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NOTES

THE RIGHT TO EFFECTIVE TRIAL COUNSEL: *STATE v. McELVEEN*

Carolyn S. Ostby

No one can possibly know how utterly alone and helpless one can be when one is a victim of “the law’s delay”—except someone who has experienced it.

from the journals of
Daniel E. McElveen, written
while in the Montana State Prison.

I. INTRODUCTION

The Sixth Amendment to the United States Constitution guarantees that in a criminal prosecution, the accused shall enjoy the right to have the assistance of counsel.¹ The Supreme Court has construed this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.² This right to counsel was extended to defendants in all capital cases in state courts in *Powell v. Alabama* in which the Supreme Court ruled that the right is “fundamental” and denial thereof violates the Fourteenth Amendment.³ This duty of the state court to assign counsel when the defendant is unable to employ counsel was extended to all felony cases in *Gideon v. Wainwright*.⁴

A concomitant of the right to counsel is the right to *effective* counsel. In *Powell v. Alabama*, Mr. Justice Sutherland wrote:

. . . the necessity of counsel was so vital and imperative that the failure of the trial court to make an *effective* appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.⁵ [Emphasis added]

The Supreme Court has not defined the phrase “effective assistance of counsel” in a trial context. Most lower federal courts and state courts traditionally adhered to the requirement that the assis-

1. MONT. CONST art. II, § 24 and REVISED CODES OF MONTANA, 1947, § 95-1001 [hereinafter cited R.C.M. 1947] also guarantee an accused the right to counsel.

2. *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938).

3. *Powell v. Alabama*, 287 U.S. 45, 68 (1932).

4. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). This right to counsel was later extended to any offense for which a person may be imprisoned. *Arsinger v. Hamlin*, 407 U.S. 25, 37 (1972).

5. *Powell v. Alabama*, *supra* note 3 at 71.

tance be so deficient as to render the trial "a farce and a mockery".⁶ Many courts have now abandoned that highly subjective test and adopted more rigorous standards.⁷

Recently, the Supreme Court of Montana considered a case in which the petitioner alleged he was denied the effective assistance of counsel.⁸ Professing to apply the traditional mockery test, the supreme court agreed, ordering the district court to set aside the conviction and sentence. The Montana standard for measuring effective assistance of counsel remains vague even after the *McElveen* decision. This note will review the development of a Montana standard, briefly identify alternative standards and analyze the *McElveen* decision in light of these alternatives.

II. FACTS OF THE CASE

The petitioner, Daniel E. McElveen, was charged with one count of theft in an information filed in the Fourth Judicial District of the State of Montana. It was alleged that he purposely or knowingly obtained or exerted unauthorized control over three trailer-house tires and rims, valued at more than one hundred fifty dollars with the purpose of depriving the owner of the property.⁹ Two versions of the sequence of events resulting in the petitioner's arrest were presented at the trial. The state's chief witness, a hitchhiker who accepted a ride with McElveen, presented one version; the petitioner, McElveen, presented the other version.

The state's witness testified he accepted the ride with McElveen on the condition that he drive the car. In their subsequent journey, they stopped at various houses and establishments. The hitchhiker alleged that at one of these stops, McElveen took the three tires. McElveen, on the other hand, testified that the hitchhiker had the three tires when he was standing by the road awaiting a ride. When the hitchhiker accepted McElveen's offer, the three tires were placed in McElveen's car.

Less than one hour after they joined company, McElveen and the hitchhiker quarreled and parted. The hitchhiker then called the police to report the stolen tires. The police came to the scene and located the tires in McElveen's automobile. After the owner identified the tires, McElveen was arrested.

At the jury trial, McElveen was represented by court-appointed counsel. He was convicted on the charge of felony theft and sentenced to four years in the state prison. Before, during, and after the

6. See notes 17-32 *infra*.

7. See notes 45-57 *infra*.

8. *State v. McElveen*, ___ Mont. ___, 544 P.2d 820 (1975).

9. The information charged a violation of R.C.M. 1947, § 94-6-302(1).

trial, petitioner claimed his appointed counsel inadequately represented him. The district court granted the appointed counsel's motion to withdraw as attorney of record after the conviction and sentencing.

After incarceration in the prison, McElveen wrote a letter to the Chief Justice of the Montana supreme court claiming that inadequate assistance of appointed counsel denied him a fair trial. The Chief Justice requested the Montana Defender Project to investigate the allegation. As a result of the investigation, a petition for post-conviction relief was filed in the supreme court. In a 3-2 decision, the court granted the petition for relief and ordered the district court to set aside the conviction and sentence without prejudice.¹⁰

Three grounds for lack of effective assistance were presented: (1) there was a lack of pre-trial preparation and investigation, (2) there was no trial advocacy, no objections to preserve the record and, as a result, (3) deprivation of right to appeal. The majority decision was based primarily on the lack of thorough investigation of the facts and circumstances surrounding the taking of the tires. Chief Justice Harrison wrote:

In the instant case the record shows there was little if any attempt by appointed counsel to substantiate petitioner's version of what transpired . . . Nor was there an investigation of the police report as related by the State's principal witness to ascertain its accuracy.¹¹

In addition to inadequate investigation and preparation, the court concluded there was ineffective representation during the trial itself. Only two objections were made by the defense during the entire trial. One of the objections, which was sustained, was made by the petitioner himself to the county attorney's questions regarding the petitioner's past criminal record. The court specifically addressed this failure to object:

One of the bases for the necessity of representation by counsel is to insure a fair trial. Counsel's effectiveness is based on his knowledge and use of the laws of evidence. If the knowledge is not used, the defendant is in little better position than if he were to defend himself.¹²

Failure to object would probably not alone support a finding of ineffective assistance;¹³ not objecting could be part of the "trial

10. *State v. McElveen*, *supra* note 8 at 825.

11. *Id.* at 823.

12. *Id.* at 824.

13. *See e.g.*, *Hester v. United States*, 303 F.2d 47, 49 (10th Cir.) cert. denied 371 U.S. 847 (1962).

tactics" employed by the defense. The court found in this case, however, that the tactic employed was "lack of tactics".¹⁴

This case of apparent disregard of the constitutional rights of the client may not be "effective representation" by any definition of the phrase. Yet the test the court applies as a measure of effectiveness is of interest to lawyer and nonlawyer alike, particularly in this time of increasing scrutiny of the professional conduct of lawyers.

III. THE MONTANA STANDARD

Many courts have confused the question whether an accused received the effective assistance of counsel with the question whether the accused received the assistance of effective counsel.¹⁵ The majority opinion in *McElveen* identified the issue raised in this case to be "whether petitioner received adequate representation by his court-appointed attorney both in preparation and investigation for trial as well as at the trial".¹⁶ In thus framing the issue, the court focused attention on whether petitioner's constitutional right to a fair trial was denied because of ineffective assistance of counsel and not on whether the attorney appointed is generally competent. The court quoted from a Third Circuit Court of Appeals case to emphasize this point:

The adequacy of the representation which petitioner received, *which is the only real issue in this case*, can only be decided on an evaluation of the services rendered on his behalf.¹⁷ [Emphasis added]

All members of the court agreed in *McElveen* that the test against which claims of ineffective assistance of counsel are measured is the "farce and sham" test.¹⁸ Quoting from a Fifth Circuit Court of Appeals case, the court defined this test as follows:

[R]elief from a final conviction on the ground of incompetency or ineffective counsel will be granted only when the trial was a farce,

14. *State v. McElveen*, *supra* note 8 at 822. The Ninth Circuit Court of Appeals drew the same distinction in an earlier case: "Appellant does not complain that after investigation and research trial counsel made decisions of tactics and strategy injurious to appellant's cause; the allegation is rather that trial counsel failed to prepare, and that appellant's defense was withheld not through deliberate though faulty judgment but in default of knowledge that reasonable inquiry would have produced, and hence in default of any judgment at all." *Brubaker v. Dickson*, 310 F.2d 30, 39 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963).

15. Bazelon, *New Gods For Old: "Efficient" Courts In a Democratic Society*, 46 N.Y.U.L. REV. 652, 671 (1971); Comment, *Right to Effective Counsel: A Judicial Heuristic*, 2 AM. J. CRIM. L. 277, 296 (1974).

16. *State v. McElveen*, *supra* note 8 at 821.

17. *Id.* at 822, *citing Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970).

18. *State v. McElveen*, at 822, 825.

or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretence, or without opportunity for conference or preparation.¹⁹

Throughout the development of Montana law on this subject, the supreme court has been reluctant to question the professional behavior of criminal lawyers. The first Montana case to squarely hold that representation by appointed counsel was ineffective was *State v. Blakeslee*.²⁰ The court's remarks in that case were directed to the duty of the court to make appointment of counsel effective.²¹ The trial judge had appointed new counsel three days prior to trial without allowing a continuance so that the newly appointed counsel could prepare for trial. The case did not place the court in the sensitive position of declaring or even implying that an attorney had willfully rendered ineffective representation.

Four years later, the court did apply the *Blakeslee* holding to a court-appointed attorney, who, "by reason of the dereliction of duties and responsibilities", denied the defendant effective representation.²² The ineffective representation was rendered on appeal, however, rather than at the trial level. The attorney failed to present the supreme court with a proper record on appeal, an error which became obvious when he later attempted to rely on crucial records not before the court. The attorney also was tardy in filing other papers, displaying a general lack of preparation.²³

The mockery test first appeared in a Montana case in *State v. Noller*.²⁴ The appellant in *Noller* claimed denial of effective counsel primarily because of counsel's failure to object to incompetent, irrelevant, and immaterial testimony. Applying the mockery test, the court disagreed with appellant's claim.

In the instant case we will not try to second guess as to what might have been better trial strategy. Hindsight cannot now be used to say what perhaps could have been done to achieve a possible but highly speculative result.²⁵

19. *Id.* at 822, citing *Williams v. Beto*, 354 F.2d 690, 704 (5th Cir. 1965). In *West v. Louisiana*, 478 F.2d 1026, 1033 (5th Cir. 1973), the court rejected the mockery standard and adopted the *McKenna* standard. See note 45 *infra*.

The *McElveen* decision also cited *People v. Wein*, 50 Cal.2d 383, 326 P.2d 457 (1958), to support its application of the mockery standard. That case has since been modified by *People v. Ibarra*, 60 Cal.2d 460, 34 Cal. Rptr. 863, 386 P.2d 487 (1963). See generally, 9 U. SAN. FRAN. L. REV. 166, 171 (1974).

20. *State v. Blakeslee*, 137 Mont. 47, 306 P.2d 1103 (1957).

21. *Id.* 306 P.2d at 1107.

22. *State v. Bubnash*, 139 Mont. 517, 366 P.2d 155, 158 (1961). The court also referred to the Canons of Professional Ethics as standards for defense attorneys.

23. *Id.*

24. *State v. Noller*, 142 Mont. 35, 381 P.2d 293, 294 (1963).

25. *Id.* 381 P.2d at 294.

This same reluctance to "second guess" defense counsel, or to speculate on alternative trial tactics appeared in other cases at that time, the court often noting the vast experience and unquestioned reputation of the trial counsel.²⁶

The court later supplemented the mockery test with other essentially negative tests, that is, with definitions of what effective counsel is not. Effective counsel, for example, does not mean one in which the defendant has confidence.²⁷ Other negative tests included:

Claimed inadequacy of counsel must not be tested by a greater sophistication of appellate counsel, nor by the counsel's unrivaled opportunity to study the record at leisure and cite different tactics of perhaps doubtful efficacy. Success is not the test of efficient counsel, frequently neither vigor, zeal, nor skill can overcome the truth.²⁸

Only three Montana cases have sustained claims of ineffective representation. The increasing frequency of such claims apparently influences judicial attitudes toward the probable validity of the claim and toward its effect on the legal profession. The Montana court has been more vociferously defending the reputation of the attorneys. An example is *State v. Perry*:

These days [ineffective counsel] is not an unusual charge by convicted defendants. . . . Here, two trial counsel adequately represented defendant. We have scrutinized the record with care and find defendant was adequately, effectively, fairly, and competently represented.²⁹

Montana's application of the mockery test is consistent with the Ninth Circuit Court of Appeal's decisions.³⁰ The most recent Ninth Circuit case on this issue held:

26. *Tomich v. State*, 141 Mont. 487, 379 P.2d 114 (1963); *State v. Callaghan*, 144 Mont. 401, 396 P.2d 821, 825 (1964).

27. *State v. Forsness*, 159 Mont. 105, 495 P.2d 176, 178 (1972).

28. *Id.* 495 P.2d at 178.

29. 161 Mont. 155, 505 P.2d 113, 116 (1973). In a similar case, the court wrote: "Here we simply have a new counsel who would have done things differently and who would take every means to spring his client". *Digiallonardo v. Betzer*, 163 Mont. 104, 515 P.2d 705, 706 (1973).

30. *United States v. Ortiz*, 488 F.2d 175, 177 (9th Cir. 1973); *Kendrick v. Nelson*, 448 F.2d 25, 29 (9th Cir. 1971); *Bourchard v. United States*, 344 F.2d 872, 873 (9th Cir. 1965). The Ninth Circuit Court affirmed a Montana federal district court case which stated: "[C]ounsel is not to be second guessed on matters of judgment or trial strategy, or even mistakes. . . ." *Application of Tomich*, 221 F. Supp. 500, 503-504 (D. Mont.), *aff'd*, 332 F.2d 987 (9th Cir. 1963). The court granted relief, however, on grounds that "the failure of counsel to consult with and even listen to petitioner's story, the failure to make a pre-trial motion to suppress . . . the refusal to subpoena witnesses, apparently without attempt to investigate . . . and the failure to take an appeal within the time permitted . . . all required a finding of denial of effective counsel." *Id.*, 221 F. Supp. at 505.

This court will not reverse a judgment of conviction unless a defendant's representation has been so inadequate as to make his trial a farce, sham, or mockery of justice. . . . We have declined to find such a "farce and mockery" where counsel's actions or omissions reflected tactical decisions, even if better tactics appear in retrospect to be available.³¹

The only Ninth Circuit case suggesting a higher standard, "reasonably adequate professional aid", is the case cited by the court in *McElveen*.³² It is possible that this standard will be restricted to cases involving guilty pleas.

IV. ALTERNATIVE STANDARDS

While the mockery test is not without support in other jurisdictions,³³ it is no longer clearly the majority rule. Commentators and courts are critical of the mockery test for its vagueness, and its subjectiveness.³⁴ The standard condemns only the most extreme irresponsibility of counsel. Sometimes it has not even condemned the extremes, as in the case of *Hudspeth v. McDonald*:

The most that can be said for this testimony is that it establishes that appellee's counsel drank throughout the trial and that he was under the influence of intoxicating liquor to a greater or less degree during the whole trial. But what of it?³⁵

D.L. Bazelon, Chief Judge of the District of Columbia Court of Appeals, argues that the mockery test requires such a minimal level of performance from counsel that it is itself a mockery of the sixth amendment.³⁶ Another commentator pointed out the irony of this non-standard by comparing the test with the tests of competence established for other professions: "Doctors, after all, owe their patients much more than a mockery of medicine".³⁷ He continued:

For fear of lost convictions, indefensible breaches of duty to the criminally accused have been ignored, the right to counsel de-

31. *United States v. Stern*, 519 F.2d 521, 524 (9th Cir. 1975).

32. *Wilson v. Rose*, 366 F.2d 611, 614 (9th Cir. 1966).

33. *See, e.g., State v. Wilkinson*, 12 Wash. App. 522, 530 P.2d 341, 342 (1975); *Moran v. Hogan*, 494 F.2d 1220, 1222 (1st Cir. 1974); *State v. Lopiz*, 84 N.M. 805, 508 P.2d 1292, 1296 (1973); *Johnson v. United States*, 380 F.2d 810, 812 (10th Cir. 1967).

34. Comment, *Assuring The Right To An Adequately Prepared Defense*, 65 J. CRIM. L. 302, 304 (1974); Comment, *Kentucky's Standard For Ineffective Counsel: A Farce and a Mockery?*, 63 Ky.L.J. 802, 820 (1975); Comment, *The Emerging Right To Effective Assistance of Counsel*, 14 WASHBURN L.J. 541 (1975).

35. 120 F.2d 962, 967 (10th Cir. 1941). *accord*, *People v. Gaither*, 173 Cal.2d 662, 343 P.2d 799, 804 (1959).

36. Bazelon, *The Defective Assistance of Counsel*, 42 U. CRIM. L. REV. 1, 28 (1973).

37. Bines, *Remedying Ineffective Representation In Criminal Cases: Departures From Habeus Corpus*, 59 VA. L. REV. 927, 928 (1973).

based, and the adversary system of justice undermined. Throughout, the bar has been a silent observer of practice which if committed by other professionals would produce a host of indignant litigation.³⁸

Additional breaks with the mockery standard have been predicted, based on the belief that when *Gideon* overruled *Betts* all justification for retaining the mockery of justice standard disappeared.³⁹

Recognizing the shortcomings of the mockery test, courts are developing new tests for measuring effective counsel. Some writers claim that the difference of language in the standards has meant little in application.⁴⁰ Awareness of the differences in language is significant, however, because they indicate a trend toward more rigorous standards for the competence of defense attorneys.

Some courts rule that ineffective counsel violates the fourteenth amendment only if counsel is appointed. The retained/appointed distinction is usually based on one or both of the following theories: (1) an agency relationship between attorney and client, or (2) lack of state action.⁴¹ Both theories have been heavily criticized.⁴² Many courts have rejected the latter theory because of the obvious "action" of state prosecution machinery and state courts.⁴³

Some courts have overcome the state action barrier by asserting that the representation of the defendant must be so insufficient that the court has a duty to intervene.⁴⁴ If the court failed to intervene when such behavior rendered the trial a mockery, breach of the duty to intervene was state action. This theory is related to the

38. *Id.* at 986.

39. *Id.* at 932.

40. Flynn, *Adequacy of Counsel: The Emerging Fair Trial Issue for the Seventies?* 47 N.Y.S.B.J. 19, 51 (1975); Waltz, *Inadequacy of Trial Defenses Representation As A Ground For Post-Conviction Relief In Criminal Cases*. 59 Nw. L. Rev. 289, 305 (1964).

41. See, e.g., United States ex rel. Darcy v. Handy, 203 F.2d 407, 426 (3d Cir. 1953); Roy v. State, 213 Kan. 30, 514 P.2d 832, 836 (1973); Mitchell v. United States, 259 F.2d 787, 790 (D.C. Cir. 1958), cert. denied, 358 U.S. 850 (1958).

42. Waltz, *supra* note 39 at 293: "The rationale expounded in *Mitchell* and allied cases ignores both the logical import and the plain words of *Powell*." Comment, *Right To Effective Counsel: A Judicial Heuristic*, 2 AM. J. CRIM. L. 277, 285 (1974): "Courts refusing to hear inadequacy claims leveled at retained counsel apply a mechanical criterion founded on some strained application of a commercial doctrine of agency or on a myopic view of the state action theory. Neither has any substantial relationship to the Sixth Amendment guarantee as interpreted in *Powell* or subsequent cases".

43. See, e.g., *Wilson v. Rose*, *supra* note 31 at 615; *Bell v. Alabama*, 367 F.2d 243 (5th Cir. 1966). These decisions have resulted primarily from a series of Supreme Court opinions identifying a state's obligation to assure a defendant's right to a fair trial. *Shelley v. Kramer*, 334 U.S. 1 (1948); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Reitman v. Mulkey*, 387 U.S. 369 (1967).

44. See, e.g., United States ex rel. Kopetka v. Young, 310 F. Supp. 1001 (D. Minn. 1970); *People v. Blevins*, 251 Ill. 381, 96 N.E. 214 (1911).

mockery test and equally undemanding of defense counsel. Both tests have been criticized as "so much circular verbiage designed to conceal the completely subjective determinations made by reviewing courts."⁴⁵

In 1962, the Fifth Circuit Court of Appeals developed a slightly more rigorous standard without expressly rejecting the mockery test. In *McKenna v. Ellis*, the court held the right to effective counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel "reasonably likely to render *and rendering* reasonably effective assistance".⁴⁶ In that case, the defense turned on an alibi, yet the obvious witness to prove the alibi was not in court, and had not been interviewed. The *McKenna* test has been criticized as a circular definition of effectiveness, giving the court no clear guidelines. Several courts, nonetheless, have adopted the test. The Sixth Circuit Court of Appeals, in *Beasley v. United States*, applied the test to a case in which defense counsel called only one witness—who happened to be antagonistic to the defense.⁴⁷ The trial judge allowed the prosecution to introduce damaging evidence of a past criminal record. The defense counsel made no more than a cursory investigation of the facts. Upon analyzing these facts, the court joined other jurisdictions in abandoning the mockery test as a meaningful standard for testing sixth amendment claims. To further explain its standards, the court added an additional test to the "reasonably likely to render *and rendering*" test:

Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, unreflected by conflicting considerations. [citing cases] Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner.⁴⁸

The requirement of performance at least as well as a lawyer with ordinary training and skill in the criminal law derives from a Supreme Court opinion in which petitioner challenged the validity of a guilty plea partially on the basis of inadequacy of counsel.⁴⁹ The

45. Comment, *Right To Effective Counsel: A Judicial Heuristic*, 2 AM. J. CRIM. L. 277, 289 (1974). The hazards of court intervention were noted in *Elison, Assigned Counsel in Montana*, 26 MONT. L. REV. 1, 21 (1964).

46. *McKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 386 U.S. 877 (1961).

47. *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974).

48. *Id.*

49. *McMann v. Richardson*, 397 U.S. 759 (1969). In a later case, however, the court refused to find ineffective representation although defense counsel did not confer with petitioner until a few minutes before trial. *Chambers v. Maroney*, 399 U.S. 42, 53 (1970). Bazelon labeled the *Chambers* case the "classic case of judicial-ducking-the-issue." Bazelon, *supra* note 35, at 21.

Supreme Court formulated the following standard:

Whether a plea of guilty is unintelligent and therefore vulnerable . . . depends as an initial matter not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.⁵⁰

This test was again applied by the Supreme Court to judge the validity of a guilty plea in *Tollett v. Henderson*.⁵¹

The Third Circuit Court of Appeals adopted a version of the *McMann* standard in *Moore v. United States*: "The standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place."⁵² Alaska, which initially applied the mockery test, rejected that test in favor of the "*Beasley* refinement of the *Moore* test."⁵³ Alaska thus adopted a two-pronged approach: (1) the attorney must perform at least as well as a lawyer with ordinary skill in the criminal law, and (2) the conduct of counsel must have contributed to the eventual conviction.

The best defined standards are those adopted by the Courts of Appeals for the District of Columbia and the Fourth Circuit.⁵⁴ These courts list the standards of conduct an attorney must meet. Violations shift the burden to the prosecution to prove the defendant was not prejudiced by the inadequate representation. The cases adopting this method also draw on the other standards mentioned above.

Emphasizing that the court does not sit to second guess strategic and tactical choices made by defense counsel, the District of Columbia Court of Appeals held that when counsel's choices are uninformed because of inadequate preparation, the defendant is denied the effective assistance of counsel.⁵⁵ Adopting the *McMann* standards of "reasonably competent assistance", the court saw no reason to require less of an attorney when the accused does not plead guilty. The court added that an additional general guide should be the American Bar Association Standards of the Defense Function.⁵⁶ Not satisfied with these generalities, the court said specifically:

50. *McMann v. Richardson*, 397 U.S. at 770-771.

51. *Tollett v. Henderson*, 411 U.S. 258, 266 (1973).

52. 432 F.2d 730, 736 (3rd Cir. 1970). See also *United States v. Hines*, 470 F.2d 225, 231 (3rd Cir. 1972), cert. denied, 410 U.S. 968 (1973).

53. *Risher v. State*, 523 P.2d 421, 424 (Alaska 1974).

54. *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973); *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968), cert. denied, 394 U.S. 849 (1968).

55. *United States v. DeCoster*, supra note 54 at 1201. This case was reviewed in 12 AM. CRIM. L. REV. 193 (1975).

56. *United States v. DeCoster*, supra note 54 at 1203.

- (1) Counsel should confer with his client without delay and as often as necessary. . . . Counsel should discuss fully potential strategies and tactical choices with his client.
- (2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. . . .
- (3) Counsel must conduct appropriate investigations both factual and legal, to determine what matters of defense can be developed.⁵⁷

The Fourth Circuit Court designed a similar list in *Coles v. Peyton*:

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.⁵⁸

V. THE McELVEEN DECISION

This review of the established tests illustrates the difficulties of the problem. Regardless of enunciated rules, most courts have resorted to a combination of the tests to protect the interests of attorney and accused alike. The *McElveen* opinion is not an exception.

Certain language in the *McElveen* opinion suggests a more rigorous standard which is inconsistent with the permissive mockery test. The court did not present a list of minimum standards for trial counsel but it did specify what may be some minimum standards of performance.

[I]t is necessary that counsel prepare for trial by attempting to discover all the facts and circumstances of the crime, including investigating eyewitness accounts. . . .

[I]t is incumbent on counsel to make a thorough investigation of the persons and events involved in the crime.⁵⁹

The inconsistencies are apparent. A trial is not necessarily rendered a farce, sham, or mockery because counsel did not make a "thorough investigation". And certainly many trials have been conducted routinely in which defense counsel did not attempt to discover "all the facts and circumstances".

Another indication of a more exacting standard is the court's statement that if the record were not one which might be termed "open and shut", speculation as to alternative trial tactics "would

57. *Id.*

58. *Coles v. Peyton*, *supra* note 54 at 226.

59. *State v. McElveen*, *supra* note 8 at 823. It is well established that the right to counsel is not a right confined to representation during the trial on the merits. *E.g.* *Moore v. Michigan*, 355 U.S. 155, 160 (1957); *Moore v. United States*, 423 F.2d 730, 735 (3rd Cir. 1970).

not be inappropriate".⁶⁰ The *McElveen* majority did indeed speculate as to alternative courses of action the defense attorney could have pursued:

Although this court disallowed in *Noller* hindsight as a mechanism of assessing counsel's professional judgment and tactics employed at trial, the record reveals a pattern of presentation of evidence which is not consistent with the theory of the laws of evidence.⁶¹

VI. THE DISSENT

The dissent in this case deserves special attention. It is based on two equally faulty notions: (1) that this "stir-wise individual" was guilty anyway, and (2) that his apparently overbearing interest in his own defense excused his counsel from adequate preparation and presentation of the defense.

Although the dissent claims to agree with the law as stated by the majority, it concludes from the defendant-petitioner's past criminal record that his "guilt in the instant case is clear beyond any possible doubt".⁶² Even if other crimes were a valid basis for determining guilt, the petitioner's guilt was not at issue in this case. The majority opinion recognized the constitutional issues at bar, quoting a provision from the Montana case, *State v. Blakeslee*: "This defendant may be as guilty as ever felon not hanged. He is nevertheless entitled to a trial consistent with our Constitution and Codes."⁶³

Unfortunately, Justice Castles and Justice J.C. Harrison are not alone in harbouring the belief that an accused's "obvious" guilt justifies denial of reasoned judicial review of constitutional protections. Chief Justice Bazelon of the District of Columbia Court of Appeals commented on the effects of this belief:

Notions such as "guilty anyway" serve as rationalizations for refusing to confront the deprivation of constitutional rights at trial. They undermine an important aspect of the appellate court's responsibility For example, when we reject an ineffectiveness of counsel claim because the inadequate representation was not prejudicial, we conceal a serious problem and nourish the mistaken euphoria that our systems for providing counsel to indigent defendants are alive and doing well. The cost of this concealment is paid in the loss of fairness to individual defendants and in the absence of guidance for lawyers in future cases.⁶⁴

60. *State v. McElveen*, *supra* note 8 at 823.

61. *Id.* at 824.

62. *Id.* at 825.

63. *Id.* at 821, *citing*, *State v. Blakeslee*, *supra* note 19 at 306 P.2d at 1107.

64. *Bazelon*, *supra* note 35 at 28.

The second basis for the dissent, the defendant's interference with trial counsel, is equally ill-founded. The Supreme Court recently clarified the role of the defendant at trial. In *Faretta v. California*, the Court held that the sixth amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.⁶⁵ The court relied in part on an earlier case that recognized the defendant's power to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself.⁶⁶

The record indicates that the dissent is mistaken in stating that the defendant gave his counsel no facts. Even if this were the case, however, it does not excuse ineffective representation. In *Smotherton v. Beto*, the court wrote of this assertion:

It would indeed be an anomaly of the Sixth Amendment were this court to hold that what a defendant did or did not relate to his attorney concerning the facts of his case was to be in any manner determinative of the question of that lawyer's effective representation of the defendant. A lawyer attends a professional school for three years; he is instructed in a myriad of legal theories, rules and rationales, all of which are designed to achieve but one end: the development of a searching, inquisitive and analytical mind. . .⁶⁷

To commend counsel for trying to defend McElveen as well as he could⁶⁸ offends notions of judicial reason and responsibility.

VII. CONCLUSION

After post-conviction relief was granted without prejudice prison officials returned McElveen to Lake County to face re-trial. Upon investigation, McElveen's newly appointed defense counsel discovered the value of the tires was less than the \$150 minimum for a felony offense. Since McElveen had already been imprisoned for one year and three months, well above the maximum sentence for misdemeanor theft, he chose to plead guilty to the misdemeanor charge rather than await a delayed trial for which he probably would have been unable to establish a defense; over a year had passed from the time of his first trial and several potential witnesses had left the state.

The guarantee of effective assistance of counsel is to assure that our adversary system of justice really is adversary and really does

65. *Faretta v. California*, ___ U.S. ___, 95 S.Ct. 2525 (1975). In *State v. Turlok*, 76 Mont. 549, 248 P.169, 175 (1926), the court reached a contrary result, stating that the attorney has "control and management of the case".

66. *Snyder v. Massachusetts*, 291 U.S. 95, 106 (1934).

67. 276 F. Supp. 579, 588 (N.D. Tex. 1967).

68. *State v. McElveen*, *supra* note 8 at 825.

justice, not to shift the balance against the "peace forces" in favor of the "criminal element".⁶⁹ Courts and commentators have labeled the inadequacy of criminal defense for indigents one of the most serious crises facing criminal law today. Suggested solutions include personal liability for lawyers⁷⁰ and specialized education.⁷¹ Meaningful appellate review can immeasurably assist in upgrading the services to indigent defendants. The Montana court took a step in the right direction in rendering this decision although both criminally accused and defense counsel would be better served by a clear definition of the Montana standards for effective representation.

69. Bazelon, *supra* note 35 at 2.

70. Bines, *supra* note 36 at 986.

71. Bazelon, *supra* note 35 at 18.