Land & Water Law Review

Volume 14 | Issue 2 Article 8

1979

Constitutional Criminal Procedure - The Standards for the Sixth Amendment Right to Effective Assistance of Counsel - Adger v. State of Wyoming

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CASE NOTES

CONSTITUTIONAL CRIMINAL PROCEDURE—The Standards for the Sixth Amendment Right to Effective Assistance of Counsel. Adger v. State of Wyoming, 584 P.2d 1056 (Wyo. 1978).

On May 26, 1976, Mabel Adger was returning to Casper in a car with several men, one of whom, Boggess, she was living with.[1] A dispute arose between Mabel and Boggess, and when Mabel stopped the car, Boggess jumped out and ran.[2] Mabel, armed with a gun, pursued him around a nearby house.[3] When Mabel was two to three feet from Boggess she fired several shots.[4] Although she did not harm him, Mabel was arrested at the scene.[5]

The legal events preceding Mabel Adger's conviction for assault with a deadly weapon led to a successful appeal of her conviction on the ground that her right to counsel had been violated. In reviewing the case, the Wyoming Supreme Court examined the following scenario.

Mabel was brought before the justice of the peace on May 27, 1976.[6] She was advised of her right to retain counsel or have counsel appointed for her if she were unable to retain one.[7] Mabel informed the Justice that she had an attorney in Casper, but that she would like to have one appointed to consult with at that time.[8] The court declined to appoint an attorney at that point, and asked Mabel to inform him as soon as she had retained counsel.[9] Mabel agreed to appear at her preliminary hearing with her attorney, and stated that if she had problems in retaining counsel she would ask the court to appoint one.[10]

At her preliminary hearing on June 23, 1976, Mabel was represented by an attorney.[11] The attorney qualified his appearance as a "special" one on behalf of the Casper attorney whom Mabel had retained.[12]

1. Brief for Appellant at 2, Adger v. State of Wyoming, 584 P.2d 1056 (Wyo. 1978).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. Adger v. State of Wyoming, 584 P.2d 1056, 1057 (Wyo. 1978).
7. *Id.*
8. Brief for Appellant, *supra* note 1, at 5.
9. *Id.*
10. *Id.*
11. Brief for Appellant, *supra* note 1, at 6.
12. Adger v. State, *supra* note 6.

Mabel was arraigned before the district court on July 29, 1976, and appeared without her attorney.[13] She informed the court that she had retained and paid a fee to her lawyer who was unable to attend.[14] Her attorney had advised her to have the court appoint an attorney for the arraignment, but when the court offered to do so, she declined the appointment stating she wanted to retain her own lawyer and agreed to waive the assistance of counsel at the arraignment.[15]

The court set the trial date for August 30 with all motions to be filed by August 13.[16] The judge strongly advised Mabel to obtain an attorney as soon as possible so there would be time for adequate preparation of her defense. He again insisted she notify the court if she were not successful in retaining counsel so the court could appoint an attorney.[17] He warned her that the consequences could be severe if she failed to comply.[18]

On August 12 Mabel called the judge and informed his clerk that an attorney would represent her at trial.[19] Four days later, her attorney called the judge and told him he would not be representing Mabel unless she paid the fee.[20] When the judge inquired about the attorney's intent he replied that he expected to be paid and that he was not out of the case.[21] After the discussion with Mabel's attorney the judge called the public defender's office to notify them of the situation, although he did not assign the case to them.[22]

The attorney, on August 18 or 19, advised the judge that arrangements had been made with another party to pay the retainer and that the attorney was satisfied with the plan, but he refused to confirm his appearance as her counsel.[23]

On August 25, only five days before trial, the judge called the attorney to inquire as to the attorney's status in

13. *Id.*
14. *Id.*
15. Brief for Appellant, *supra* note 1, at 7.
16. *Id.*
17. Adger v. State, *supra* note 6.
18. *Id.*
19. *Id.*
20. Adger v. State, *supra* note 6, at 1057, 1058.
21. *Id.*
22. *Id.*
23. Brief for Appellant, *supra* note 1, at 8.

the case.[24] The attorney indicated there was still a problem with the fees, and would not commit himself.[25] The court then instructed the sheriff's office to find Mabel Adger and insist she meet with her attorney to resolve the problem.[26] That evening the attorney called the judge and indicated he felt the fee would be paid but again he would not declare himself formally as counsel.[27] At this time the judge told the attorney that it appeared to him he was not being fair with the defendant.[28]

That same evening the attorney called the public defender's office and indicated he probably would not be handling the Adger defense.[29] He told them he would have Mabel contact them so they could consult with her, and he gave them a brief summary of the case.[30]

Finally on August 26, two members of the public defender's staff were assigned to prepare Mabel Adger's defense.[31] Mabel Adger's new counsel filed a motion for a continuance on August 27, stating that three days, two of which were on a weekend were insufficient for adequate trial preparation.[32] The trial judge denied the motion in chambers, but did offer the court's assistance in locating witnesses over the weekend, and ordered the prosecution to disclose all information available.[33]

Monday morning, August 30, the defense counsel renewed its motion for a continuance, again stating they did not have adequate time to prepare themselves to protect Mabel Adger's interests, to properly present any defenses she might have and to adequately cross-examine the State's witnesses.[34] Though the defense counsel did not present factual information showing how more time would improve the defense, they did discuss specific areas where the preparation was insufficient.[35] Also, they indicated they had to take

24. Adger v. State, *supra* note 6, at 1058.
25. *Id.*
26. *Id.*
27. *Id.*
28. Brief for Appellant, *supra* note 1, at 9.
29. Adger v. State, *supra* note 6, at 1058.
30. *Id.*
31. Brief for Appellant, *supra* note 1, at 10, 11.
32. Adger v. State, *supra* note 6, at 1058.
33. *Id.*
34. *Id.*
35. *Id.*

care of other matters on Thursday and Friday before they could begin research on the case.[36]

The trial court again denied the motion for a continuance.[37] While the judge was sympathetic to the public defender's desire to properly defend, he indicated that the court had given Mabel Adger every reasonable opportunity to prepare for the defense, and any inadequacies were the result of her actions.[38] Following a brief trial, Mabel was convicted of assault with a deadly weapon.

On appeal, Adger contended that the trial court's refusal to grant her pretrial motions for a continuance resulted in a deprivation of her right to effective assistance of counsel as guaranteed by the state and federal constitutions. The Wyoming Supreme Court reversed and remanded the case for a new trial. The court held that the trial court had erred in allowing the defendant's retained counsel to withdraw from the case, but since the withdrawal had been made, the continuance should have been granted.[39]

BACKGROUND OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The Right Applied to the States

The sixth amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[40] The notion of effective right to counsel was conceived by the United States Supreme Court in the 1932 decision *Powell v. Alabama*, which involved a capital case.[41] In *Powell*[42] the Court held that mere assignment of counsel does not meet the mandate of the constitution. The assignment of counsel must also provide *effective aid* in the preparation of the case for trial.[43]

36. Brief for Appellant, *supra* note 1, at 11.
37. Adger v. State, *supra* note 6, at 1058.
38. Brief for Appellant, *supra* note 1, at 10, 11.
39. Adger v. State, *supra* note 6, at 1062.
40. U.S. Const. amend. VI.
41. Powell v. Alabama, 287 U.S. 45 (1932).
42. *Id.*
43. *Id.* at 71.

The *Powell* holding pioneered the decisions providing for effective assistance of counsel in capital cases. Shortly after *Powell*, the Court extended the right to non-capital federal cases in *Johnson v. Zerbst.*[44] But for thirty-one years the Court refused to apply the sixth amendment to the States in non-capital cases.[45] Underlying much of their recalcitrant position was a fear that extension of the right to effective counsel in all state criminal prosecutions could lead to an extension of the right in civil cases.[46]

The break through came in 1963 with the Supreme Court decision of *Gideon v. Wainright.*[47] The Court indicated that *Powell v. Alabama*[48] should be controlling with its instruction that the right to effective counsel is fundamental in character.[49] Analogizing the sixth amendment right to effective counsel with other constitutional rights, the Court declared that the fourteenth amendment made the sixth amendment obligatory upon the states, as it had other fundamental rights.[50]

The *Gideon* decision extended the right to effective assistance of counsel to state felony prosecutions. Nine years later the Supreme Court again broadened the protection by declaring the right to effective assistance of counsel exists in any criminal proceeding felony or misdemeanor, where there existed the possibility of confinement as punishment.[51]

The Standards for Effective Assistance of Counsel

Since the Supreme Court's holding in *Powell*, the elements of effective assistance of counsel have been a kaleidoscopic area of the law. Though the Supreme Court has intimated there exists a broad general test, they have left the task of delineating the standards for effective assistance of counsel to the lower federal and state courts.[52]

44. Johnson v. Zerbst, 304 U.S. 458 (1938).
45. *E.g.*, Betts v. Brady, 316 U.S. 455 (1942).
46. HERMAN, THE RIGHT TO COUNSEL IN MISDEAMEANOR COURT, 6 (1973).
47. Gideon v. Wainwright, 372 U.S. 335 (1963).
48. Powell v. Alabama, *supra* note 41.
49. Gideon v. Wainwright, *supra* note 47.
50. *Id.*
51. Argersinger v. Hamlin, 407 U.S. 25 (1972).
52. Annot., 26 A.L.R. Fed. 218, 222 (1976).

The federal courts originally employed a sham, farce or mockery test under which there was no denial of effective assistance of counsel unless tactical mistakes, errors in judgment, inexperience, lack of skill or lack of preparation were so apparent or inadequate that the trial was reduced to a sham, farce or mockery of justice.[53] In 1945 the District of Columbia Circuit applied this test in *Diggs v. Welch,* and set the trend for other circuits to follow.[54]

Not until 1960, in *Mackenna v. Ellis,* did a higher standard for effective assistance of counsel appear.[55] The test formulated in *Mackenna* required that effective assistance of counsel amount to "counsel reasonably likely to render and rendering reasonably effective service."[56]

Needless to say the "reasonably effective assistance" test left many questions unanswered, mainly, what was customary or reasonable conduct for an attorney during the various stages before, during and after a trial.[57] The fourth circuit enunciated the first major guidelines in applying the "reasonably effective assistance" standard. In *Coles v. Peyton*[58] the Court set out five requirements that needed to be met to assure that effective assistance of counsel was provided. First, counsel should be appointed promptly and be afforded reasonable opportunity to prepare. Thirdly, counsel should confer with his client without delay and conduct sufficient investigations. Finally, he should be allowed time for reflection and preparation.[59] Failure to meet these requirements was prima facie evidence of a denial of effective representation.[60] The burden of proof then fell on the state to show lack of prejudice.[61]

Again the District of Columbia Circuit established a new trend when Judge Bazelon,[62] wrote the opinion in *United States v. De Coster.*[63] The Court held that a defendant is en-

53. WHARTON'S CRIMINAL PROCEDURE 3, § 416 (12th ed. 1976).
54. Diggs v. Welch, 80 U.S. App. D.C. 5, 148 F.2d 667 (1945).
55. Mackenna v. Ellis, 280 F.2d 592 (5th Cir. 1960).
56. *Id.* at 599.
57. Bazelon, *The Realities of Gideon and Argersinger,* 64 GEO. L. J. 811, 819-24 (1976).
58. Coles v. Peyton, 389 F.2d 224 (4th cir. 1968).
59. *Id.*
60. *Id.*
61. *Id.* at 230.
62. Chief Judge Daniel L. Bazelon has been a major proponent for establishing workable standards for the effective assistance of counsel.
63. United States v. DeCoster, 159 App. D.C. 326, 487 F.2d 1197 (1973).

titled to the reasonably competent assistance of an attorney acting as his diligent, conscientious advocate.[64] The distinguishing feature of this case was the general and specific guidelines the court delineated for meeting the standard. Generally, the court required that counsel follow the American Bar Association Standards for the Defense Function,[65] and more specifically counsel should: 1. confer with his client without delay and as often as necessary to plan his defense, 2. advise his client of his rights and take all actions necessary to preserve them, and 3. conduct appropriate investigations both legal and factual.[66]

All of the federal circuits have adopted standards or tests for the effective assistance of counsel. Only the second and tenth circuits have clearly held on to the "sham, farce, or mockery of justice" test.[67] Though the first circuit had previously adopted the "sham, farce or mockery" test, many of its decisions include discussions of reasonably effective assistance of counsel as part of a higher standard that may be applied.[68]

Both the eighth and ninth circuits, while adopting the "sham, farce, mockery" test, indicate that the effect of the test will not be the traditional low standard. In *McQueen v. Swenson* the eighth circuit clarified its use of the "sham, farce, mockery" test, saying that the words were not intended to be a "shibboleth" to avoid analysis of the case, but instead the words were to indicate that a defendant claiming ineffective assistance of counsel had a heavy burden to prove unfairness.[69] The ninth circuit, in a number of cases that had purportedly applied the "sham, farce, mockery" test, indicated that the defendant need only show that counsel was not reasonably likely to render and did not render reasonably effective assistance to establish want of effective assistance.[70]

64. U.S. v. DeCoster, *supra* note 64, at 1202.
65. *See,* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION PP. 153-170.
66. U.S. v. DeCoster, *supra* note 64, at 1203, 1204.
67. Annot., 26 A.L.R. Fed. 218, 241, 254 (1976).
68. Annot., 26 A.L.R. Fed. 218, 239 (1976).
69. McQueen v. Swenson, 498 F.2d 207, 214 (8th Cir. 1974).
70. *See, e.g.,* Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977).

The remaining circuits, including the fourth as evidenced by *Coles v. Peyton*,[71] have either impliedly or explicitly rejected the "sham, farce, mockery" test and have established higher standards. In applying a standard of cus tomary skills and knowledge prevailing at the time and place when the question of effective assistance arises, the third circuit stated that the court should look to the sufficiency of preparation and knowledge of relevant law exhibited by the defense counsel.[72] They also held that this standard of normal competancy applied to the states as well as the federal courts.[73]

The fifth circuit has continued to support the "reasonably effective assistance" standard which they set forth in *MacKenna v. Ellis*.[74] But guidelines have been given such as requiring that an attorney be acquainted with the law and the facts of a case.[75] Recently in *Gandy v. Alabama*[76] the fifth circuit determined that the right to effective assistance of counsel includes four variations; (1) the right to have counsel, (2) the right to minimum quality of counsel, (3) the right to a reasonable opportunity to select and be represented by chosen counsel, (4) and the right to a preparation period sufficient to assure a minimum quality of defense.[77]

In abandoning the "sham, farce, mockery" test the sixth circuit, in *Beasley v. United States*, declared that the right to effective assistance of counsel was too fundamental and absolute to allow courts to attempt to calculate the amount of prejudice that resulted from a denial of the right.[78] Thus the court refused to allow the harmless error rule to be applied when questions of effective assistance of counsel arose.[79] The *Beasley* decision also stated that defense counsel must perform at least as well as a lawyer with ordinary skill and training in Criminal Law in protecting his client's interest.[80]

71. Coles v. Peyton, *supra* note 59.
72. Moore v. United States, 432 F.2d 730, 737 (3rd Cir. 1970).
73. *Id.*
74. Mackenna v. Ellis, *supra* note 56.
75. *See*, Caraway v. Beto, 421 F.2d 636 (5th Cir. 1970).
76. Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978).
77. Gandy v. Alabama, *supra* note 77 at 1323.
78. Beasley v. United States, 491 F.2d 687 (6th Cir. 1974).
79. *Id.* at 696.
80. *Id.*

In *Williams v. Twomey* the seventh circuit held that mere inexperience of counsel alone would not be sufficient to establish lack of effective assistance of counsel.[81] The court should look to how well counsel performed, not to counsel's experience.[82] The new rule established by the seventh circuit required that defense counsel representation meet a minimum standard of professional representation.[83]

While the United States Supreme Court has not actively expressed its views on the standards for effective assistance of counsel, the justices have alluded to what they perceive the standards to be. In *McMann v. Richardson* the court indicated that effective counsel did not turn on whether counsel's advice was right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.[84] Three years later the McMann[85] standard was reiterated in part in *Tollett v. Henderson.*[86] Justice Rehnquest's majority opinion held that a defendant was entitled to relief if his counsel's advise was not within the range of competence demanded of attorneys in criminal cases.[87] But the Court has also avoided many opportunities to review questions of ineffective assistance of counsel by denying certiorari[88] or skirting the issue.[89]

The state courts, on the other hand, have looked to the federal courts for guidance and have adopted and modified many of the circuit court tests. An analysis of the state court decisions applying these tests is in the Analysis of the Adger case.

THE COURT'S REASONING IN *ADGER*

The Wyoming Supreme Court considered two issues in deciding whether the defendant had been denied her right to

81. Williams v. Twomey, 510 F.2d 634, 638 (7th Cir. 1975).
82. *Id.* at 639.
83. *Id.*
84. McMann v. Richardson, 397 U.S. 759 (1970).
85. *Id.*
86. Tollett v. Henderson, 411 U.S. 258 (1973).
87. *Id.*
88. Brescia v. New Jersey, *cert. denied* 94 S. Ct. 2630 (1974). Justice's Marshall and Brennan in a brief dissent to the denial of certiorari cited U.S. v. Ash, 413 U.S. 300 (1973) as requiring timely appointment of counsel and adequate preparation as absolute pre-requisites affording defendant's constitutional protection. The case in question in *Brescia* involved a defendant who had to go to trial with an unprepared public defender appointed at the last minute.
89. Holloway v. Arkansas, 435 U.S. 475 (1978). Though the case dealt with the right to effective counsel and the problems with representing conflicting interests the Court evaded commenting on the effectiveness standards.

effective assistance of counsel. First they considered the trial court's discretionary function in granting a continuance. Secondly they addressed the issue of an attorney's withdrawal from a case.

In determining that the trial court had erred in denying a continuance to Mabel Adger, the court had to reconcile its position[90] with the earlier holding in *Ash v. State of Wyoming.*[91] In *Ash,* the defendant was charged with two counts of burglary.[92] At his arraingment on January 6, 1975 Ash was advised of his right to an attorney, for the arraignment.[93] He told the court he wanted to proceed without an attorney and he entered a plea of not guilty.[94] The court informed Ash that the state would provide an attorney if he were unable to obtain one, then the court inquired if he would have an attorney at trial.[95] Ash replied that he would, unless he could not afford one.[96] The judge asked if there were any reason why he could not afford to retain an attorney.[97] Ash stated that he had no cash, but that he had given some money to an attorney in Casper who had given him preliminary advice.[98] The attorney wanted a chance to look over the case before he accepted it.[99] Again the judge explained that an attorney would be provided for Ash at public expense if he could not afford one.[100] Ash advised the court that he did not feel he was a needy person.[101] At that point the judge asked Ash if he waived all claim to an attorney provided at public expense, and Ash responded that he did.[102] Ash was then required to post an additional five hundred dollars for a bond, part of which would be released to pay an attorney.[103]

A few weeks later Ash filed a motion for a change of judge which was granted.[104] On February 10 the newly assigned judge reset the trial date from February 11 to Feb-

90. Adger v. State, *supra* note 6, at 1059.
91. Ash v. State, 555 P.2d 221 (1976).
92. Ash v. State, *supra* note 92, at 222.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. Ash v. State, *supra* note 92, at 223.
102. *Id.*
103. *Id.*
104. *Id.*

ruary 12[105] and asked a member of the public defender's office to consult with Ash and see if he had retained counsel.[106]

The day before trial a public defender met with Ash to explain the trial procedure.[107] Ash indicated he could not handle it himself, and the public defender advised him to get an attorney.[108] Ash then asked the public defender to represent him.[109]

The following day at trial, the court appointed the public defender to represent Ash.[110] The public defender had represented another defendant involved in the same incident and was familiar with the facts.[111] At the outset of the trial Ash's counsel made a motion for a continuance so that he could be more fully prepared on the issues.[112] The court denied the motion.[113] Ash appeared, stating it was error for the trial court to deny his motion for a continuance.[114]

In affirming the lower court's decision, the Wyoming Supreme Court stated that Ash, by his actions, waived his rights to the appointment of counsel until the morning of the trial.[115] The Court looked at many factors in making their determination. First, Ash was given an opportunity to request counsel which he waived.[116] If the judge had not been concerned about the situation, Ash would have gone to trial without counsel due to his own fault in not seeking appointed counsel.[117] The court found that Ash's own carelessness and lack of diligence created the situation.[118]

Also the court indicated that the time spent with a client is not the sole factor in determining competent assistance.[119] If the attorney is familiar with the facts and the problem, as Ash's counsel was, then a late appointment would be less

105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. Ash v. State, *supra* note 92, at 224.
116. *Id.*
117. *Id.*
118. Ash v. State, *supra* note 92, at 226.
119. Ash v. State, *supra* note 92, at 224.

likely to cause harm.[120] The court stated that the Ash record revealed it was "a well tried and sharply contested" case.[121] Thus the trial had not been reduced to a sham, farce or mockery of justice, and Ash had not been deprived of effective assistance of counsel.

This lengthy description of the *Ash* facts is necessary to understand the court's reasoning in *Adger*. The major factor distinguishing *Adger* from *Ash* was the finding that Ash, by his own actions had waived his right to appointed counsel until the morning of the trial, while Adger had relied on retained counsel who withdrew, leaving her no choice but to accept appointed counsel right before trial.[122]

In *Adger* the court focuses on the problem created by Mabel Adger's retained counsel withdrawing so close to trial.[123] By accepting the fifty dollars for services and the continued representations that when Mabel made further payment he would be in the case, the attorney in effect made a formal appearance.[124] In doing so, the attorney owed a duty both to his client and to the court to give reasonable justification and notice for his withdrawal, so that his client would have adequate time to seek other counsel.[125] His failure to give this timely notice resulted in the hurried appointment of a public defender a few days before Mabel Adger's trial. Adger should not be held responsible for the problems created by her attorney.

The court also addressed the problem of late appointment of counsel. In her appeal Adger did not claim that her appointed counsel lacked legal competence.[126] Her sole claim was based on the fact that her counsel had insufficient time to prepare an adequate defense.[127] The court recognized that the right to effective assistance of counsel includes reasonable and adequate time for counsel to prepare, they followed the approach of the United States Supreme Court.[128] This approach is not based on any per se rules as to what is timely

120. Ash v. State, *supra* note 92, at 224, 225.
121. Ash v. State, *supra* note 92, at 226.
122. Adger v. State, *supra* note 6, at 1059.
123. *Id.*
124. Adger v. State, *supra* note 6, at 1060.
125. *Id.* at 1059.
126. Adger v. State, *supra* note 6, at 1061.
127. *Id.*
128. Adger v. State, *supra* note 6, at 1058.

appointment of counsel.[129] Instead this approach requires that the court make each decision on a case by case basis in light of the circumstances presented and the harm if any that occurred.[130]

By considering the circumstances in *Adger* the court found that the tardy appointment of counsel had worked to deny Adger her right to effective assistance of counsel.[131] Since the problem was created by the retained counsel withdrawing and was not the fault of Adger, the court held that there was error in not granting the continuance.[132]

ANALYSIS

As mentioned, the constitutional right to effective assistance of counsel is guaranteed to all defendants in federal or state criminal prosecutions whenever the possibility of imprisonment exists. The standards for measuring what is effective assistance of counsel are varied as evidenced by the rulings in the federal circuit courts.

Many state courts have adopted standards to help define effective assistance of counsel. Wyoming addressed the effective assistance issue in *Galbraith v. State of Wyoming.*[133] Though not specifically adopting the "sham, farce, mockery of justice" test, the court approved that standard for evaluating a defendant's claim that his counsel was unconstitutionally ineffective.[134]

The court referred to the "sham, farce, mockery" test again in *Ash.*[135] The reference was not made in conjunction with the question of whether the tardy appointment of counsel and denial of the continuance constituted a violation of the right of effective counsel. Rather, the test was applied to the performance of the public defender at trial, where it was found that effective representation under the test had been provided.[136]

129. *Id.*
130. *Id.*
131. Adger v. State, *supra* note 7, at 1062.
132. *Id.*
133. Galbraith v. State of Wyoming, 503 P.2d 1192 (Wyo. 1972).
134. *Id.*
135. Ash v. State, *supra* note 92.
136. *Id.*

In *Adger* the court again considered the effective assistance of counsel issue, but this time it turned its attention to whether tardy appointment of counsel denied a defendant's right to effective assistance of counsel.

Although the court found that the tardy appointment of counsel in *Adger* did deny Mabel her right to effective counsel, the decision made no reference to the standard for effective assistance of counsel other than to indicate the right included reasonable and adequate time to prepare. Instead the court followed the case by case method accepted by the United States Supreme Court.[137] The court went on to say that tardy appointment of counsel would not be per se a denial of effective assistance of counsel.[138] The court looked at the question of fault, indicating by their decisions in *Ash* and *Adger* that if the defendant were the cause of the late appointment of counsel, as in *Ash*, then the tardy appointment was not a denial of effective assistance of counsel. But if, as in *Adger*, the late appointment was due through no fault of the defendant, then the late appointment could result in a denial of effective assistance of counsel.

When faced with a similar situation, the Florida court, in *Kimbrough v. State*, also ruled that the trial court erred in denying the continuance.[139] The defendant's public defender resigned at the defendant's arraignment. At trial, the public defender who represented the defendant had not had time to prepare the case and moved for a continuance, which was denied.[140] In finding the denial of the continuance error, the court examined the American Bar Association Standards relating to the Defense Function.[141] Section 4.1 of the defense standards provides that counsel has the duty to promptly investigate all facts of the case.[142] The court found that defendant's counsel had not had an opportunity to fulfill his duty to investigate, resulting in the defendant's loss of effective assistance of counsel.[143]

137. Adger v. State, *supra* note 6, at 1059.
138. *Id.*
139. Kimbrough v. State of Florida, 352 So. 2nd 925 (Fla. 1977).
140. *Id.* at 926.
141. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 66.
142. *Id.*
143. Kimbrough v. State of Florida, *supra* note 140.

Wisconsin has also used the ABA Standards for Criminal Justice in providing guidelines to determine effective assistance of counsel.[144] Violation of the guidelines is not automatically ruled as incompetent or ineffective counsel, but the Wisconsin court felt that the "sham, farce, mockery" test was too lenient, and that more stringent standards were needed to guide the courts and bar.[145] In a concurring opinion one justice indicated that the Rules of the Court might provide a more efficient means for expressing the standards for effective assistance and timely appointment of counsel.[146] Texas chose to adopt such a rule stating that appointed counsel is entitled to ten days to prepare for trial which may be waived by written notice.[147]

In rejecting the "sham, farce, mockery" test both Idaho[148] and Kansas[149] turned to the standards set forth in *United States v. DeCoster.*[150] Alaska also chose to reject the "sham, farce, mockery" test and adopted a test created by Professor J. Finer[151] which requires effective counsel to exhibit the normal, customary skill possessed by an attorney fairly skilled and experienced in criminal law.[152] While this case did not address the problem of tardy appointment of counsel, the court indicated that the original sham, farce, mockery standard was so vague that it placed too heavy a burden on the defendant.[153]

Other courts have also found that the sham, farce, mockery test places too heavy a burden on the defendant to prove that the trial has been reduced to a mockery. The *Coles v. Peyton* test provides strong protection for the defendant since it shifts the burden of proof to the prosecution to show lack of prejudice when an effective counsel claim is established.[154] In *DeCoster* the court stated that if the defendant could show a substantial violation of any of the A.B.A. standards on the specific requirements the court laid out, then it

144. State v. Harper, 205 N.W.2d 1 (Wis. 1973).
145. *Id.* at 9.
146. *Id.* at 11.
147. TEX. CRIM. PRO. CODE ANN. Art. 26.04(b).
148. State v. Tucker, 539 P.2d 556 (*Id.* 1975).
149. Schoonover v. State of Kansas, 582 P.2d 292 (Kan. 1978).
150. U.S. v. DeCoster, *supra* note 64.
151. McCraken v. State of Alaska, 521 P.2d 499 (Alaska 1974).
152. Finer, *Ineffective Assistance of Counsel,* 58 CORNELL L. REV. 1077, 1080 (1973).
153. McCraken v. State, *supra* note 152, at 509.
154. Coles v. Peyton, *supra* note 59, at 226.

was presumed he had been denied effective representation unless the prosecution could prove the defendant had not been prejudiced.[155] As mentioned, the sixth circuit has refused to allow the harmless error rule to be applied when questions of effective assistance of counsel arise, thus giving great weight to a finding of ineffective assistance of counsel.[156]

It is not clear that the Wyoming Supreme Court has ever adopted the sham, farce, mockery test. While they alluded to the test in *Galbraith* and *Ash*, the court also referred to the *Ash* case as being "well tried and sharply contested"[157] intimating that the court was actually applying a higher standard than the sham, farce, mockery test. Further support for this can be found in *Adger* where the court determines that the case was not well tried and sharply contested.[158]

The decisions in *Ash* and *Adger* leave many questions about Wyoming's effective assistance of counsel standards unanswered. Though it appears the court would apply a stronger test than the sham, farce, mockery test, the factors for a "well tried and sharply contested" trial are not clearly defined.

Also, the court fails to fully explain where the burden of proof for establishing denial of effective assistance of counsel falls. In their concurring opinion Justices Rose and McClintock argue for a presumption of ineffective assistance of counsel whenever there has been a tardy appointment of counsel, placing the burden of proof on the prosecution to prove that the late appointment was harmless.[159] Since the courts inquired into whose fault brought about the tardy appointment of counsel, an assumption can be made that the defendant has the burden of proving that he was not at fault.

Although the court has not fully addressed the issue of standards for effective assistance of counsel, the *Adger* case does provide guidance on the tardy appointment of counsel

155. U.S. v. DeCoster, *supra* note 64, at 1204.
156. Beasley v. U.S., *supra* note 79.
157. Ash v. State, *supra* note 92, at 226.
158. Adger v. State, *supra* note 6, at 1062.
159. Adger v. State, *supra* note 6, at 1063.

question. The court indicates that if, through no fault of the defendant's, there has been a late appointment of counsel, the defendant's right to effective assistance of counsel has been denied if he can show that inadequate preparation time has prejudiced his case.

GUIDANCE FOR THE FUTURE

One argument that courts have advanced when deciding not to approve a higher standard for effective assistance of counsel is that the expedition of the trial process will be hampered by claims of ineffective counsel.[160] This view was expressed by the Wyoming court in *Ash*.[161] The Constitutional right to effective assistance of counsel far outweighs any administrative concerns the court might have.[162] A defendant can not adequately exercise any of his other fundamental rights unless he is guided by effective counsel.

There are several strategies that could be utilized at the pretrial level to help avoid any backlogging of the courts due to ineffective assistance of counsel claims. Trial judges could require counsel to demonstrate adequate case preparation through submittal of worksheets reporting the steps covered.[163] Public defender offices could set internal standards for appointment of counsel, caseload limits and preparation.[164] Where penal implications are not as severe, grievance procedures could be established for nonfelony defendants.[165] Finally, the bar could act as a monitor of the effectiveness of the defense system.[166]

Implementation of selected pretrial strategies and the use of the higher standard alluded to in the *Adger* case would help assure that meritorious claims of ineffective assistance of counsel did not create a backlog in the courts.

160. Farrell v. United States, 391 A.2d 755 (D.C. 1978).
161. Ash v. State, *supra* note 92, at 224.
162. Farrell v. U.S., *supra* note 161.
163. NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, THE RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF *Argersinger v. Hamlin*, EXECUTIVE SUMMARY 12 (1976).
164. *Id.*
165. *Id.* at 13.
166. *Id.*
167. Bazelon, *The Defective Assistance of Counsel*, 42 U. CRIM. L. REV. 1 (1973).

CONCLUSION

The "sham, farce, mockery of justice" test sets such a low standard that it has been called a mockery of the sixth amendment right to effective counsel.[167] Ineffective assistance of counsel need not imply that counsel was inadequate. It only indicates that the defendant did not get the effective assistance he was entitled to, whatever the reason.

The Wyoming Supreme Court has taken a step forward in accepting a higher standard for the effective assistance of counsel by its holding in *Adger* that tardy appointment of counsel can work to deny a defendant effective assistance of counsel. In future cases the court may have to confront the issue of incompetent counsel and other effective assistance problems. Their apparent adoption of a higher standard than the sham, farce, mockery test should be used to guide decisions in these areas.

The right to effective assistance of counsel is the most fundamental of all rights since without effective counsel, most defendants would be incapable of asserting other rights they might have.[168]

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168. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).