
One of the most important guarantees in the United States Constitution is the sixth amendment guarantee of the assistance of counsel.1 Since 1932, when the Supreme Court recognized the criminal defendant's need for the "guiding hand of counsel at every step in the proceedings against him,"2 the sixth amendment guarantee has gradually evolved to encompass the right to effective assistance of counsel. One well-known judge has remarked, however, that because of the strained and overcrowded conditions of the criminal justice system, "a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the Sixth Amendment."3 Although this remark specifically mentions indigent defendants, the problem is not confined to them.

The Supreme Court of Ohio dealt with the problem of ineffective assistance of counsel in State v. Hester.4 The court held that the Postconviction Remedy Act5 was a proper procedure by which a

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1 U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence."
4 45 Ohio St. 2d 71, 341 N.E.2d 304 (1976).
5 OHIO REV. CODE ANN. § 2953.21 (Page 1975):

(A) Any person convicted of a criminal offense or adjudged delinquent claiming that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a verified petition at any time in the court which imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file such supporting affidavit and other documentary evidence as will support his claim for relief.

(B) The clerk of court in which the petition is filed shall docket the petition and bring it promptly to the attention of such court. A copy of the petition need not be served by the petitioner on the prosecuting attorney. The clerk of the court in which the petition is filed shall immediately forward a copy of the petition to the prosecuting attorney of that county.

(C) Before granting a hearing the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition and supporting affidavits, all the files and records pertaining to the proceedings against the petitioner, including but not limited to the indictment, the court's journal entries, the journalized records of the clerk of court, and the court reporter's transcript. Such court reporter's transcript if ordered and certified by the court shall be taxed as court costs. If the court dismisses the petition it shall make and file findings of fact and conclusions of law with respect to such dismissal.
criminal defendant could assert a violation of his constitutional right to effective assistance of counsel, and that the doctrine of res judicata will not preclude a claim of ineffective assistance of counsel unless it is clear from the record that the claim was previously raised and adjudicated against the defendant.\(^6\)

The Ohio Supreme Court also articulated in *Hester* a standard by which claims of ineffective assistance are to be judged. The resulting formulation, however, falls short of the sixth amendment guarantee. The decision in *Hester* reflects the chronic confusion of appellate courts concerning whether the claims of ineffective assistance of counsel should be judged by sixth amendment principles, requiring an affirmative duty on the part of the defense counsel, or under fifth and fourteenth amendment notions of due process, which protect the defendant only against incompetence that prejudices the defendant's right to a fair trial. The purpose of this Case Note is to examine the *Hester* standard and to demonstrate that it is based on the latter, thereby leaving the defendant's right to effective assistance of counsel far short of that which should exist under the sixth amendment.

I. THE FACTS AND HOLDING

Richard Earl Hester was charged with armed robbery and found guilty after a jury trial. He was sentenced on February 20, 1973, and

\[^{6} \text{See generally Herman, Symposium on Post-Conviction Remedies: Foreword and Afterword,} 27 \text{Ohio St. L.J. 237 (1966).} \]

\[^{4} \text{45 Ohio St. 2d at 75-76, 341 N.E.2d at 308.} \]
on July 5, 1973, he petitioned the Court of Common Pleas of Guernsey County for postconviction relief on the ground that he had not been advised of his constitutional right to appeal his conviction. Upon dismissal of that petition, Hester perfected a merit appeal to the court of appeals, but failed to include an assignment of error alleging incompetence of his retained trial counsel. When the judgment of the trial court was affirmed, Hester filed a notice of appeal to the Supreme Court of Ohio. He voluntarily dismissed this appeal when he discovered that he could not raise the issue of incompetent counsel for the first time in the high court.7

On September 4, 1974, Hester filed a second petition for postconviction relief pursuant to the Postconviction Remedy Act, this time basing his petition primarily on the incompetence of counsel. The petition alleged that the trial counsel generally failed to engage in pretrial discovery or investigation, neglected to call an expert witness to present testimony concerning defendant's alcoholism and the "blackouts" it caused, and failed to object to the State's use of unconstitutional one-man "line-up" procedures which had reinforced the in-court identification of Hester as the individual who robbed the complainant.8

In opposition to Hester's petition the State claimed that the matters set forth in the petition were res judicata, asserting that "the judgment of conviction in the trial court and subsequent appeal... constitute a final judgment of the matters raised in the defendant's petition and all of which appears from the face of the petition."9 The court of common pleas sustained the state's claim.10 When the court of appeals affirmed, Hester filed a motion for leave to appeal the dismissal of his petition to the Supreme Court of Ohio.11 On appeal, the Ohio Supreme Court reversed the lower court and held that Hester's allegations were sufficient to require a hearing under the Ohio Postconviction Remedy Act.12

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7 Id. at 71, 341 N.E.2d at 304.
8 Id. at 72, 341 N.E.2d at 305.
9 Id. at 76, 341 N.E.2d at 308.
10 Id. at 72, 341 N.E.2d at 305.
11 Id.
12 Id. at 76, 341 N.E.2d at 308. State v. Milanovich, 42 Ohio St. 2d 46, 325 N.E.2d 540 (1975), stated the prerequisites for an evidentiary hearing. The claim should be sufficient on its face to raise a question whether the petitioner's conviction is void or voidable on constitutional grounds. For the authoritative definition of "void" and "voidable," see State v. Perry, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967). The claim must also raise factual allegations that cannot be determined by an examination of the record.

In other areas involving the assistance of counsel Ohio courts have been liberal in allowing an evidentiary hearing to resolve any factual dispute that could invalidate the conviction. They have been careful in allowing a hearing to resolve any factual questions pertaining to whether
The practical effect of this holding is to greatly facilitate the presentment of claims of ineffective assistance of counsel in Ohio. Prior to the Act, defendants experienced great difficulty in asserting the infringement of their right to effective counsel. Procedural difficulties in asserting the claim made it difficult, if not impossible, for a defendant convicted without competent counsel to attack the conviction. This was due primarily to the overcrowding of the system and to the long-standing skepticism about such allegations.

The defendant was represented by counsel or whether he intelligently waived his right to counsel. See State v. Bryant, 15 Ohio St. 2d 62, 238 N.E.2d 562 (1968); State v. Smith, 12 Ohio St. 2d 7, 230 N.E.2d 551 (1967); Jones v. State, 8 Ohio St. 2d 21, 222 N.E.2d 313 (1966); State v. Mattox, 8 Ohio App. 2d 65, 220 N.E.2d 708 (1966). For claims of ineffectiveness of counsel resulting from lack of knowledge, lack of preparation, or faulty advice pursuant to a guilty plea, an evidentiary hearing may be the only means of resolving the dispute since proof of such ineffectiveness will be missing from the record. See State v. Milanovich, 42 Ohio St. 2d 46, 325 N.E.2d 540 (1975); State v. Dvorovy, 31 Ohio Misc. 160, 287 N.E.2d 409 (1971), appeal dismissed, 36 Ohio App. 2d 57, 302 N.E.2d 589 (1973).

The Supreme Court of Ohio had previously given some indication that the Postconviction Remedy Act would encompass claims of ineffective assistance of counsel. In State v. Juliano, 24 Ohio St. 2d 117, 265 N.E.2d 290 (1970), the court took cognizance of a claim of ineffective assistance of counsel on its own motion. Although the court denied relief on the facts, it intimated that the remedy would be available to press such claims. This case led the Sixth Circuit to state that the Postconviction Remedy Act was the proper procedure in Ohio for adjudicating claims of ineffective assistance of counsel. Steed v. Salisbury, 459 F.2d 475 (6th Cir. 1972).

Procedural difficulties in asserting these claims were not unique to the Ohio courts. See generally Bines, Remedyng Ineffective Representation in Criminal Cases: Departures from Habeas Corpus, 59 VA. L. REV. 927 (1973); Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 NW. U. L. REV. 289 (1964).

The one avenue of collateral attack, a state habeas corpus proceeding, was foreclosed to petitioners who claimed denial of effective representation by counsel. McConnaughy v. Alvis, 165 Ohio St. 102, 133 N.E.2d 133 (1956); In re Beard, 164 Ohio St. 488, 132 N.E.2d 96 (1956).

Although the avenues of direct attack were theoretically more fruitful, they were of little practical help to the defendant; generally a claim of ineffective assistance of counsel is not favored in a motion for a new trial. Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944), cert. denied, 324 U.S. 869 (1945); But cf. State v. Deal, 17 Ohio St. 2d 17, 244 N.E.2d 742 (1969) (conviction reversed when objection to counsel made before the end of the trial). A new trial has been granted in extreme cases, based not on the defendant's right to counsel, but rather upon his right to a fair trial under fourteenth amendment standards of due process. Cornwell v. State, 106 Ohio St. 626, 140 N.E. 363 (1922).

The "proper" method of direct appeal is less than successful for obvious reasons. The defendant has to file his appeal within 30 days; if his counsel was ineffective during the trial, it is unlikely that he will be more conscientious in the appeal, especially in appealing his own incompetence. When there is an appeal, the review is restricted to the record and, as the Ohio Supreme Court has noted, proof of ineffectiveness generally lies outside the record. State v. Hester, 45 Ohio St. 2d 71, 76, 341 N.E.2d 304, 308 (1976). See also United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973). If the defendant misses the 30-day deadline, he must file a motion for leave to appeal, which will probably not be granted absent a strong showing of prejudicial error. State v. Vires, 25 Ohio App. 2d 70, 266 N.E.2d 245 (1970); State v. Brazell, 15 Ohio App. 2d 104, 239 N.E.2d 125 (1968).

The court in *Hester* also clarified the role of the doctrine of res judicata in claims of ineffective assistance of counsel. It held that in order for res judicata to operate it must be clear from an examination of the record that the claim of ineffective assistance was previously raised and adjudicated against the petitioner. This holding followed the approach of the A.B.A. Standards for Postconviction Remedies, which recommend a narrow application of the doctrine lest it foreclose meritorious claims that have not received a full hearing. Although the court specifically stated that its holding does not mean that a claim of ineffective assistance of counsel could never be barred by res judicata, it conceded that it is unlikely such claims will ever be fully litigated at the trial or on appeal.

The *Hester* court then considered what standards should guide the lower courts in passing on claims of ineffective assistance of counsel. The court examined two competing tests by which the performance of defense counsel has been measured in the past. The traditional standard, set forth in *Diggs v. Welch*, requires the defendant to show that the ineffectiveness of counsel caused the trial to become a "farce and mockery of justice." The more modern test, set forth in *Beasley v. United States*, requires that the defendant prove that he did not receive reasonably competent assistance of counsel. The court in *Hester* ostensibly rejected the *Diggs* standard and formulated its own standard. The standard adopted by the court however—"whether the accused, under all the circumstances... had a fair trial and substantial justice was done"—appears to retain

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*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. See also Gray v. United States, 299 F.2d 467 (D.C. Cir. 1962).*


2. The court cited State v. Carter, 36 Ohio Misc. 170, 304 N.E.2d 415 (C.P. Montgomery Cty. 1973) with approval on the issue of res judicata. In passing on the sufficiency of a petition for postconviction relief under Revised Code § 2953.21, the court there concluded that it would be virtually impossible to raise the claim of ineffective assistance of counsel at the trial and procedurally very difficult to raise the issue on direct appeal.

3. 45 Ohio St. 2d at 79, 341 N.E.2d at 310.
the significant aspects of the Diggs test. It protects only against blatant incompetence, and thus does not guarantee truly effective representation.

II. CONSTITUTIONAL DEVELOPMENT OF THE RIGHT TO EFFECTIVE COUNSEL

Ineffective assistance of counsel differs from complete denial of counsel, but the practical result is the same. A long line of constitutional adjudication has gradually come to view the two circumstances as synonymous.

The United States Supreme Court first touched upon the subject in Powell v. Alabama, holding that in a capital case a defendant unable to employ counsel and incapable of acting in his own defense must have counsel appointed for him in such a manner as not "to preclude the giving of effective aid in preparation and trial of the case." Since that time, the Court has held that there is a right to counsel in all federal criminal cases, that the sixth amendment guarantee of the right to counsel applies to the state courts through the fourteenth amendment, and, more recently, that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." In addition, the right to counsel has not been confined merely to the trial but has been expanded so that "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution ... where counsel's absence might derogate from the accused's right to a fair trial."

While the Supreme Court was expanding the situations in which counsel is required it was also making clear that the assistance of counsel required more than "a mere formal appointment." In Glasser v. United States the Court voided the defendant's conviction on the ground that his attorney's representation of a codefendant with an inconsistent defense violated his sixth amendment right to assistance of counsel. In Reece v. Georgia Mr. Justice Clark,

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25 287 U.S. 45 (1932).
26 Id. at 71.
31 Avery v. Alabama, 308 U.S. 444, 446 (1940).
32 315 U.S. 60 (1942).
writing for the Court, said the "effective assistance of counsel in [a state prosecution] is a constitutional requirement of due process which no member of the Union may disregard."\(^4\) More recently, the Court has reiterated its position that "the right to counsel is the right to *effective* assistance of counsel."\(^5\) It is clear, therefore, that a conviction is infirm under the United States Constitution if the defendant is denied effective aid of counsel.\(^6\)

### III. Standards of Effective Counsel

One problem that has plagued the entire area of postconviction relief for ineffective assistance of counsel is the lack of identifiable standards. The United States Supreme Court has not offered much guidance in determining what constitutes effective assistance of counsel because it has focused only on the threshold issue of when the right of counsel applies.\(^7\) Without the unifying effect of high court pronouncements, varying standards of what constitutes ineffective assistance have proliferated.\(^8\) The confusion has been aggravated by the vagueness of some of the opinions.\(^9\) The standards are bound to be nebulous to a certain extent since the effectiveness of representation must be judged in light of the needs of a particular case; nonetheless, the standards should point towards certain definable principles that courts can use as touchstones when judging the exigencies of a particular situation.

The primary confusion in the area of ineffectiveness of counsel concerns whether the standards should be defined in terms of the sixth amendment guarantee of assistance of counsel as incorporated through the fourteenth amendment, or only in terms of the fifth and fourteenth amendment principles of due process and right to a fair trial.\(^10\) The resolution of this conflict is extremely important because the sixth amendment principles have been viewed as more stringent and as covering a wider range of errors of counsel than the due process tests.\(^11\) The attempt of the Ohio Supreme Court to formulate

\(^{24}\) Id., at 90.

\(^{35}\) Id.

\(^{34}\) Id. at 90.

\(^{36}\) Id. at 91.
a standard for the effective assistance of counsel in *Hester* reflects this confusion, and the resulting standard falls short of the sixth amendment guarantee.

A. *Diggs and the "Farce and Mockery" Standard*

The standard most widely accepted in the past, but ostensibly rejected by the court in *Hester*, is the "farce and mockery" test. This test was first articulated in *Diggs v. Welch*. In that case the Court of Appeals for the District of Columbia held that a trial was not constitutionally defective due to ineffective assistance of counsel until it had been rendered a "farce and mockery, shocking to the conscience of the Court." The court viewed the sixth amendment as requiring only that there be effective appointment of counsel; the performance of counsel subsequent to appointment was to be viewed against the less stringent requirements of the fifth amendment guarantee of a fair trial.

*Mitchell v. United States* also held that the "farce and mockery" standard applies to sixth amendment claims. In that case Judge Prettyman commented at length upon the inability of a court to judge, subsequent to conviction, the quality of the defense lawyer's work. His discussion of "ineffective assistance" made it clear that the term applies only to the most blatant type of incompetency:

> We think the term "ineffective assistance"...does not relate to the quality of the service rendered by a trial lawyer or the decisions he makes in the normal course of a criminal case; except that, if his conduct is so incompetent as to deprive his client of a trial in any real sense—render the trial a mockery and a farce is one descriptive

The "farce and mockery" standard derives from some older doctrine on the content of the due process clause of the Fifth Amendment. What is involved here is the Sixth Amendment. The Sixth Amendment has overlapping but more stringent standards than the Fifth Amendment as is clear from other contexts. Compare, for example, *United States v. Wade, 388 U.S. 218 (1967)* with *Stovall v. Denno, 388 U.S. 293 (1967)*.

Fitzgerald v. Estelle, 505 F.2d 1334, 1336 (5th Cir. 1974), *cert. denied, 422 U.S. 1011 (1975)*: Moving from the Fourteenth Amendment alone to the incorporated Sixth, our decisions establish that the standard of reasonably effective assistance of counsel...covers a greater range of counsel errors than does the fundamental fairness standard of the due process concept solely embodied within the Fourteenth Amendment.

Cases in which the farce and mockery standard has been applied include: *Cardarella v. United States, 375 F.2d 222 (8th Cir.), cert. denied, 389 U.S. 882 (1967)*; *Williams v. Beto, 354 F.2d 698 (5th Cir. 1965)*; *Frand v. United States, 301 F.2d 102 (10th Cir. 1962)*; *United States ex rel. Darcy v. Handy, 203 F.2d 407 (3d Cir.), cert. denied, 346 U.S. 865 (1953)*; *United States ex rel. Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948)*.

148 F.2d 667 (D.C. Cir.), *cert. denied, 325 U.S. 889 (1945)*.
148 F.2d at 669.
259 F.2d 787 (D.C. Cir.), *cert. denied, 358 U.S. 850 (1958)*.
expression,—the accused must have another trial, or rather more accurately, is still entitled to a trial.\footnote{Id. at 793.}

The subjective nature of the "farce and mockery" standard defied precise definition, but it retained the character of a due process concept and, as one court commented, became "a metaphor that the defendant has a heavy burden to show requisite unfairness."\footnote{Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970).}

Since the roots of the "farce and mockery" test lie in fifth and fourteenth amendment concepts of due process and the right to a fair trial, the test does not focus on the conduct of the defense attorney, but on the proceedings as a whole.

The conduct of counsel in the trial of a case is that of only one of the officers of the court whose duty it is to see that the defendant receives a fair trial . . . . His mistakes, although indicative of lack of skill or even incompetency, will not vitiate the trial unless on the whole the representation is of such low caliber as to amount to no representation and to reduce the trial to a farce.\footnote{United States ex rel. Feeley v. Ragen, 166 F.2d 976, 980 (7th Cir. 1948) (emphasis added).}

Thus the defendant is compelled to show an extreme case before the standard imposes a burden on the prosecutor and trial judge to remedy the incompetence and return fairness to the proceedings.\footnote{491 F.2d 687 (6th Cir. 1974).} This changes the focus of the sixth amendment from a guarantee that the defendant be assisted by competent counsel to a protection against only the most blatant incompetence.

B. Beasley and the Objective Standard

In Beasley v. United States\footnote{Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945).} the Court of Appeals for the Sixth Circuit rejected the "farce and mockery" test of Diggs. The court formulated a more objective standard, holding that "the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance," and that "[i]t is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence."\footnote{491 F.2d 687 (6th Cir. 1974).} This test has more objective limits and focuses only on the performance of the defense counsel.\footnote{Id. at 696.}

\footnote{Cases which have also rejected the "farce and mockery" test for a more objective test include: United States v. Easter, 539 F.2d 665 (8th Cir. 1976); Williams v. Twomey, 510 F.2d 634 (7th Cir.), cert. denied, 423 U.S. 876 (1975); West v. Louisiana, 478 F.2d 1026 (5th Cir.)}
The difference between the Diggs standard and this more objective test can be seen by comparing the district court's disposition of Beasley under the "farce and mockery" standard and the ultimate result under the new test. In Beasley the defendant's counsel had called as the only defense witness an F.B.I. agent who, according to the defendant, was "out to get him." This agent was not interviewed by the defense counsel prior to being placed on the stand and his testimony was highly damaging to the defense. The alleged purpose of calling this agent was to show that a "pro" like the defendant could not have been responsible for such an "amateurish job." Besides this highly questionable strategy of counsel, his preparation was lax: counsel neglected to call several res gestae witnesses who could have conceivably aided defendant's case; he failed to request an independent fingerprint analysis, at government expense, which would have revealed defects in the government's fingerprint evidence; and he failed to interview an alibi witness who died before the trial. The district court labeled these and other actions by defense counsel as "incompetent and ineffective," but refused habeas corpus relief because it felt the attorney's performance did not render the trial a "farce and mockery, shocking to the court." The Sixth Circuit reversed the order and, after a review of the history of adjudication of claims of ineffective assistance of counsel, rejected the Diggs language in favor of a more objective test firmly founded on sixth amendment principles.

Under the Diggs rationale employed by the district court, the focal point of analysis was a vague notion of "fair trial" garnered from a fifth and fourteenth amendment due process mandate, rather than the sixth amendment guarantee of effective assistance of counsel. Because of this focus on the proceedings as a whole, the issue of defense counsel's strategy and trial tactics was effectively foreclosed to the defendant. Under the Sixth Circuit approach, however, "[d]efense strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent deny a criminal defendant the effective assistance of counsel." The emphasis of

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1973); Moore v. United States, 432 F.2d 730 (3rd Cir. 1970); Scott v. United States, 427 F.2d 609 (D.C. Cir. 1970); Coles v. Peyton, 389 F.2d 224 (4th Cir.), cert. denied, 393 U.S. 849 (1968); Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967).

53 491 F.2d at 690-91.

54 Id. at 689.

55 Cases which have refused to examine claims of ineffectiveness of counsel based on trial tactics and strategy include: O'Malley v. United States, 285 F.2d 733 (6th Cir. 1961); Anderson v. Bannan, 250 F.2d 654 (6th Cir. 1958). See generally Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 NW. U.L. REV. 289, 301 (1964).

56 491 F.2d at 696.
this latter approach is on the actions of counsel; thus laxity of preparation and questionable trial strategy may be considered sufficient to deprive the defendant of a substantial defense and entitle him to relief.\textsuperscript{57}

The approach of the Sixth Circuit to the problem in \textit{Beasley} appears preferable to that of the district court. A criminal trial has been viewed as a three-legged stool, consisting of judge, prosecutor, and defense counsel; the failure of any of the legs leads to a serious imbalance in the system as a whole.\textsuperscript{58} The Sixth Circuit approach avoids the necessity of placing undue reliance on the remaining legs, which may, in fact, be already overburdened.

Finally, a key difference between the two tests is the requirement of prejudicial error. The "farce and mockery" test demands a strong showing of prejudice before relief will be granted. Under the \textit{Beasley} approach, however, there may be no need to show actual prejudice. As the Sixth Circuit stated in that case, "[h]armless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel."

However, the requirement in \textit{Beasley} that one be deprived of a substantial defense indicates that the claim cannot be immaterial.\textsuperscript{60}

\section*{IV. Analysis of \textit{State v. Hester}}

In \textit{State v. Hester} the Supreme Court of Ohio cites with approval the \textit{Beasley} rejection of the \textit{Diggs} standard. It does not, however, adopt the standard set forth in \textit{Beasley}.\textsuperscript{61} Instead the court states:

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\textsuperscript{\footnotesize 57} It is highly doubtful that the strategy of calling a witness to comment on the defendant's prowess in the art of crime would have appeared sound to a reasonably competent attorney at the time of the trial.

\textsuperscript{\footnotesize 58} Bazelon, supra note 3, at 6.

\textsuperscript{\footnotesize 59} 491 F.2d at 696. The limits of the "harmless error" rule were developed in Chapman v. California, 386 U.S. 18, 23 (1967), but because the right to counsel was seen as fundamental, the harmless error rule did not apply in that case. In Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), \textit{cert. denied}, 393 U.S. 849 (1968), the court developed a standard under which the government has the burden of proving there was no prejudice. \textit{But see} McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974), in which the court found that ineffectiveness of counsel is substantially different from lack of counsel and that in the former situation the harmless error rule applies. For discussion of this case, see \textit{Note}, Ineffective Assistance of Counsel and the Harmless Error Rule: The Eighth Circuit Abandons Chapman, 43 GEO. WASH. L. REV. 1384 (1975).

\textsuperscript{\footnotesize 60} One recent case defines "substantial" as being "consequential, that is, it in some way must have impaired the defense." United States v. Decoster, No. 72-1283, at 20 (D.C. Cir., October 18, 1976).

\textsuperscript{\footnotesize 61} One recent Ohio Court of Appeals case had applied the \textit{Beasley} test to a claim of ineffective assistance of counsel. \textit{State v. Goins}, 47 Ohio App. 2d 283 (1975). \textit{But see State v. Woolum}, 47 Ohio App. 2d 313 (1976).
\end{flushleft}
In formulating a test for effective counsel pursuant to the Fifth, Sixth, and Fourteenth Amendments, and Sections 10 and 16 of Article I of the Ohio Constitution we note with approval tests articulated in *State v. Cutcher* [17 Ohio App. 2d 107, 244 N.E.2d 767 (1969)], *Cornwell v. State* [106 Ohio St. 626, 140 N.E. 363 (1922)], and *Kramer v. Alvis* (1956), 103 Ohio App. 324. Balancing the rights of the accused and of the public, we hold the test to be whether the accused, under all circumstances, including the fact that he had retained counsel, had a fair trial and substantial justice was done.\(^6\)

Analysis of this test shows that it falls short of the protection afforded in *Beasley*.

The most obvious indication that the court has not adopted the *Beasley* test is found in the principles upon which it bases its formulation. Rather than basing it squarely on sixth amendment principles, the court includes notions of due process.\(^6\) It is undeniable that the right to counsel is one aspect of due process. Indeed, it is a most critical one. "Of all the rights that an accused 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."\(^6\) For this reason, the standards for effective counsel based on the sixth amendment are more stringent than those based on the generalized mandate of due

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\(^6\) 45 Ohio St. 2d at 79, 341 N.E.2d at 310. The standard for effective counsel that the court formulated in *Hester* is meant to "avoid the anomaly that one who employs his own counsel may have a lower standard applied to measure his constitutional right to assistance of counsel than one who at state expense had appointed counsel." *Id.* Many courts had denied relief to a defendant who was represented by retained counsel. The justification for a distinction between retained and appointed counsel generally proceeds on a theory of agency or a theory of the need for state action. Under the agency theory the actions of a retained counsel are imputed to the defendant who retained him. *See* Hendrickson v. Overlade, 131 F. Supp. 561, 562 (N.D. Ind. 1955). The state action theory is generally based on the requirement that there be state action to constitute a violation of fourteenth amendment rights. The state action is certainly present when the counsel is appointed by the state; but some courts thought that when counsel was retained by the defendant, something more than the state's participation in a conviction in violation of the defendant's rights is needed for state action. *See* United States *ex rel.* Darcy v. Handy, 203 F.2d 407, 427 (3d Cir.), cert. denied, 346 U.S. 865 (1953).

Notably, the case that *Hester* cites with approval in abolishing the distinction between retained and appointed counsel discussed at length the constitutional principles against which to measure the performance of counsel and concluded that it would abolish the distinction only when judging effectiveness of counsel against the due process standards. Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974), *cert. denied*, 422 U.S. 1011 (1975).

\(^6\) These notions are indicated, in part, by the court's citation of the fourteenth and fifth amendments and the Ohio due process clause, which reads: "All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." *Ohio Const.* art. 1, § 16.1.

In a claim that is based solely on the sixth amendment right to counsel there should be no reliance on the less stringent due process standards.

The second aspect of the *Hester* test showing the court's less than vigorous protection of sixth amendment rights is the rather vague indication that there must be a balancing of the rights of the public and the rights of the accused. The United States Supreme Court has stated that the right to counsel is one of the most fundamental rights guaranteed by the Constitution. Indeed, if an accused is convicted as a result of a violation of his right to effective assistance of counsel, then the rights and interests of the public should weigh in favor of a new trial. And if a court views the rights of the public as calling for finality of adjudication and a fixing of punishment, then the interests of the public should be in the vigorous protection of sixth amendment rights so that guilt or innocence may be determined finally and fairly without sacrificing cherished constitutional principles.

Finally the court says the deciding factor will be whether the defendant "had a fair trial and substantial justice was done." The phrase "substantial justice was done" indicates that a finding of ineffective assistance will not immediately invalidate the conviction; in addition the Ohio court will require some showing of prejudice. Though the requirement that substantial justice be done appears to be more stringent than the requirement that the trial be something more than a "farce and mockery of justice," the court still misses the main focuses of the sixth amendment guarantee. The sixth amendment guarantee of effective assistance of counsel does not contemplate that the fairness of the trial will be judged by hindsight; rather, it guarantees a defendant the effective aid of counsel as a means of insuring the fairness of the trial as it is proceeding.

An examination of the cases cited by the Ohio Supreme Court with approval also indicates that the standard formulated in *Hester* is close to the *Diggs* standard which the court purported to reject. The first case cited by the court was *Cornwell v. State*. This case was decided in 1922, 10 years before the decision in *Powell v. Alabama* brought the adjective "effective" into discussion of the sixth amendment. In *Cornwell* the court focused on whether the totality of events combined to deny the defendant a fair trial, and not on whether the actions of counsel were effective. The defendant had retained counsel but, prior to the commencement of the trial, a second attorney was

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43 See note 41 supra.
45 106 Ohio St. 626, 140 N.E. 363 (1922).
46 287 U.S. 45 (1932).
appointed for the defendant by the bench. The two defense attorneys disagreed on how the case should be tried and had serious disagreements in the presence of the court and jury. They withheld evidence from each other and the defendant complained several times that he did not know which of his counsels' advice to follow. The court granted a motion for a new trial, not because the defendant had a right to assistance of counsel falling within a reasonably competent range, but on the ground that the unprofessional attitude of the two attorneys fatally prejudiced defendant's chance for a fair trial.

The next case cited, Kramer v. Alvis, actually adopted the test and the reasoning of Diggs and created a presumption of competency for members of the bar which forced upon the defendant a heavy burden to show requisite unfairness. We have always indulged the presumption that any lawyer who has been admitted by our Supreme Court to practice law is qualified to defend a client against a criminal prosecution. Unless it clearly appears that he is so incompetent, or conducted a defense so negligently and so incapably as to have denied his client the benefit of a fair trial and judicial determination, it may not be said that his client was denied the assistance of counsel or due process.

This test focuses on the fourteenth amendment principle of due process almost to the exclusion of the sixth amendment guarantee of assistance of counsel.

The most recent of the cases cited by the Hester court was State v. Cutcher. Cutcher was on trial for rape. At the trial defense counsel for some unknown reason entered into evidence a photograph of the defendant which had been taken at the time of a previous indictment for a sex crime, of which the defendant had been found innocent. Trial counsel also failed to adequately interview several defense witnesses prior to the trial with the result that when they took the stand, their testimony not only failed to strengthen the defense but ultimately proved damaging to it. In addition, the attorney's hostile cross-examination of the victim served to "inflame the members of the jury against him and his client." When counsel twice attempted to recall the victim for further cross-examination, he discovered that she was unavailable because he had neglected to issue a subpoena for her.

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69 106 Ohio St. at 627, 140 N.E. at 363.
70 103 Ohio App. 324, 141 N.E. 2d 489 (1956).
71 Id. at 338, 141 N.E.2d at 498.
72 17 Ohio App. 2d 107, 244 N.E.2d 767 (1969).
73 Id. at 112, 244 N.E.2d at 770.
The court in *Cutcher*, after reviewing the decisions which employed the "farce and mockery" standard and those which employed the more objective standard, concluded:

[A]ssistance of counsel under the Sixth Amendment implies adequate representation by efficient counsel. Efficiency of counsel in a criminal trial implies skill and preparation in endeavoring to produce the desired result. Such legal representation, as demonstrated by the record before us on this appeal, was not provided to this defendant, in his trial, *thereby reducing his trial to a farce*.

This test seems to be based on sixth amendment standards, but the use of the catchwords at the end give disturbing undertones of the "farce and mockery" standard. Reading *State v. Cutcher* in concert with *Cornwell v. State* and *Kramer v. Alvis* leads to the inescapable conclusion that the *Hester* standard for reviewing claims of ineffective assistance of counsel, though not as lax as the *Diggs* standard, will protect the criminal defendant only against gross incompetence and not guarantee him reasonably competent representation.

A major question left unanswered by the *Hester* decision is what allegations of incompetency of counsel will be sufficient to void resulting convictions. The decision gives only vague guidance in this area. However, while the courts are to deal with the petitions case by case, two ideas garnered from the *Hester* standard will be in the forefront. First, the standard is defined in terms traditionally associated with ideas of due process and falls short of the standard developed by the Sixth Circuit in *Beasley*. Second, since *Hester* indicates that substantial justice is the ultimate goal, the petitioner must be ready to show prejudicial error due to counsel's conduct. Unless a criminal defendant is able to meet these burdens, his appeal for postconviction relief because of ineffective assistance of counsel will in all probability be denied.

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45 Ohio St. 2d at 80, 341 N.E.2d at 310:
Application of the test, like the application of the exclusionary rule, must be on a case-to-case basis. The trial court may find assistance in a number of related pronouncements. For example, Pattern Rules of Court and Code Provisions, based upon the A.B.A. Standards for Criminal Justice by Wilson, for the Committee on Implementation of Standards for the Administration of Criminal Justice; the A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services, and Standards Relating to the Defense Function; cf. Standards Relating to Criminal Appeals and Standards Relating to Post-Conviction Remedies. Presumably, the ABA Standards must be applied with the gloss of the *Hester* standard. Compare the specific duties of counsel developed in United States v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973).
V. Conclusion

The time has come for the courts to stop papering "over the cracks in the house Gideon built." The right of every criminal defendant to the effective assistance of counsel has been insufficiently protected in the past because courts have often defined "effective assistance of counsel" too leniently. As one commentator has suggested, we expect more of doctors than a performance rising above that which would make a farce and mockery of the medical profession, and there is no reason to expect less of attorneys.

*State v. Hester* is a step in the right direction for Ohio. After years of ignoring the problem by denying a postconviction remedy for ineffective assistance of counsel, the Ohio Supreme Court has recognized a procedure that can be very effective in redressing such constitutional infirmities. This is at most, however, a tentative step. The standard set forth in the *Hester* decision falls short of that required by the sixth amendment. While the *Hester* court gives lip service to the mandates of the sixth amendment, its standards for judging the constitutional requirements of assistance of counsel seem mired in notions of general due process. The sixth amendment does not guarantee only that, considering all the circumstances, the defendant's trial was fair; it guarantees to the defendant the effective assistance of counsel as a means of assuring the integrity of the proceedings. In situations where representation is not reasonably competent, and yet a defendant is denied relief because of his inability to satisfy the *Hester* requirements, the sixth amendment right to effective assistance of counsel may well be illusory.

*Robert J. Gilker*

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