheny*, where the defendant met the substantial prejudice requirement by showing that (1) without his consent, his lawyer argued that he was guilty during opening and closing statements, and (2) his attorney failed to locate and interview key witnesses who would have largely corroborated defendant's testimony. During opening and closing statements, Stepheny's attorney remarked: "[I]f there is a finding of guilty, . . . probably this Court can find [the defendant] guilty of a lesser charge . . . . I respectfully submit that this is what I believe would serve the ends of Justice in this case." Nevertheless, the bevy of cases in which defendants have been unable to meet the "substantial prejudice" burden attest to the stringent nature of the "actual incompetence" formulation.

Courts and commentators have vigorously attacked the rationale underlying the use in Illinois of separate standards for appointed and retained counsel inadequacy. Not only do separate standards exist in Illinois, but also the several districts of the Illinois Appellate Court do not agree on the proper application of the standards. Some recent cases may indicate a trend against use of the archaic "farce or sham" test, but this test prevails as the measure of incompetency of retained counsel in Illinois.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL IN ILLINOIS: THE CURRENT DEBATE

A. The Dual Standard and the Inadequacy of the "Farce or Sham" Test

The Illinois courts use different standards for evaluating claims of ineffectiveness depending upon whether defense counsel is retained or appointed. If counsel is retained, the "farce or sham" standard applies. By contrast, if counsel is appointed, the defendant may be enti-
tled to post-conviction relief if his lawyer was "[a]ctually incompetent, . . . , and if this incompetence produced substantial prejudice to the defendant without which the result of the trial would probably have been different." 79

Illinois courts have justified the use of the "farce or sham" standard on the ground that any other test would foster feigned incompetence. 80 The courts further justify the burden on the grounds that most such claims are frivolous, 81 and that most convicts are "guilty anyhow." 82

The "guilty anyhow" attitude permits constitutional violations unless the victims prove their innocence. This attitude fosters inadequate criminal defense by encouraging judicial blindness 83 to ineffective assistance in cases in which the defendant is unable to make a colorable showing of innocence. 84 Widespread judicial belief that most defend-


80. "Any other rule would put a premium upon pretended incompetence of counsel, for if the rule were otherwise a lawyer with a desperate case would have only to neglect it in order to insure reversal or vacation of the conviction." People v. Stephens, 6 Ill. 2d 257, 259, 128 N.E.2d 731, 732 (1955); accord People v. Heirens, 4 Ill. 2d 131, 144, 122 N.E.2d 231, 238 (1954); People v. Mitchell, 411 Ill. 407, 104 N.E.2d 285, cert. denied, 343 U.S. 969 (1952); People v. Ortiz, 22 Ill. App. 3d 788, 799, 317 N.E.2d 763, 768 (1974). The notion is that if a more liberal standard of review existed for retained counsel cases, counsel would employ substandard representation as a trial strategy in order to obtain the release of patently guilty clients.

81. Under the "farce or sham" test, a defendant must prove essentially that his representation was so poor that he would have been better off defending the case pro se. Previous errors by counsel will not support post-conviction relief unless the entire proceedings are reduced to a farce. See, e.g., Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945). In Diggs, the court said:

It is well known that the drafting of petitions for habeas corpus has become a game in many penal institutions. Convicts are not subject to the deterrents of prosecution for perjury and contempt of court which affect ordinary litigants. The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner . . . . He may realize that his allegations will not be believed, but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down. 148 F.2d at 669-70. See generally Grano, supra note 4, at 1243.

82. See Bazelon, supra note 4, at 825; Bines, supra note 4, at 962-64. See, e.g., People v. Schulman, 299 Ill. 125, 132 N.E. 530 (1921). Courts have also justified the "farce or sham" test by saying that the test fosters more careful selection of attorneys. See, e.g., People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957).

83. See, e.g., Friendly, supra note 4. Judge Friendly believes that our system, which allows numerous appeals in addition to collateral proceedings, is abused by prisoners, wastes precious judicial resources and fosters public disrespect for the judgments of our criminal courts. Id. at 148-50. The thesis of his article is that "convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence." Id. at 142.

84. In a "guilty anyhow" case, the defense attorney and, perhaps, the judge believe that the defendant is obviously guilty of the offense charged. Judge Bazelon has forcefully decried the "guilty anyhow" attitude:
ants are "guilty anyhow" clearly violates established constitutional principles. Moreover, the "guilty anyhow" attitude undermines the traditional presumption of a criminal defendant's innocence. Of course, defendants do not need to prove their innocence in American courts; instead, the government must prove each element of an offense beyond a reasonable doubt.86

The "farce or sham" test, by requiring the defendant to show that his legal assistance was tantamount to no representation and that the entire proceedings amounted to a mockery of justice, violates the rule of *Chapman v. California*.87 *Chapman* held that the state must prove beyond a reasonable doubt that violations of a defendant's rights are harmless. By contrast, under the "farce or sham" test, the defendant must show not only that he was harmed by ineffective representation, but also that counsel's performance was so poor that the entire pro-

Perhaps counsel concluded from this limited information that his client had no alibi defense and was guilty, and that therefore counsel was excused from conducting any investigation. But the suggestion that a client whose lawyer believes him to be guilty deserves less pretrial investigation is simply wrong. An attorney's duty to investigate is not relieved by his own perception of his client's guilt or innocence. I can think of nothing more destructive of the adversary system than to excuse inadequate investigation on the grounds that defense counsel—the accused's only ally in the entire proceedings—disbelieved his client and therefore thought that further inquiry would prove fruitless.

The Constitution entitles a criminal defendant to a trial in court by a jury of his peers—not to a trial by his court-appointed defense counsel.


85. See Bines, supra note 4, at 962. See also Defective Assistance, supra note 4; Friendly, supra note 4.

Some researchers have suggested that judges may be justified in believing that most defendants who go to trial are "guilty anyhow." *Vera Institute, Felony Arrests* (lst rev. ed. 1981); H. JACOB, JUSTICE IN AMERICA: COURTS, LAWYERS AND THE JUDICIAL PROCESS (3d ed. 1978) [hereinafter cited as JACOB]; C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE (1978); J. EISENSTEIN & H. JACOB, FELONY JUSTICE, (2d ed. 1977) [hereinafter cited as EISENSTEIN]; B. FARST, J. LUCIANOVIC & S.J. COX, WHAT HAPPENS AFTER ARREST?: A COURT PERSPECTIVE OF POLICE OPERATIONS IN THE DISTRICT OF COLUMBIA (1977); Lecture by Professor Michael G. Maxfield, Northwestern University Political Science Department (October 18, 1978).

Professor Jacob's study of the disposition of felony arrests in Baltimore, Chicago, and Detroit indicates that only a small percentage of felony arrestees are ever convicted or sentenced to prison. JACOB, supra, at 182. In Chicago, 66% of felony arrestees in 1972 had all charges against them dismissed. EISENSTEIN, supra, at 191. Only 25% of all felony arrestees were convicted, and only 15% were incarcerated. JACOB, supra, at 182. Professors Eisenstein and Jacob report similar findings in Baltimore, Detroit, Washington, D.C., Los Angeles, and San Diego. EISENSTEIN, supra, at 191; JACOB, supra, at 182.

The authors point out that the vast majority of felony charges are dismissed prior to trial because prosecutors determine that corroborative physical evidence or inculpatory testimony is lacking. Therefore, felony arrestees have myriad opportunities between arrest and incarceration to drop out of the felony justice system. Accordingly, the Vera Institute researchers, as well as Professors Maxfield, Forst, and Silberman, conclude that the relatively small number of felony arrestees who remain in the system all the way through arrest, trial, conviction and imprisonment are truly guilty of the offenses charged.


87. 386 U.S. 18 (1967).
ceedings were reduced to a farce. It is very difficult for a defendant to prove that his lawyer provided no representation and that the entire trial proceedings were reduced to a farce by counsel's performance. In jurisdictions using the "farce or sham" standard, few convictions have been reversed due to ineffective assistance of counsel.88

Further, to assert, as many have, that the "farce or sham" test must be retained in Illinois because counsel may feign incompetence in order to assure reversal of an anticipated conviction.89 Attorneys know of the likelihood of a besmirched reputation and of sanctions90 imposed by the Illinois Supreme Court Attorney Registration and Disciplinary

88. In Illinois, the following cases have granted relief to aggrieved defendants under the "farce or sham" test or a similar test: People v. Redmond, 50 Ill. 2d 313, 278 N.E.2d 766 (1972) ("farce or sham" test; retained counsel; attorney allowed the prosecutor to disparage defendant's character without objection and admitted his client's guilt during closing argument); cf. People v. Carter, 41 Ill. App. 3d 425, 354 N.E.2d 482 (1976) ("no representation at all" test; lawyer admitted defendant's guilt during closing argument and failed to take advantage of a police officer's omission of Miranda warnings); People v. McCoy, 80 Ill. App. 2d 257, 225 N.E.2d 123 (1967) ("no representation at all—deprived defendant of any chance of being found not guilty" test; retained counsel; attorney abandoned defendant's theory of the case and permitted jury to hear inadmissible, highly prejudicial evidence); People v. Reeves, 412 Ill. 555, 107 N.E.2d 861 (1952) ("farce or sham" test used for first time in Illinois; appointed counsel; attorney failed to present evidence of a previous adjudication of insanity and did not object to highly prejudicial, incompetent evidence); People v. DeSimone, 9 Ill. 2d 522, 138 N.E.2d 556 (1956) ("farce or sham" test; appointed counsel; attorneys did not understand how to mount an insanity defense, made no objections during the trial which consumed 2,250 pages of transcript, and asked markedly bizarre questions of prospective jurors during voir dire).

The following authorities from other jurisdictions underscore the difficulty in mounting an ineffectiveness claim against the "farce or sham" test: United States v. Katz, 425 F.2d 928 (2d Cir. 1970) (no reversal even though defense counsel expressed unhappiness over having the case, and was observed sleeping during witness examination); Butler v. United States, 260 F.2d 574 (4th Cir. 1958) (no reversal even though retained counsel was under indictment for a drug offense and under treatment for addiction); Hudspeth v. McDonald, 120 F.2d 962 (10th Cir.), cert. denied, 314 U.S. 617 (1941) (no reversal where defense counsel was allegedly drinking heavily during trial); Beasley v. United States, 491 F.2d 6 (6th Cir. 1974) (no reversal where defense counsel displayed bizarre courtroom behavior); Brown v. Swenson, 487 F.2d 1236 (8th Cir. 1973), cert. denied, 416 U.S. 944 (1974) (no ineffectiveness even though defendant's guilty plea led to twenty-five year sentence when he should have received no more than five years); Daughtery v. Beto, 388 F.2d 810 (5th Cir. 1967), cert. denied, 393 U.S. 986 (1968) (no reversal where counsel failed to raise only available defense and only consulted with defendant fifteen minutes before trial). See also Satil-
Commission.91 As one court has stated: "[a]ttorneys 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."92

Moreover, if the pretended incompetence fails to fool the court, and the case proceeds to verdict, counsel's intentional errors93 are likely to have stripped away any hint of a meritorious defense.94 Accordingly the accused may receive a harsher sentence, because his defense was not properly presented.95 In addition, it is unlikely that attorneys will take these risks,96 because many criminal lawyers appear before a particular judge more than once and, thus, do not want to bias a judge against them.

91. In addition to violating Rule 771, supra note 90, feigned incompetence may violate the following disciplinary rules set forth in the Code of Professional Responsibility:

(1) Canon 7 requires that an attorney represent a client zealously within the bounds of the law. Rule 7-101 provides that:

(1) A lawyer shall not intentionally
(1) fail to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules...

(2) Canon 6 commands that a lawyer should represent a client competently. Rule 6-101, entitled "Failing to Act Competently" provides:

(a) A lawyer shall not
(1) handle a legal matter which he knows or should know that he is not competent to handle,
(2) handle a legal matter without preparation adequate in the circumstances;
or
(3) neglect a legal matter entrusted to him.

(3) Canon 1 states that a lawyer should assist in maintaining the integrity and competence of the legal profession. Rule 1-102 makes a lawyer subject to discipline for violation of disciplinary rules as well as for behavior involving "dishonesty, fraud, deceit, or misrepresentation." ILL. REV. STAT. ch. 110A, foll. § 771, Canon 1, Rule 1-102 (1981).

(4) Rule 7-102 provides in part:

(a) In his representation of a client, a lawyer shall not

. . . (5) knowingly make a false statement of law or fact;
(7) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent; or
(8) knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule.

92. Williams v. Beto, 354 F.2d 698, 706 (5th Cir. 1965). See also Bines, supra note 4, at 940; Waltz, supra note 4, at 313; Ineffective Representation, supra note 4, at 32.

93. The gross ineffectiveness of counsel exhibited in People v. DeSimone, 9 Ill. 2d 522, 138 N.E.2d 556 (1956), has been referred to as pretended incompetence. See United States ex rel. Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967); Note, Effective Assistance of Counsel, 49 VA. L. REV. 1531, 1541 (1963).

94. The DeSimone brothers had a colorable insanity defense. Id. at 526-27, 138 N.E.2d at 558.

95. One of the DeSimone defendants received the death penalty, the other defendant was sentenced to forty years imprisonment. Id. at 523, 138 N.E.2d at 557.

96. See, e.g., United States ex rel. Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967).
Furthermore, the “farce or sham” test will not dissuade lawyers who try to deceive the court. Even if feigned ineffectiveness could be deterred by the “farce or sham” standard, it is inequitable to apply this test to retained counsel only.97

In light of the Supreme Court’s holdings in *Gideon v. Wainwright*98 and *McMann v. Richardson*,99 the “farce or sham” standard fails to adhere to sixth amendment requirements.100 First, “[t]he mockery test requires such a minimal level of performance from counsel that it is itself a mockery of the sixth amendment.”101 Second the “farce or sham” formulation should be an embarrassment to the legal profession itself, because attorneys and judges require more than a “farce or sham” standard of care in other professions, such as medicine.102 Third, the “farce or sham” standard’s focus on the trial proceedings103 is too narrow. Much criminal defense work is done before trial.104 Consequently, counsel’s ineffectiveness may not appear in the trial court record,105 and so counsel’s mistakes may be disregarded. Finally, the

100. The Court in *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) stated that “[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel . . . (citations omitted) [counsel’s performance must be] within the range of competence demanded of attorneys in criminal cases.” The requirements of the “farce or sham” test fall far below the Supreme Court mandate of *McMann*. The “farce or sham” standard requires only that counsel’s performance not be so wretched as to amount to no representation at all. As long as counsel’s mistakes are not so outrageous as to reduce the entire proceedings to a mockery of justice, the requirements of the “farce or sham” test are met.

A shocking example of what it takes to establish ineffective assistance of counsel under the “farce or sham” test is presented by *Cooks v. United States*, 461 F.2d 530 (5th Cir. 1972). In *Cooks*, defendant’s attorney advised his client to agree to a sentence six times longer than he could receive as a matter of law. *Id.* at 532. Under this extreme circumstance, the accused was able to show ineffective representation.

101. *Defective Assistance, supra* note 4, at 28.
102. *Bines, supra* note 4, at 928.
103. *See, e.g.*, People v. Steel, 52 Ill. 2d 442, 288 N.E.2d 355 (1972); People v. Stanley, 50 Ill. 2d 320, 278 N.E.2d 792 (1972); People v. Fleming, 50 Ill. 2d 141, 277 N.E.2d 872 (1972); People v. Nelson, 42 Ill. 2d 172, 246 N.E.2d 244 (1969).
104. Defense counsel’s role in crucial decisions such as (1) entry of plea; (2) waiver of jury trial; (3) whether to rest at the conclusion of the government’s evidence or present a defense case; and (4) whether the defendant should testify transpires outside the trial record. *See Defense Standards, supra* note 13, at §§ 4.1, 5.2 and 6.1.
105. In *Holloway v. Arkansas*, 435 U.S. 475 (1978), the Court faced a claim of counsel ineffectiveness due to joint representation of conflicting interests. The Court stated that it is important to assess counsel’s performance:

not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney’s failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney’s representation of a client. And to assess the impact of a conflict of interests on the attorney’s options, tactics, and decisions in plea negotiations would be virtually impossible.
“farce or sham” test provides no guidance for the bench or bar.\textsuperscript{106}

B. Current Disarray In Illinois Courts Over the Applicable Standard

The Illinois Supreme Court has repeatedly held that different tests should be used to assess defense counsel’s competency, according to whether counsel is retained or appointed. Nevertheless, recent Illinois Appellate Court decisions reveal confusion among the courts about what standard to apply. The turmoil is manifest in four types of misapplication of the Illinois standards for ineffective assistance:

1. Applying both standards in one case.\textsuperscript{107}

2. Holding that the “farce or sham” standard applies to both appointed and retained counsel.\textsuperscript{108}

3. Applying the “actual incompetence” test to retained counsel after holding that the “farce or sham” test applies to both appointed and retained counsel.\textsuperscript{109}

4. Applying the “actual incompetence” standard, but holding that there could be no reversal unless counsel’s efforts amounted to no representation at all.\textsuperscript{110}

In \textit{People v. Brent},\textsuperscript{111} the defendant alleged ineffective assistance, because his retained lawyer failed to make timely objections.\textsuperscript{112} The \textit{Brent} court cited two cases for the proposition that the Illinois Supreme Court uses the “actual incompetence” test to assess incompetence of retained counsel.\textsuperscript{113} Yet, the court did not discuss a long line of Illinois Supreme Court authority to the effect that the test for re-

\footnotesize{Id. at 490-91.}

\textsuperscript{106} “There are no tests by which it can be determined how many errors an attorney may make before his batting average becomes so low as to make his representation ineffective.” Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), \textit{cert. denied}, 325 U.S. 889 (1945). \textit{See} People v. Ortiz, 22 Ill. App. 3d 788, 795, 317 N.E.2d 763, 768 (1974) (“No test can be formulated which will, in advance of close scrutiny of the trial record . . . furnish a definite checklist of what is needed to sustain a defendant’s assertion of constitutional deprivation of effective assistance of counsel.”).


\textsuperscript{111} 56 Ill. App. 3d 661, 371 N.E.2d 1245 (1978).

\textsuperscript{112} \textit{Id.} at 666, 371 N.E.2d at 1248.

\textsuperscript{113} \textit{Id.} (citing People v. Gill, 54 Ill. 2d 357, 297 N.E.2d 135 (1973), \textit{cert. denied}, 414 U.S. 1144 (1974); People v. Harper, 43 Ill. 2d 368, 253 N.E.2d 451 (1969)).
tained counsel’s ineffectiveness is “farce or sham”.114 Furthermore, the
court indicated that the First District does not follow the Illinois
Supreme Court mandate: the First District standard is “farce or sham”
for both retained and appointed counsel.115 The court apparently was
uncertain about which standard to apply, so they used both tests.116

Two kindred cases are People v. Ferguson117 and People v. John-
son.118 Both of the defendants were represented by appointed counsel,
and both ineffectiveness claims failed. The court in Ferguson evaluated
the defendant’s allegation that his attorney’s misfeasance resulted in
the exclusion of a key alibi witness under both tests.119 In Johnson, the
Third District again applied both of the Illinois standards, this time to
an allegation of incompetence based on inadequate trial preparation
and imprudent trial tactics.120

The First District Illinois Appellate Court has issued many recent
decisions improperly holding that the “farce or sham” formulation ap-
plies to incompetence of appointed, as well as retained counsel.121
Three cases highlight the confusion in the intermediate appellate
courts, because they involve retained defense counsel. Despite the tu-
mult in Illinois courts over ineffectiveness standards, there has been
little doubt, at least since People v. Heirens,122 that the “farce or sham”
test applies to retained counsel. Therefore, the courts in People v. Shes-
tuik,123 People v. Virgil124 and People v. Hawkins125 had no reason to
address which standard applies to appointed attorneys.

In Virgil, a man appealed his armed robbery conviction, alleging
that his retained attorney mishandled the alibi defense, failed to elicit
medical testimony regarding the accused’s physical ailments, and failed


114. See, e.g., People v. Torres, 54 Ill. 2d 384, 297 N.E.2d 142 (1973); People v. Redmond, 50
Ill. 2d 313, 278 N.E.2d 766 (1972); People v. Washington, 41 Ill. 2d 16, 241 N.E.2d 425 (1968);
115. 56 Ill. App. 3d at 666, 371 N.E.2d at 1248.
116. The Brent court said:
Considering the entire record in this case, it cannot be said that the outcome would
probably have been different had defense counsel made all of the proper and timely
objections, nor can it be said the proceedings were reduced to a sham or a farce by
counsel’s conduct.
Id.
119. 99 Ill. App. 3d at 785-86, 425 N.E.2d at 585-86.
120. 98 Ill. App. 3d at 230-31, 424 N.E.2d at 613-14.
121. See, e.g., cases cited infra note 180.
122. 4 Ill. 2d 131, 122 N.E.2d 231 (1954) (first Illinois case to apply “farce or sham” test to
retained lawyers).
to object to evidence of prior criminal activity. The court turned aside Virgil's contentions, holding that the “farce or sham” test applies equally to appointed and retained lawyers, and that counsel's miscues were not so grave as to reduce the trial to a farce. Strangely enough, a few sentences after the court had announced the dual applicability of the “farce or sham” standard, the court declared that the “actual incompetence” test applied to the case.126

People v. Clark127 presents a variant of the “mixing and matching” of standards demonstrated in Virgil. Clark contended that his appointed lawyer (1) moved to strike testimony favorable to the defense; (2) prompted an identification of the accused during cross-examination of a witness who had made no identification on direct exam; (3) failed to adequately cross-examine the government's witnesses; and (4) ineffectively examined another witness regarding competency. The court affirmed Clark's conviction, holding that he failed to prove that his attorney was actually incompetent.128 Yet, a few paragraphs later, the court intoned that the “farce or sham” test governed the case.129

Illinois' dual standard has brought about judicial anarchy in the law of ineffective assistance. The districts of the Illinois Appellate Court have taken their own positions on the issue, sometimes in direct conflict with Illinois Supreme Court decisions. Many recent Illinois decisions have either imposed new requirements on ineffective assistance cases130 or announced the adoption of a new standard in an appellate district.131

The right to effective trial representation in criminal cases is too vital to be applied and interpreted inconsistently among the appellate

126. 54 Ill. App. 3d at 686-87, 370 N.E.2d at 77-78.
128. Id. at 630, 365 N.E.2d at 26.
129. The court said, “It is only where such legal assistance amounts to no representation at all that the constitutional requirement will demand reversal.” Id. (citations omitted) (emphasis added).
131. See, e.g., People v. Corder, 103 Ill. App. 3d 434, 437, 431 N.E.2d 701, 704 (1982) (Third District abandoned dual standard and adopted “actual incompetence” as standard for both appointed and retained counsel); accord People v. Talley, 97 Ill. App. 3d 439, 443, 422 N.E.2d 1084, 1087-88 (1st Dist. 1981); People v. Scott, 94 Ill. App. 3d 159, 163-64, 418 N.E.2d 805, 808 (5th Dist. 1981). But cf. People v. Malley, 103 Ill. App. 3d 534, 537, 431 N.E.2d 708, 711 (3d Dist. 1982) (Justice Barry, who had concurred without opinion in Corder two days earlier, wrote that “in order to show ineffective assistance of counsel, the defendant must demonstrate that counsel neglected to do something he should have done and that the defendant was thereby prejudiced.”) (citations omitted).
courts in Illinois. The contours of the right should not vary according to the location of arrest. A few Illinois courts have recently attempted to remove the chaos by discarding the “farce or sham” test and applying the “actual incompetency” test to retained as well as appointed counsel.

C. Abolition of the Dual Standard and the “Farce or Sham” Test

In *People v. Scott*, the Fifth District reviewed the dual standard for evaluating ineffectiveness claims. The *Scott* court noted that the United States Supreme Court had recently held in *Cuyler v. Sullivan* that no distinction should be drawn between retained and appointed counsel for the purpose of determining ineffectiveness. The Fifth District in *Scott* adopted the rationale of *Cuyler* and held that the double standard used in Illinois “[i]s now impermissible by reason of the decision in *Cuyler.*”

Similarly, the First District in *People v. Talley* noted that the Illinois Supreme Court had not yet evaluated the double standard in light of *Cuyler*. The *Talley* court adopted the rule of *Scott*: only the “actual incompetency” standard should be applied to all cases. Five more recent cases have followed *Scott* and *Talley* in abolishing the

---

133. 446 U.S. 335, 334 (1980). *See also* Morris v. Slappy, 103 S. Ct. 1610, 1618 (1983) (Brennan, J., concurring in the result). *Cuyler* dealt with an allegation of counsel ineffectiveness based upon a conflict of interest, a topic which is beyond the scope of this article.
134. The *Cuyler* Court said:
   
   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.

*Id.*

135. People v. Scott, 94 Ill. App. 3d 159, 163-64, 418 N.E.2d 805, 808 (1981). The court held that the actual incompetence standard applies to both appointed and retained counsel. *Id.*
137. *Id.* at 443, 422 N.E.2d at 1088.
dual standard.

One such case is People v. Corder. The defendant was tried and convicted of a drug offense. The only evidence linking Corder to the crime was the testimony of an undercover police officer who testified that he bought heroin from a clean-shaven man introduced as Richard Corder.

The mainstay of Corder's defense was that he had worn a beard since 1972. Although the accused's retained lawyer called one witness who testified that Corder had continually worn a beard, the witness had not seen the defendant near the time of the crime.

In his amended petition for post-conviction relief, Corder alleged that his trial attorney failed to present corroborating evidence about the beard. At his post-conviction hearing, Corder presented three witnesses and affidavits from two potential witnesses, all of whom testified that Corder wore a beard on the day of the alleged heroin sale. Moreover, the defendant testified that he presented his trial counsel with a list containing the names, addresses, and telephone numbers of the exculpatory witnesses three weeks before trial. Corder's driver's license photograph, taken six days after the subject occurrence, showed that the defendant wore a beard. Counsel knew of the driver's license a full month before trial, but did not introduce it into evidence. Defense counsel made little effort to contact the witnesses, did not subpoena the witnesses, and failed to seek a subpoena duces tecum for Corder's driver's license.

The court in Corder noted that the dual standard, had recently been rejected in Talley and Scott, and condemned by the United States Supreme Court in Cuyler v. Sullivan. The court abrogated the two-tiered standard, holding that "[t]he better view . . . supported by precedent . . . [is] that the standard for retained counsel must rise to that for appointed counsel." The Third District found that trial counsel's failure to interview or subpoena any of the exculpatory witnesses constituted actual incompetency which substantially harmed the accused, probably causing an adverse outcome. The court reversed the denial of

140. 103 Ill. App. 3d 434, 431 N.E.2d 701 (1982).
141. Id. at 435, 431 N.E.2d at 701.
142. Id. at 436, 431 N.E.2d at 702.
143. Id.
144. Id. at 436, 431 N.E.2d at 703.
145. Id.
146. Id. at 436-37, 431 N.E.2d at 703.
147. 103 Ill. App. 3d at 437-38, 431 N.E.2d at 704.
Corder’s petition for post-conviction relief and remanded the case for a new trial.

The untenable nature of Illinois’ dual standard and use of the “farce or sham” test have recently been brought into sharper focus in a case where, like Corder, retained trial counsel failed to secure available exonerating witnesses. In *United States ex rel. Cosey v. Wolff*, 148 the United States District Court for the Northern District of Illinois declared that Illinois courts commit a constitutional error by using the “farce or sham” test.149

Larry Cosey was convicted in the Circuit Court of Cook County of attempted murder, armed robbery and aggravated battery.150 He appealed his conviction, alleging ineffective assistance by his retained lawyer. The Illinois Appellate Court denied Cosey’s claim because counsel’s alleged incompetency did not reduce the trial to a “farce or sham.”151

Cosey’s retained trial counsel did not locate any witnesses to support his client’s statement that he was not at the scene of the alleged assault and robbery.152 Between Cosey’s conviction and sentencing, his lawyer on appeal quickly gathered the affidavits of five exculpatory witnesses. The collective testimony of the witnesses would have indicated that (1) the defendant was not on the premises of alleged assault at the time of the occurrence; (2) no gunfire or other disruptive noises were heard in and around the building at the time of the alleged shooting and brawl; and (3) the condition of the room where the alleged shooting and beating took place was the same before and after the supposed incident.153 The trial court had convicted Cosey largely on the testimony of the victim, a drug addict, that Cosey had shot at and beaten the victim during a lengthy fracas.154 The Illinois Appellate Court held that counsel’s failure to investigate and properly prepare the case, as indicated by his failure to locate and interview any of the potentially exculpatory witnesses, did not amount to ineffective assistance, because the trial proceedings were not thereby reduced to a farce or sham.155 The Illinois Supreme Court denied leave to appeal, and the

148. 526 F. Supp. 788 (N.D. Ill. 1981), rev’d per curiam on other grounds, 682 F.2d 691 (7th Cir. 1982).
149. *Id.* at 790. *Accord* United States *ex rel. Cosey v. Wolff*, 682 F.2d 691, 693 (7th Cir. 1982); *Wade v. Franzen*, 678 F.2d 56, 58 (7th Cir. 1982).
153. *Id.* at 790.
154. *Id.* at 789-90.
155. *People v. Cosey*, 82 Ill. App. 3d at 973, 403 N.E.2d at 661.
EFFECTIVE ASSISTANCE OF COUNSEL

The Supreme Court denied the petition for a writ of certiorari.\(^\text{156}\) Cosey then brought a petition for a writ of habeas corpus\(^\text{157}\) in the United States District Court for the Northern District of Illinois, alleging constitutional violations in the proceedings in the Circuit Court of Cook County and in the First District Illinois Appellate Court.\(^\text{158}\)

In considering Cosey's motion for summary judgment during the habeas corpus proceedings, Judge Shadur ruled that "[i]n applying the 'farce or sham' test the Illinois Appellate Court committed error of constitutional dimensions."\(^\text{159}\) The court noted that, for many years, the Seventh Circuit has employed a "minimum standard of professional representation" as its formulation for evaluating claims of ineffectiveness of counsel.\(^\text{160}\) Judge Shadur also pointed out that a different panel of the same appellate court that upheld Cosey's conviction under the "farce or sham" test had abolished the test\(^\text{161}\) in response to the United States Supreme Court mandate of \textit{Cuyler v. Sullivan}.

In order to obtain relief in the habeas corpus proceedings, Cosey was required to show that (1) his counsel's performance fell below a minimum standard of representation and (2) his defense was harmed as a result. Judge Shadur said that trial counsel's failure to locate any of the five exonerating witnesses demonstrated a level of representation below "[t]he skill of the experienced practitioner . . . . In essence, Cosey was sent to prison for 20 years after a trial in which his defense was never made."\(^\text{162}\) The court quoted from \textit{United States ex rel. Williams v. Twomey},\(^\text{163}\) to illuminate its holding:

The Constitution, unlike the judicial oath, does not go so far as to promise equal justice to the poor and to the rich. Yet it does not

\[\text{157. When an incarcerated prisoner files a petition for a writ of habeas corpus the petitioner is asking the court to hold an evidentiary hearing on his claim. Since the attack is collateral, matters outside the formal record may be relied upon. The petition must allege factual examples of ineffectiveness, because general, conclusory allegations of ineffective trial representation will not necessitate the holding of a hearing. If a hearing is granted, the determination will proceed as to whether counsel’s representation was effective. See Waltz, supra note 4, at 295-96; Gard, supra note 4.}\]
\[\text{158. United States ex rel. Cosey v. Wolff, 526 F. Supp. 788, 789 (N.D. Ill. 1981), rev’d per curiam on other grounds, 682 F.2d 691 (7th Cir. 1982).}\]
\[\text{159. Id. at 790.}\]
\[\text{162. Cosey, 526 F. Supp. at 791-92.}\]
\[\text{163. 510 F.2d 634 (7th Cir. 1975), cert. denied sub nom., Sielaff v. Williams, 423 U.S. 876 (1975).}\]

leave the poor to a representation which is in any aspect . . . shockingly inferior to what may be expected of the prosecution's representation. While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.\textsuperscript{164}

The court found that the testimony of five exculpatory witnesses probably would have affected the trial court's perception of the victim's testimony, the major factor in Cosey's conviction.\textsuperscript{165} Judge Shadur reasoned that the trial court may well have assumed from the lack of affirmative witnesses on Cosey's behalf that none was available.\textsuperscript{166} Even part of the testimony from the exonerating witnesses might have supplied the "reasonable doubt mandating an acquittal for Cosey."\textsuperscript{167} Because the Illinois Appellate Court acted unconstitutionally by employing the "farce or sham" standard, and because Cosey was able to show that he was denied a minimum standard of professional representation, Judge Shadur issued the writ of habeas corpus, directing the state to release Cosey to re-try him promptly.\textsuperscript{168}

Although the Seventh Circuit recently reversed and remanded \textit{Cosey},\textsuperscript{169} the court agreed with Judge Shadur that, in applying the "farce or sham" branch of its two-tiered standard, "[t]he Illinois Appellate Court made an incorrect legal determination."\textsuperscript{170} The Seventh Circuit in \textit{Cosey} held that the district court erred in granting Cosey's motion for summary judgment because it did not have a sufficient factual record to determine whether counsel's failure to call the five exculpatory witnesses was due to counsel's failure to meet minimum standards of professional representation or was a matter of trial strategy.\textsuperscript{171} However, the court agreed with Judge Shadur that "[i]n light of the erroneous standard applied by the Illinois Appellate Court, the district court had to decide whether Cosey's counsel failed to meet constitutional standards."\textsuperscript{172} Moreover, another recent Seventh Circuit decision, \textit{Wade v. Franzen},\textsuperscript{173} may sound the death knell for the "farce or sham" test in Illinois.

\begin{footnotesize}
\begin{enumerate}
\item \textit{Cosey}, 526 F. Supp. at 792, \textit{quoting}, \textit{Twomey}, 510 F.2d at 640.
\item \textit{Cosey}, 526 F. Supp. at 790.
\item \textit{id.} at 792.
\item \textit{id.}
\item \textit{id.}
\item \textit{United States ex rel. Cosey v. Wolff}, 682 F.2d 691 (7th Cir. 1982).
\item \textit{id.} at 693.
\item \textit{id.} at 693-94.
\item \textit{id.} at 693.
\item 678 F.2d 56 (7th Cir. 1982).
\end{enumerate}
\end{footnotesize}
On appeal, Wade urged that his retained counsel had provided ineffective representation. The Illinois Appellate Court, using the "farce or sham" test, held that defense counsel's representation was adequate.\(^{174}\)

The Seventh Circuit, in reviewing the dismissal of Wade's habeas corpus petition, noted the following errors by trial counsel:

1. Counsel waived his strongest pretrial motion because he was unaware of fundamental principles in the law of self-incrimination.\(^{175}\)

2. Defense counsel made inculpatory remarks during his opening statement.\(^{176}\)

3. During cross-examination of the state's witnesses, the attorney asked questions tending to inculpate his client.\(^{177}\)

4. The only significant fact in defendant's favor was that the murder weapon had never been found. However, defense counsel negated any resultant advantage by suggesting to witnesses locations where the firearm may have been concealed.\(^{178}\)

The court stated that, in applying the "farce or sham" test, the Illinois Appellate Court "[a]pplied the wrong standard."\(^{179}\) The court observed that the Supreme Court has held that the constitutional standard for ineffective assistance is the same for retained and appointed counsel\(^{180}\) and that the applicable standard in the Seventh Circuit is "minimum professional competence," not "farce or sham."\(^{181}\) Accordingly, the Seventh Circuit vacated the district court's dismissal of Wade's habeas corpus petition and remanded the case for further proceedings.\(^{182}\)

Finally, one Illinois Supreme Court Justice argues that Illinois courts should abandon the two-tiered standard and the "farce or sham" test in favor of a single test of ineffectiveness for both appointed and

---


\(^{175}\) Contrary to Summons v. United States, 390 U.S. 377, 389-94 (1968), counsel believed that Wade's attestation to the allegations in a motion for a hearing on the voluntariness of the defendant's confession would constitute a waiver of his self-incrimination rights. Wade, 678 F.2d at 57.

\(^{176}\) Id.

\(^{177}\) Id.

\(^{178}\) Id. at 58.

\(^{179}\) Id.

\(^{180}\) Id. (citing Cuyler v. Sullivan, 466 U.S. 335, 344-45 (1980)).

\(^{181}\) Id. (citing United States ex rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1975)). Defense counsel in Wade was a real estate attorney with no prior experience at the criminal bar and scant knowledge of criminal procedure. Id. at 57. Wade's attorney would certainly be labeled ineffective under the following standard proposed by Professor Finer: "[w]hether counsel exhibited the normal and customary degree of skill possessed by attorneys who are fairly skilled in the criminal law and who have a fair amount of experience at the criminal bar." Finer, supra note 4, at 1080.

\(^{182}\) 678 F.2d at 59.
retained counsel. In *People v. Murphy*, Justice Clark wrote that “[t]he time has come to abandon the ‘farce or sham’ and ‘no representation at all’” tests. The Justice argued that ineffective assistance is little better than none. Since non-lawyers cannot be presumed to be able to evaluate the competency of the attorneys they retain, the dual standard should be abolished. Moreover, Justice Clark asserted that “[b]y licensing attorneys . . . this court has, to some degree, placed its imprimatur upon their competence, and is estopped from asserting *ca-veat emptor* as to their incompetence.” Lastly, the “farce or sham” test evades the issue of whether an attorney skillfully performed his duties. The “farce or sham” standard emphasizes errors which counsel did not commit, as proof of his competence, and to assume that counsel’s miscues reflect planned trial tactics, even though these errors may actually reflect inadequate preparation.

The mounting attack on the “farce or sham” test and the dual standard applied by Illinois courts, makes it appropriate for Illinois to adopt a new approach to the law of ineffective assistance, such as an ineffectiveness test supplemented by guidelines, e.g., the *American Bar

183. 72 Ill. 2d 421, 381 N.E.2d 677 (1978).
184. *Id.* at 440, 381 N.E.2d at 687 (Clark, J., specially concurring). Justice Clark advocated adoption of the Seventh Circuit’s test described in *Twomey*. *Id.* See United States ex rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1975).
185. 72 Ill. 2d at 442, 381 N.E.2d at 687-88.
186. Commentators have questioned the use of a dual standard for more than a decade. See, e.g., Polur, *Retained Counsel, Assigned Counsel: Why the Dichotomy?*, 55 A.B.A.J. 254 (1969). Polur asserts that the rationale for the dual standard—one hiring his own lawyer makes a considered, informed choice of counsel in the jail or in-custody setting—is a fiction. The author submits that the dual standard undermines constitutional hallmarks of equal protection of the laws and due process of law. Under a dual standard, people who are represented by appointed counsel are more fully cloaked with sixth amendment protection of the right to assistance of counsel than are those who retain private counsel. Polur aptly concludes that “[o]ne is left with the feeling that the citizen’s right to meaningful assistance of counsel is reserved exclusively for those fortunate enough to be poverty stricken and, therefore, to have assigned or appointed counsel defending them.” *Id.* at 256. Accord United States ex rel. Hart v. Davenport, 478 F.2d 203, 211 (3d Cir. 1973).
187. *People v. Murphy*, 72 Ill. 2d 421, 442-43, 381 N.E.2d 677, 688 (1978) (citation omitted). In the same connection, Justice Brennan said:

if responsibility for [ineffective assistance of counsel] must be apportioned between the parties, it is the State, through its attorney’s admissions and certification policies, that is more fairly held to blame for the fact that practicing lawyers too often are ill-prepared or ill-equipped to act carefully and knowledgeably. . . .

EFFECTIVE ASSISTANCE OF COUNSEL

Association Standards Relating to the Defense Function,\(^\text{189}\) for minimum duties of criminal defense lawyers.

V. RECOMMENDATIONS FOR A NEW APPROACH TO THE LAW OF INEFFECTIVE ASSISTANCE OF COUNSEL IN ILLINOIS

A. A Standard Based Upon Enumeration of Specific Minimum Duties

The shortcomings of one-sentence standards such as “farce or sham,” “actual incompetence,” and “minimum standard of professional representation” can be overcome by adoption of an “enumeration” approach. Such an approach supplements a counsel effectiveness test with guidelines listing specific duties of criminal defense attorneys. The American Bar Association’s *Project Standards for Criminal Justice, Standards Relating to the Defense Function\(^\text{190}\)* has been used by courts\(^\text{191}\) and endorsed by commentators\(^\text{192}\) as a list of defense counsel duties which provides good measures of competence of representation.

*Coles v. Peyton\(^\text{193}\)* was an early attempt to review a claim of ineffectiveness by reference to a list of the responsibilities of criminal defense lawyers. In *Coles*, the Fourth Circuit granted a petition for habeas corpus after a state conviction for rape. The defendant alleged in his petition that the state unconstitutionally suppressed crucial exonerating evidence, and that want of counsel at his preliminary hearing constituted denial of his right to counsel.\(^\text{194}\) The court held that the failure of the accused’s appointed counsel to clarify the elements of the offense to the defendant, to interview witnesses, and to investigate the prosecutrix’ reputation denied the accused his right to effective assistance.\(^\text{195}\) The court assessed defense counsel’s effectiveness in light of an enumeration of duties taken from earlier Fourth Circuit ineffectiveness

---


190. *Id.*

191. See infra cases cited in notes 274-85.


194. 389 F.2d at 225.

195. The court also noted that the attorneys assigned to represent the petitioner were representing fifty-seven other felony defendants whose cases were scheduled for trial that term, *id.* at 225, that the lawyers were unaware of a medical report prepared immediately after the arrest which stated that slides and swabs from a medical examination of the prosecutrix showed no evidence of spermatozoa or seminal stains, *id.* at 226, and that counsel had conducted only three brief interviews with the petitioner while investigating the case. *Id.*
cases. While *Coles* assumed a leading role in applying a list of criminal defense counsel's duties to evaluate ineffectiveness allegations, the list propounded in *Coles* was brief. Promulgation of the American Bar Association's Standards for the Defense Function fosters a more comprehensive analysis in evaluating claims of ineffective assistance.

The *Defense Standards* provide specific guidelines for every stage in the process of criminal defense, from initial client interview through post-conviction remedies. The Standards reflect a sustained effort to establish the components of proficient defense representation. They are a synthesis of diverse viewpoints from eminent judges, trial lawyers, and law professors.

For example, in *State v. Harper*, Wisconsin's high court abolished the “farce or sham” test, adopted a “community standards” approach and endorsed several parts of the ABA Standards as guideposts for evaluating ineffectiveness claims. The court alluded to several alleged errors in counsel's representation, including his failure

196. The *Coles* court said:

Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

*Id.* at 226 (footnote omitted) (citing Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967); Martin v. Virginia, 365 F.2d 549 (4th Cir. 1966); Braxton v. Peyton, 365 F.2d 563 (4th Cir. 1966)).

The court in *Coles* went on to set up a burden-shifting rule whereby a showing of failure to fulfill one of the listed duties would establish ineffectiveness unless the government could demonstrate an absence of prejudice. *Coles* v. Peyton, 389 F.2d at 226. The prejudice issue is analyzed infra text accompanying notes 223-254.


199. *Id.* at § 8.5.

200. 57 Wis. 2d 543, 205 N.W.2d 1 (1973). Harper's automobile was illegally searched by a Chicago police officer. The fruits of the illegal search provided the basis for arrest, indictment, and conviction of armed robbery. The defendant's court-appointed lawyer made scant preparation for trial, as a result of which he was unaware of the illegally obtained evidence. Consequently, counsel did not move for suppression of the tainted evidence, and it was received in evidence at trial. *Id.* at 548, 205 N.W.2d at 4.

201. *Id.* at 557, 205 N.W.2d at 9. Wisconsin's new test inquires whether counsel's advocacy was “equal to that which the ordinarily prudent lawyer, skilled and versed in the criminal law, would give to clients who had privately retained his services.” *Id.* Cf. People v. Kirkrand, 14 Ill. 2d 86, 92, 150 N.E.2d 788, 790 (1958) (Schaefer, J.) (“Appointed counsel is held to the standard of diligence and competence that is to be expected of the lawyer who is retained to represent his client.”).
EFFECTIVE ASSISTANCE OF COUNSEL

to obtain available police reports. The lawyer's failure to inspect relevant records was held contrary to the Standards and detrimental to proper investigation.

Similarly, the United States Court of Appeals for the District of Columbia Circuit adopted the “enumeration” scheme in *United States v. DeCoster.* The record in *DeCoster* showed several errors in defense counsel's performance, including improper filing of a bail motion, lack of preparation for presenting alibi witnesses, failure to discover that the defendant's alleged accomplices had pled guilty before the judge assigned to hear DeCoster's case, and offering only one defense witness at trial (whose testimony was damaging to the defense). The District of Columbia Circuit approved a “reasonable attorney” formulation, but added that an enumeration of counsel's responsibilities is an essential supplement to a one phrase test. The court held that criminal defense attorneys should look to the ABA Standards for guidance and further held

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

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

(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed . . . This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law-enforcement authorities. And, of course, the duty to investigate also requires adequate legal

202. 57 Wis. 2d at 553-54, 205 N.W.2d at 7.

203. *Defense Standards,* supra note 13, at § 4.1 (duty to investigate). The court also criticized the attorney's failure to interview his client until shortly before trial (§ 3.2(a)), his failure to move for change of venue (§§ 3.6, 5.2), and his failure to make a timely presentation of alibi notice or move to suppress a lineup identification and evidence found in the trunk of the defendant's car (§ 3.6). 57 Wis. 2d at 550-57, 205 N.W.2d at 6-9.

204. 487 F.2d 1197 (D.C. Cir. 1973).

205. *Id.* at 1200-01.

206. "A defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate." *Id.* at 1202 (footnote omitted) (emphasis in original).

207. *Id.* at 1203. The court also adopted a burden-shifting rule whereby, upon a showing of a substantial violation of one of counsel's duties, the burden shifts to the government to show a lack of prejudice thereby. *Accord* Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied,* 393 U.S. 849 (1968).
research. The trial record “poses more questions about counsel’s preparation and investigation than it answers,” the court remanded the case for a hearing on the issue of counsel’s trial preparation and performance.

Applying the Standards to a few cases in which defendants were denied relief under the “farce or sham” test will show that the Standards lead to more just decisions. In People v. Heirens, a privately retained attorney decided not to prepare an insanity defense because he did not want his client to be returned to society. Analyzing Heirens under the Defense Standards, using Judge Bazelon’s tripartite test, shows that:

1. Counsel violated a duty set forth in Section 1.6 of the ABA standards.

2. The violation of counsel’s duty to his client was substantial. Depriving one’s client of a possibly valid defense to a murder charge in order to protect society from him is a grievous breach of Section 1.6.

3. Heirens was prejudiced by his attorney’s sua sponte withdrawal of the accused’s only possible valid defense. In Heirens, the state failed to establish that no prejudice resulted from defense counsel’s representation.

---


209. 487 U.S. at 1201.

210. On remand, the district judge found adequate assistance of counsel and declined to grant a new trial. The District of Columbia Circuit reversed. United States v. DeCoster, No. 72-1283 (D.C. Cir., filed October 19, 1976) (unpublished opinion reproduced as an appendix to United States v. DeCoster, 624 F.2d 196, 300 (D.C. Cir.) (en banc), cert. denied, 444 U.S. 944 (1979)). The panel, the same as the one in the original case, split 2-1. On rehearing en banc, the plurality rejected the use of the ABA Standards, 624 F.2d at 214, over a vociferous dissent by Judge Bazelon, joined by Chief Judge Wright. Id. at 264.

In his dissent, Judge Bazelon outlined the tripartite inquiry first articulated in DeCoster I, 487 F.2d 1197, 1204 (D.C. Cir. 1973) (Bazelon, J.) for reviewing inadequacy of counsel allegations:

1. Did counsel violate one of the articulated duties?
2. Was the violation “substantial”?
3. Has the government established that no prejudice resulted?

DeCoster III, 624 F.2d at 275 (Bazelon, J., dissenting) (joined by Wright, C.J.).


212. Id. at 141, 122 N.E.2d at 237.

213. See supra note 213.

214. Defense Standards, supra note 13, at § 1.6 (client interests are paramount): “[T]he duties of a lawyer to his client are to represent his legitimate interests, and considerations of personal and professional advantage should not influence his advice or performance.”

215. Heirens’ murder conviction was affirmed under the “farce or sham” formulation. 4 Ill. 2d at 144, 122 N.E.2d at 238.
In *United States v. Katz*,216 also the court excused severe misconduct under the “farce or sham” test. In *Katz*, defense counsel was disgruntled over having to try the case, and was sleeping during the trial proceedings. Section 7.1 of the *Defense Standards* provides that “[t]he lawyer should support the . . . dignity of the courtroom by strict adherence to the rules of decorum and by manifesting an attitude of respect toward the judge, opposing counsel, witnesses and jurors.” Under Judge Bazelon’s three-pronged test, the defendant had a colorable claim of inadequate representation. Under the “farce or sham” standard, the man with the somnambulent attorney went to the penitentiary.217 Many defendants deserving of post-conviction relief are sent home (or, more likely, to prison) empty-handed when their lawyer’s competence is measured by the “farce or sham” formulation.218

Adopting the enumeration approach in Illinois would greatly improve the disposition of ineffectiveness claims.219 A clear statement of the elements of effective representation offers a uniform standard against which all Illinois courts can assess the performance of criminal defense lawyers. The standards are not excessively rigid. Rather, the guideposts will aid the Illinois Appellate Courts in the discharge of their responsibilities, by establishing a common ground on which they may decide on the facts of each case. Illinois courts should embrace the enumeration framework lest Professor Waltz’ pessimistic statement in 1963 that “[u]nsatisfactory as it may seem to those desirous of objective, prospectively usable standards, all of these judicial admonitions can only be translated as the familiar command that persons accused of crime be accorded a ‘fair trial’ ”220 becomes a prophecy for the future. Finally, Illinois courts should not only abandon the current dual standard,221 but should also eliminate the requirement that the defendant

216. 425 F.2d 928 (2d Cir. 1970).
217. Id.
218. See, e.g., cases cited supra note 88.
219. Judge Bazelon, a moving force in the development of such an approach, concludes that:

> Dealing with the ineffectiveness issue in terms of a duty of care, with specific acts and omissions presumed to be violations, furthers the development of clear standards which inform courts and lawyers of the minimum requirements for rendering effective assistance. But this approach is still flexible enough to discourage lawyers from relying on these standards as articulations of all that they may be required to do.

> Defective Assistance, supra note 4, at 33.
220. Waltz, supra note 4 at 305.
221. Section 3.9 of the *Defense Standards* contemplates a single standard for assessing both appointed and retained counsel competence: “Once a lawyer has undertaken the representation of an accused his duties and obligations are the same whether he is privately retained, appointed by the court, or serving in a legal aid or defender system.”
prove that counsel's incompetence caused substantial prejudice to the defense, without which the result would have been different.

**B. Harmless Error Approach**

Ineffective assistance of counsel is a disfavored ground of relief, as reflected in the harsh standards against which many courts measure counsel inadequacy. Courts have also limited ineffectiveness of counsel relief by requiring that the accused prove prejudice, *i.e.*, that his attorney's incompetence caused an adverse verdict or unduly harsh sentence.

Courts have taken four approaches to the prejudice question. First, some decisions require the aggrieved defendant to show not only attorney incompetence, but also harmful consequences. Second, some courts maintain that an accused who shows ineffective assistance of counsel is not required to show that he was prejudiced thereby. Third, some courts hold that once the claimant proves inadequate representation, the burden shifts to the prosecution to prove beyond a reasonable doubt that counsel's failings were harmless error. Fourth, some jurisdictions require that the accused show incompetence of counsel plus likely prejudice. Once the defendant shows a likelihood that ineffective representation influenced the trial outcome, the burden shifts to the government to show that no prejudice actually occurred.

---

222. This is the formulation used in Illinois appointed counsel cases. *See* People v. Greer, 79 Ill. 2d 103, 120-21, 402 N.E.2d 203, 211 (1980) ("it must be established that counsel was actually incompetent in the performance of his duties and that substantial prejudice resulted from such incompetency, without which the results of the trial would have been different.")

The Seventh Circuit, in a very recent decision, has disapproved, by implication, the prejudice formulation endorsed by Illinois courts. *Wade* v. *Franzen*, 678 F.2d 56, 59 (7th Cir. 1982). *See also* *Morris* v. *Slappy*, 103 S. Ct. 1610, 1618 (1983) (Brennan, J., concurring in the result).

223. *See* Gilbert v. *Sowders*, 646 F.2d 1146, 1150 (6th Cir. 1981) (Jones, J., concurring) (per curiam); *Beasley* v. *United States*, 491 F.2d 687, 696-97 (6th Cir. 1974); *Goodwin* v. *Cardwell*, 432 F.2d 521, 522 (6th Cir. 1970); *Flener* v. *Commonwealth*, 514 S.W.2d 201 (Ky. 1974). *See also* *Glasser* v. *United States*, 315 U.S. 60, 76 (1942) ("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 resulting from its denial.") *McQueen* v. *State*, 475 S.W.2d 111, 123 (Mo. 1971) (en banc) ("To insist that the defendant now . . . show specific prejudice is requiring him to establish by his own efforts the very things for which the law recognized he needed the assistance of counsel in the first place and which he did not receive.") (Seiler, J., dissenting).


In two recent cases, the Eighth Circuit approved the harmless error approach to the prejudice issue, without expressly adopting it. *Hawkman* v. *Parratt*, 661 F.2d 1161, 1169 (8th Cir. 1981); *Thomas* v. *Wyrick*, 535 F.2d 407, 414-17 (8th Cir. 1976).

Illinois courts adhere to the first approach. The contours of this formulation are revealed by two Illinois cases, one denying relief, and one granting a evidentiary hearing on the defendant's ineffectiveness allegations.

In *People v. Bynum*, the defendant alleged that he received inadequate representation because his appointed lawyer:

(1) conferred with the accused for the first time only five days prior to trial;
(2) failed to obtain transcripts of lengthy pretrial proceedings;
(3) erroneously made a motion to dismiss the case against one of the other defendants; and
(4) mistakenly objected to a motion to suppress a confession which named his client as one of the offenders.

Counsel's unpreparedness resulted in his not being aware of aliases used by his client and another defendant. This led counsel to make two motions against his own client's best interests. The court held that these instances of counsel unpreparedness did not demonstrate ineffectiveness, because counsel's errors did not substantially prejudice the defendant or cause an adverse trial result.

In *People v. Stepheny*, a case involving a voluntary manslaughter conviction, appointed counsel provided ineffective representation:

(1) Counsel unauthorizedly admitted his client's guilt during closing argument;
(2) The attorney failed to interview available occurrence witnesses who would have testified that the victim was brandishing a weapon at the time of the subject occurrence; and
(3) The lawyer failed to interview an occurrence witness who would have testified that it was general knowledge that the decedent


229. *Id.* at 466, 430 N.E.2d at 114-15.
230. Bynum's lawyer made a motion to dismiss Bynum because the indictment used an alias which referred to a different defendant. Moreover, counsel objected to a motion by a codefendant to suppress Gary Smith's confession. The confession named Bynum as one of the offenders. Counsel was unaware because the name printed on the confession was his client's alias. *Id.* at 466, 430 N.E.2d at 115.
231. *Id.*
had killed one person and had spent time in prison for the killing of another person.233

The court held that counsel’s failure to locate available key witnesses showed actual incompetence.234 Furthermore, the fact that the missing testimony would have corroborated defendant’s testimony substantially prejudiced the defendant’s case. The court found that the testimony “could well have produced a different result,”235 and remanded the case for an evidentiary hearing on the ineffectiveness of counsel.236

Chapman v. California237 requires the prosecution to prove an absence of prejudice once the defendant has shown that he received ineffective assistance. In Chapman, the Court announced a harmless error rule that avoids automatic reversals for constitutional errors. The prosecution can maintain a conviction by proving that any constitutional error was harmless beyond a reasonable doubt.238

The First, Third, Fourth and Seventh Circuits follow the harmless error approach.239 The Fourth Circuit’s rule, for example, is that counsel’s failure to abide by the listed requirements of defense representation “[c]onstitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby.240 The California Supreme Court has also adopted the harmless error formulation.241 In two recent cases the Eighth Circuit has approved, without expressly adopting, the harmless error approach.242

The harmless error approach strikes a middle course between the Illinois rule which requires the defendant to show not only ineffective assistance, but also resultant prejudice, and the rule adopted by some courts that reversal is automatic, if the claimant shows ineffectiveness. The rationale for an automatic reversal approach stems from the

233. Id. at 154-56, 263 N.E.2d at 84-85.
234. Id. at 158, 263 N.E.2d at 86.
235. Id.
236. Id. at 159, 263 N.E.2d at 87.
238. Id. at 24. The harmless error rule applies to denials of constitutional rights in both state and federal proceedings. Id. at 20-21.
239. Wade v. Franzen, 678 F.2d 56, 59 (7th Cir. 1982) (by implication); United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); United States v. Crowley, 529 F.2d 1066 (3d Cir. 1976); Coles v. Peyton, 389 F.2d 224 (4th Cir.), cert. denied, 393 U.S. 849 (1968).
240. Id. at 226.
EFFECTIVE ASSISTANCE OF COUNSEL

Supreme Court’s decisions in Glasser v. United States,243 Chapman v. California,244 and McMann v. Richardson.245

Glasser indicated that “[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial.”246 The Chapman Court stated that the harmless error rule should not apply to denial of the right to counsel, holding that denial of such right mandates automatic reversal.247 Finally, the McMann Court said “[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.”248 Drawing on these cases the Sixth Circuit in Beasley v. United States249 held that the right to effective assistance is not subject to harmless error analysis, and a fortiori, that denial of the right justifies automatic reversal.250

Differing viewpoints on the merits of an automatic reversal rule have generated lively exchanges. For example, Judge Hufstedler, relying on a long line of Supreme Court precedent, including Glasser, Chapman and McMann, said, “[t]he right to the assistance of counsel is so fundamental that failure to provide constitutionally adequate counsel at trial can never be dismissed as harmless error.”251 By contrast, Judge Posner wrote, “[i]t is too syllogistic to argue, as Judge Hufstedler did,” that since denial of the right to counsel can never be harmless error, and because the right to counsel is the right to effective assistance of counsel, then denial of effective assistance of counsel can never be harmless error.252

In summary, the harmless error doctrine compromises between the competing interests of the defendant and the government. The defendant need not prove prejudice, and the prosecution is allowed to avoid reversal by proving that an error was harmless. Illinois courts should follow the lead of the First, Third, Fourth and Seventh Circuit and the

243. 315 U.S. 60 (1942).
244. 386 U.S. 18 (1967).
246. Glasser, 315 U.S. at 76.
248. McMann, 397 U.S. at 771 n.14 (emphasis supplied) (citations omitted).
249. 491 F.2d 687 (6th Cir. 1974).
250. The court said that “[h]armless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel.” Id. at 696. (citations omitted).
252. Wade v. Franzen, 678 F.2d 56, 59 (7th Cir. 1982) (citation omitted).
California courts by adopting the harmless error approach to the prejudice requirement.

VI. CONCLUSION

Illinois courts must give full meaning to the sixth amendment right to effective assistance of counsel. Under current standards, defendants must shoulder the burdens of proving not only incompetence of counsel, but also resultant prejudice. The United States Supreme Court and eleven federal circuits have repudiated standards similar to those employed in Illinois. In two recent decisions, the United States Court of Appeals for the Seventh Circuit has declared that Illinois courts act unconstitutionally in applying the "farce or sham" standard. Illinois courts disagree on the proper ineffectiveness standard. Moreover, the Illinois decisions reflect confusion about application of the current standards. Recently, several Illinois courts have abolished the "farce or sham" test and the dual standard in their respective judicial districts. Justice Clark of the Illinois Supreme Court has forcefully advocated abolition of the "farce of sham" test.

Such a vital constitutional right as the right to effective assistance of counsel should not be shrouded in the unfairness of conflicting and confusing standards. Public confidence in the judiciary, and in the criminal justice system as a whole, will be undermined by the current chaos surrounding the law of ineffective assistance of counsel in Illinois.

The prevailing standards for reviewing claims of ineffective assistance in Illinois are only "empty vessels into which content must be poured." Illinois courts must abolish the "farce or sham" test, and adopt a test based upon the ABA Standards for the Defense Function. Illinois courts should also relieve defendants of the onus of proving that they were prejudiced by their lawyers' ineffectiveness, and place that burden upon the prosecution, in the form of a harmless error analysis.

254. See supra note 18.
255. United States ex rel. Cosey v. Wolff, 682 F.2d 691, 693 (7th Cir. 1982); Wade v. Franzen, 678 F.2d 56, 58 (7th Cir. 1982).
256. People v. Murphy, 72 Ill. 2d 421, 440, 381 N.E.2d 677, 686 (1978) (Clark, J., specially concurring).
257. Bazelon, supra note 4, at 820.