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Indigents' Dissatisfaction with Assigned Counsel

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THE AMERICAN CONCEPT OF DEMOCRACY embraces the principle that the basic interests of society are endangered when the rights of an individual are diminished.[1] The indigent's dissatisfaction with his assigned counsel is relevant only because Americans presuppose that a criminal prosecution unaccompanied by the panoply of the adversary process is a deprivation of the fundamental rights of the accused. This concept of justice obligates a government which institutes criminal prosecutions to provide representation for those unable to afford their own counsel.[2] It further imposes a duty to assure effective counsel in order to preserve the element of challenge which is the very nucleus of the adversary system.

The General Rule — Effective Assistance of Counsel

The judicial assumption that the Sixth Amendment right to counsel is a right to effective counsel originated with the decision in *Powell v. Alabama*[3] where the trial judge's appointment of the entire bar to represent the Scotsboro boys was deemed a failure to make an effective appointment and therefore a denial of due process. *Mitchell v. United States*[4] interpreted *Powell's* use of the term "effective" to describe a procedural requirement rather than a standard of skill and held that it is not part of the judge's function to evaluate the relative proficiency of the lawyer's trial performance. It was alleged that such action would destroy the concept of an impartial judge and deprive the accused of his right to counsel's selection of tactical trial methods.[5] Better reasoned cases have rejected this procedural limitation and have held that the right to effective representation is substantive and not merely formal,[6] thus imposing on the courts the duty of evaluating at least to some minimal degree the quality of representation provided in the judicial process.

The liberalizing trend of the 1960's extending the rights of the accused in criminal prosecutions[7] and lessening the requirements for

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[1] Hayes, *Common Fallacies in Criticism of Recent Court Decisions on Rights of the Accused*, 53 A.B.A.J. 425, 426 (1967).

[2] ATT'Y GEN. COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REPORT at 9-11 (1963).

[3] 287 U.S. 45 (1932) [hereinafter *Powell*].

[4] 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

[5] *Id.* at 793.

[6] Chambers v. Maroney, 399 U.S. 42 (1970); Avery v. Alabama, 308 U.S. 444 (1940); Fields v. Peyton, 375 F.2d 624 (4th Cir. 1967); Johnson v. United States, 110 F.2d 562 (D.C. Cir. 1940).

[7] United States v. Wade, 388 U.S. 218 (1967) (right to counsel during police line-up); Miranda v. Arizona, 384 U.S. 436 (1966) (right to counsel during police interrogations); Escobedo v. Illinois, 378 U.S. 478 (1964) (exclusion of confession taken without advising

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federal review of state convictions[8] encouraged many states to enact comparable procedures for review of state convictions.[9] The result has been that both federal and state courts have been inundated with petitions for post-conviction relief, many of which assert unsubstantiated and frivolous allegations of ineffective assistance of counsel.[10]

The Court's reluctance to set standards whereby the quality of representation may be tested and its insistence that each case be determined on an *ad hoc* basis[11] from the totality of the circumstances[12] has permitted, if not encouraged, the multitude of petitions which strain both the vaunted judicial patience[13] as well as its budget.[14] The predictable result has been a demand for a limitation upon interminable review[15] and for a procedure which, while providing ready access to the appeals court, would also quickly dispose of cases lacking in merit.[16]

The problem has become more urgent with the recent decision in *Argersinger v. Hamlin*[17] which extended the right to assigned counsel to misdemeanor cases where the penalty may be imprisonment. The inevitable increase in assignments of counsel which will result and the concomitant petitions for dismissal of counsel or for post-conviction relief based on ineffective representation require a reappraisal of the court's imprecise definition of effective representation.

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suspect of his rights); Jackson v. Denno, 378 U.S. 368 (1964) (right to a hearing on issue of voluntariness of confession); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination extended); Fay v. Noia, 372 U.S. 39 (1963) (exhaustion of state remedies doctrine liberalized in *habeas corpus* actions); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusion of illegally seized evidence).

[8] 28 U.S.C. §§2255, 2244 (1948).

[9] For a study of state post-conviction statutes enacted to meet the requirements of 28 U.S.C. §§2255, 2244 see Swindler, *State Post-Conviction Remedies and Federal Habeas Corpus* (pts. 1-5) 12 WM. & MARY L. REV. 149, 159, 171, 183, 225 (1970).

[10] S. REP. NO. 1097, 90th Cong., 2d Sess. 64 (1968).

[11] Bruffett v. State, 208 Kan. 942, 494 P.2d 1160 (1972); Witt v. State, 475 S.W.2d 259 (Tex. Cr. App. 1971); State v. Lindsey, 53 Wis.2d 759, 193 N.W.2d 699 (1972).

[12] Ungar v. Sarafite, 376 U.S. 575 (1964); Goodwin v. Swenson, 287 F. Supp. 166 (W.D. Mo. 1968); Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950).

[13] Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1948).

[14] Interview with John J. Lavelle, Administrator, The Court of Common Pleas of Cuyahoga County, Ohio, in Cleveland, Ohio, on July 26, 1972. Mr. Lavelle indicated that in 1972 the number of law clerks employed by the court increased from seven to a total of fifteen. The law clerks' primary responsibility is to research the record when a petition for post-conviction relief is received by the court. Each application requires three to four hours of review to determine its validity.

[15] Simpson v. State, 211 So.2d 862 (Fla. App. 1968). *See also Habeas Corpus — an Erosion of Law and Order?* 14 CATHOLIC L. 293 (1968).

[16] *Frivolous Appeals and the Minimum Standards Project; Solution or Surrender?*, 24 U. MIAMI L. REV. 95, 102 (1969).

[17] 92 S.Ct. 2006 (1972). The court reasoned that the common-law right to counsel limited to misdemeanor and petty offense cases was extended but not supplanted by the Sixth Amendment.

The Court has described effective representation in negative terms, requiring that the trial be "a sham, a farce, a mockery of justice,"[18] "shocking to the conscience of the court and lacking in fundamental fairness"[19] or that the representation be "so horribly inept as to constitute virtually no representation at all"[20] before a lack of effective assistance of counsel may be found. The task of providing more illuminating guidelines than these broad and amorphous terms has been delegated to the lower federal courts. This challenge has been met with varying degrees of specificity and a regrettable lack of uniformity.

Interpretations of "Effective Assistance"

One standard for determining whether representation which is constitutionally adequate supports a finding of effective representation whenever it is determined that trial counsel's actions had any reasonable basis, regardless of the existence of more reasonable alternatives.[21] A second test, that of "normal competency," requires only that there be no failure to present the case in any fundamental respect[22] and holds that lack of diligence is not necessarily equated with ineffective assistance of counsel.[23] Theorizing that the constitutional right to effective assistance of counsel does not entitle an indigent to be defended by a lawyer whose skill meets any specified aptitude test,[24] reviewing courts have been exceptionally undemanding in their expectations of normal competence.

The only standard employed in which courts have indicated a willingness to take more than a cursory look at trial performance is that which requires counsel both "reasonably likely to render and rendering reasonably effective assistance."[25] This standard demands

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[18] United States v. Roche, 443 F.2d 98 (10th Cir. 1971); Bruner v. United States, 432 F.2d 931 (10th Cir. 1970); Scott v. United States, 334 F.2d 72 (6th Cir. 1964); Jones v. Huff, 152 F.2d 14 (D.C. Cir. 1945); Goforth v. United States, 314 F.2d 868 (10th Cir. 1963), *cert. denied*, 374 U.S. 812 (1963); Harper v. Wainwright, 334 F. Supp. 1338 (M.D. Fla. 1971); State v. Thornton, 108 Ariz. 119, 493 P.2d 902 (1972); People v. Flanigan, 49 Ill.2d 321, 274 N.E.2d 75 (1971).

[19] United States *ex rel.* Maselli v. Reincke, 383 F.2d 129, 132 (2d Cir. 1967); *accord*, Betts v. Brady, 316 U.S. 455 (1942); United States *ex rel.* Boucher v. Reincke, 341 F.2d 977 (2d Cir. 1965); United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963).

[20] United States v. Radford, 452 F.2d 332 (7th Cir. 1971); Wilcoxon v. Aldredge, 192 Ga. 634, 15 S.E.2d 873 (1941), *noted in* 146 A.L.R. 365; Bies v. State, 53 Wis.2d 322, 193 N.W.2d 46 (1972).

[21] Pennington v. Beto, 437 F.2d 1281 (5th Cir. 1971); Pineda v. Bailey, 340 F.2d 162 (5th Cir. 1965); United States *ex rel.* Bolden v. Rundle, 300 F. Supp. 107 (E.D. Pa. 1969); Givens v. Dutton, 222 Ga. 756, 152 S.E.2d 358 (1966); Commonwealth *ex rel.* Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967).

[22] State v. Sinclair, 236 A.2d 66 (Me. 1967); McQueen v. State, 475 S.W.2d 111 (Mo. 1971); State v. Anderson, 117 N.J. Super. 507, 285 A.2d 234 (1971).

[23] Cardarella v. United States, 375 F.2d 222 (8th Cir.), *cert. denied*, 389 U.S. 882 (1967); *cf.* State v. Newton, 1 Or. App. 376, 462 P.2d 696 (1969).

[24] Frand v. United States, 301 F.2d 102, 103 (10th Cir. 1962).

[25] Williams v. Beto, 354 F.2d 698 (5th Cir. 1965); Pineda v. Bailey, 340 F.2d 162 (5th Cir. 1965); Bentley v. State, 285 F. Supp. 498 (S.D. Fla. 1968), *cert. denied*, 396 U.S. 960 (1970).

actual and substantial assistance and something more than mere *pro forma* representation.[26] Although this test is also very tolerant of an attorney's transgressions, it appears to offer the greatest hope of relief to a post-conviction petitioner. The guidelines have been expressed in *Smotherman v. Beto* as follows:

> Defense attorneys are called upon to apply their knowledge, experience and talents to a given set of facts and to derive from such fusion a defense which the Sixth Amendment requires to be adequate, not miraculous. When the adequacy of a defense rendered by an attorney is subject to attack, the relevant consideration is . . . whether . . . his representation failed to render *reasonably effective* assistance to the accused.[27]

The Duty of the Court

The right of the indigent to the effective assistance of counsel imposes a duty on the court to appoint counsel capable of providing such assistance, and the incompetence of the lawyer is sometimes imputed to the trial judge.[28] A lawyer is expected to refuse to handle a legal matter in which he is not competent,[29] but where an assigned attorney insisted that his lack of experience in criminal matters rendered him incompetent to defend the accused, the trial court's refusal to dismiss him was upheld as the record did not show ineffective representation.[30] Although a rotation system of appointment has been upheld on the theory that the Constitution does not guarantee each indigent that only a leader of the bar will speak for him,[31] it has also been asserted that the court has a duty to assign counsel with sufficient ability and experience to fairly represent the accused and to protect his rights.[32] In jurisdictions where there is no dearth of lawyers experienced in criminal trials, the practice is to assign only the most skillful lawyers.[33] The indigent is thus provided with a defense which only a wealthy defendant or the state could afford.

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[25] MacKenna v. Ellis, 280 F.2d 592, 601 (5th Cir. 1960), *modified,* 289 F.2d 928 (5th Cir. 1961), *cert. denied,* 368 U.S. 877 (1961); *accord,* People v. Bennett, 29 N.Y.2d 462, 280 N.E.2d 637, 329 N.Y.S.2d 801 (1972).

[27] 276 F. Supp. 579, 586 (N.D. Tex. 1967).

[28] Glasser v. United States, 315 U.S. 60 (1942); Bentley v. State, 285 F. Supp. 498 (S.D. Fla. 1968), *cert. denied,* 396 U.S. 960 (1970).

[29] ABA CANONS OF PROFESSIONAL ETHICS, DR 6-101 (A)(1) (1969).

[30] State v. Riley, 394 S.W.2d 360 (Mo. 1965).

[31] State v. Rush, 46 N.J. 399, 402, 217 A.2d 441, 444 (1966), *noted in* 21 A.L.R.3d 804; *accord,* Calhoun v. United States, 454 F.2d 702 (7th Cir. 1971), *cert. denied,* 92 S. Ct. 1302 (1972).

[32] State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972); State v. Rushford, 127 Vt. 105, 241 A.2d 306 (1968). *See generally Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings,* 55 CORNELL L. REV. 632 (1970); *Right to Adequate Representation in the Criminal Process: Some Observations,* 22 SW. L. J. 260 (1968).

[33] Interview, Lavelle, *supra* note 14.

An effective appointment implies that the lawyer shall be given sufficient time to confer with his client, investigate, and prepare a defense. It has been held, therefore, that a late appointment of counsel is inherently prejudicial and a deprivation of effective assistance of counsel.[34] Although mere formal appointment does not satisfy the Constitutional mandate, in determining whether a late appointment has deprived defendant of effective representation, the relative complexity of the case, the prior experience of the lawyer, and whether or not additional time would have appreciably benefited the defense will be considered.[35] Thus, one day, or even a few minutes, has been held sufficient time to confer with a client and prepare an effective defense.[36]

Pre-Trial Remedies

Prior to trial the indigent who is dissatisfied with his assigned counsel will discover that his remedies are subject to the sound discretion of the court.[37] When the court calendar is not threatened with disruption, substitute counsel is often appointed upon a sincere, although not necessarily valid, expression of dissatisfaction;[38] but it is the court and not the indigent who selects the counsel to be assigned.[39] Moreover, the indigent must allege a more valid complaint than a lack of rapport before a denial of his request for substitute counsel reaches the level of deprivation of a constitutional right.[40] In this regard it has been held that a language barrier between the indigent and his assigned counsel is not such a lack of communication as to deprive the indigent of his right to effective assistance of counsel.[41] Even where his assigned lawyer had charged

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[34] Martin v. Virginia, 365 F.2d 549 (4th Cir. 1966); Rastrom v. Robbins, 319 F. Supp. 1090 (S.D. Me. 1970); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION AND THE DEFENSE FUNCTION. §4.1 (Approved Draft 1971).

[35] Fowler v. Powell, 336 F. Supp. 276 (W.D. Pa. 1972); State v. Anderson, 117 N.J. Super. 507, 285 A.2d 234 (1971); Commonwealth v. Woody, 440 Pa. 569, 271 A.2d 477 (1970).

[36] Goforth v. United States, 314 F.2d 868 (10th Cir. 1963) *cert. denied* 374 U.S. 812 (1963) (a few minutes sufficient where lawyer took active part in the trial); Commonwealth v. Russell, 428 Pa. 440, 239 A.2d 399 (1968) (one day sufficient where defendant admitted guilt).

[37] United States v. White, 451 F.2d 1225 (6th Cir. 1971); United States *ex rel.* Davis v. McMann, 386 F.2d 611 (2d Cir. 1967), *cert. denied,* 390 U.S. 958 (1968); Good v. United States, 378 F.2d 934 (9th Cir. 1967); United States v. Ellenbogen, 365 F.2d 982 (2d Cir. 1966), *cert. denied,* 386 U.S. 923 (1967); State v. Miller, 1 Or. App. 460, 460 P.2d 874 (1969).

[38] Interview, Lavelle, *supra* note 14.

[39] Fugate v. Gaffney, 453 F.2d 362 (8th Cir. 1971); Lee v. Crouse, 284 F. Supp. 541 (D. Kan. 1967); People v. Tolbert, 70 Cal.2d 790, 452 P.2d 661, 76 Cal. Rptr. 445 (1969); People v. Hughes, 57 Cal.2d 89, 367 P.2d 33, 17 Cal. Rptr. 617 (1961); State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972).

[40] Lamoureux v. Massachusetts, 412 F.2d 710 (1st Cir. 1969); State v. Johnson, 257 So.2d 654 (La. 1972); Weeks v. State, 476 S.W. 2d 310 (Tex. Cr. App. 1972).

[41] United States v. Valenzuela-Mendoza, 452 F.2d 773 (9th Cir. 1971).

defendant with theft, there was not sufficient hostility to destroy the attorney-client relationship and produce ineffective representation.[42]

The most common complaint of indigents awaiting trial is that their lawyer rarely visits them in jail. Indigents sometimes interpret the lawyer's duty to represent a client "exclusive of all others" as entitling them to full-time attention; whereas the lawyer interprets this as a duty to represent the client exclusive of those who have conflicting interests.[43] The Public Defender program has been highly praised for the good public relations it has maintained through frequent client consultations,[44] a feat greatly simplified by its specialized practice. The economy of time resulting from a public defender's ability to move from cell to cell is analogous to the efficiency demonstrated by a physician in making his hospital rounds. Yet indigents often complain that their public defender has little time for them because of his heavy case load.[45] A Public Defender explains the source of the dissatisfaction:

> The indigent feels that his lawyer's duty to counsel extends to all areas in which he has difficulties. We're prepared for our cases but we can't afford the luxury of reassurance.[46]

In instances where a guilty plea is entered, the indigent has a fertile field for alleging faulty representation by his assigned counsel[47] as it is a lawyer's duty to advise his client as to the probable penalty and legal consequences accruing from a guilty plea.[48] There is no record to refute the indigent's allegations, and perjury presents little threat to one already in prison. The unwary lawyer may find himself subjected to the most libelous attacks in a trial where he has become the accused.[49] The indigent has little to gain other than the ego-satisfaction of this role reversal, as courts consistently find that an attack upon the credibility and reputation of a fellow member of

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[42] Gray v. State, 475 S.W.2d 246 (Tex. Cr. App. 1971).

[43] United States v. Pine, 452 F.2d 507 (5th Cir. 1971); *see* Estep v. State, 14 Md. App. 53, 286 A.2d 187 (1972); ABA CANONS OF PROFESSIONAL ETHICS, EC 5-1 (1969).

[44] Interview with Hon. Frank J. Gorman, Judge of The Court of Common Pleas of Cuyahoga County, Ohio, in Cleveland, Ohio on July 27, 1972.

[45] State v. Green, 161 Conn. 291, 287 A.2d 386 (1971); *see* Hawk v. Hann, 103 F. Supp. 138 (D. Neb. 1952), *rev'd on other grounds* 205 F.2d 839 (8th Cir. 1953).

[46] Interview with Harry E. Youtt, Director of the Criminal Division, Legal Aid Society of Cleveland, in Cleveland, Ohio, on July 24, 1972.

[47] Robinson v. United States, 448 F.2d 1255 (8th Cir. 1971); State v. Morrow, 108 Ariz. 108, 493 P.2d 119 (1972); *In re* Watson, 6 Cal.3d 831, 494 P.2d 1264, 100 Cal. Rptr. 720 (1972); Commonwealth v. Studenroth, 430 Pa. 425, 243 A.2d 352, *cert. denied,* 393 U.S. 1007 (1968).

[48] ABA CANONS OF PROFESSIONAL ETHICS, EC 7-5, EC 7-8 (1969).

[49] United States v. Barcley, 452 F.2d 930 (8th Cir. 1971); Ameen v. State, 51 Wis.2d 175, 186 N.W.2d 206 (1971). *See generally* Comment, *Federal Habeas Corpus — A Hindsight View of Trial Attorney Effectiveness,* 27 LA. L. REV. 784 (1967).

the bar is repugnant.[50] A plea in reliance on his lawyer's mistaken advice does not entitle the defendant to have the plea and judgment set aside even though he faces a long prison term rather than the expected probation.[51] It has been suggested that conducting plea bargaining in the presence of the defendant and making it part of the record would make a claim of inadequate representation impossible.[52] This reasoning is criticized on the ground that: "This practice would seriously inhibit the free exchange of evidence which makes plea bargaining an effective and meaningful tool for both the prosecution and the defense."[53]

As the day set for trial approaches, the trial judge often takes a jaundiced view of any expression of dissatisfaction with counsel, deeming it a delaying tactic.[54] However, even the most unjustified grumbling by the indigent defendant imposes a duty upon the court to hold a hearing and investigate the charge. A failure to determine the legitimacy or capriciousness of the complaint is ground for reversal of a conviction even though the record does not support a charge of incompetency.[55] Where the complaint is found to be legitimate in the considered reflection of the reviewing court, the trial judge's necessarily immediate decision to deny substitute counsel will be considered an abuse of discretion.[56] Permitting substitute counsel but denying a continuance may also be held to be an abuse of discretion,[57] as "[a] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."[58]

A trial court more lenient in granting substitute counsel and a continuance to prepare the defense may find itself subsequently confronted with the assertion that the accused has been denied his

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[50] United States v. Bella, 353 F.2d 718 (7th Cir. 1965); O'Neill v. Tahash, 324 F.2d 18 (8th Cir. 1963); *cf.* United States v. Horton, 334 F.2d 153 (2d Cir. 1964).

[51] Harris v. United States, 434 F.2d 23 (9th Cir. 1970); *In re* Croft, 145 Cal. App.2d 155, 302 P.2d 61 (1956); People v. Thomas, 51 Ill.2d 39, 280 N.E.2d 433 (1972); People v. Story, 3 Ill. App.3d 120, 278 N.E.2d 457 (1971); Commonwealth *ex rel.* Crosby v. Rundle, 415 Pa. 81, 202 A.2d 299 (1964), *cert. denied,* 379 U.S. 976 (1965); Quinn. v. State, 53 Wis.2d 821, 193 N.W.2d 665 (1972).

[52] Interview with Roger Hurley, Assistant Legal Aid Defender, Legal Aid Society of Cleveland, in Cleveland, Ohio, on July 24, 1972.

[53] Interview with Hon. John T. Patton, Judge of the Court of Common Pleas of Cuyahoga County, Ohio, in Cleveland, Ohio, on July 28, 1972.

[54] United States v. Llanes, 374 F.2d 712 (2d Cir.), *cert. denied,* 388 U.S. 917 (1967); Commonwealth v. Scott, 277 N.E.2d 483 (Mass. 1971).

[55] State v. Deal, 17 Ohio St.2d 17, 244 N.E.2d 742 (1969).

[56] People v. Moss, 253 Cal. App.2d 248, 61 Cal. Rptr. 107 (1967); People v. Williams, 386 Mich. 565, 194 N.W.2d 337 (1972); *cf.* United States v. Lisk, 454 F.2d 205 (4th Cir. 1972).

[57] Reynolds v. Cochran, 365 U.S. 525 (1961); People v. Crovedi, 65 Cal.2d 199, 417 P.2d 868, 53 Cal. Rptr. 284 (1966). *But cf.* State v. Burch, 261 La. 3, 258 So.2d 861 (1972).

[58] Ungar v. Sarafite, 376 U.S. 575, 589 (1964); *accord,* Chandler v. Fretag, 348 U.S. 3 (1954).

right to a speedy trial.[59] Theorizing that it is the accused who benefits from a delay in the trial, the reviewing court usually concludes that the defendant has impliedly waived this right by his request for substitute counsel.[60] In effect, the defendant must elect between two constitutional rights although the Sixth Amendment gives no indication that these are conditional or alternative rights.

Remedies at Trial

An indigent so remiss as to become dissatisfied with his assigned counsel belatedly will find his remedies sharply curtailed. He may continue with counsel, proceed with his own defense, or retain other counsel at his own expense.[61] The availability of the last alternative would appear to suggest that the determination of his indigency may have been inaccurate. The right of the accused to act as his own lawyer is unqualified if invoked prior to trial, but the court has no duty to inform him of this right.[62] Further, if the defendant first expresses his desire to exercise the right to defend himself during the course of the trial, he may do so only upon the court's determination that he his competent to represent himself.[63]

Although the trial judge has no obligation to conduct the defense,[64] it is his duty to supervise the proceedings so as to assure the defendant a fair trial with competent representation. In an attempt to compensate for inadequate representation, the court may intervene to the extent of instructing counsel in chambers, denying or granting motions, questioning witnesses, removing the case from the jury, declaring a mistrial or granting a new trial on its own motion.[65]

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[59] Michel v. Louisiana, 350 U.S. 91 (1955); People v. Johnson, 45 Ill.2d 38, 257 N.E.2d 3 (1970); Hall v. State, 3 Md. App. 680, 240 A.2d 630 (1968).

[60] People v. Jones, 130 Ill. App. 769, 266 N.E.2d 411 (1971); Raburn v. Nash, 78 N.M. 385, 431 P.2d 874 (1967); State v. Jackson, 228 Or. 371, 365 P.2d 294 (1961), *noted in* 89 A.L.R.2d 1225.

[61] United States v. Gutterman, 147 F.2d 540 (2d Cir. 1945); People v. Maddox, 67 Cal.2d 647, 433 P.2d 163, 63 Cal. Rptr. 371 (1967); State v. Boudoin, 257 La. 583, 243 So.2d 265 (1971); Peters v. State, 139 Mont. 634, 366 P.2d 158 (1961); State v. Reed, 188 Neb. 195, 195 N.W.2d 503 (1972).

[62] United States v. White, 429 F.2d 711 (D.C. Cir. 1970); United States *ex rel.* Jackson v. Follette, 425 F.2d 257 (2d Cir. 1970); United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965). *But cf.* Cleveland v. Whipkey, 29 Ohio App.2d 79, 278 N.E.2d 374 (1972).

[63] People v. Durham, 70 Cal.2d 171, 449 P.2d 198, 74 Cal. Rptr. 262, *cert. denied*, 395 U.S. 968 (1969); People v. Newton, 258 Cal. App.2d 572, 65 Cal. Rptr. 822 (1968); *see* United States *ex rel.* Pugach v. Mancusi, 310 F. Supp. 691 (S.D. N.Y. 1974), *cert. denied*, 404 U.S. 849 (1971); *In re* Johnson, 62 Cal.2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965).

[64] People v. Coogler, 71 Cal.2d 153, 454 P.2d 686, 77 Cal. Rptr. 790 (1969); *see* King v. United States, 355 F.2d 700 (1st Cir. 1966); United States *ex rel.* Ellington v. Conboy, 333 F. Supp. 1318 (S.D. N.Y. 1971); People v. White, 25 Mich. App. 176, 181 N.W.2d 56 (1970).

[65] Smith v. Superior Court, 68 Cal.2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968) (dictum); *accord*, People v. Bailey, 76 Ill. App.2d 310, 222 N.E.2d 268 (1966); *see* People v. Foster, 377 Mich. 233, 140 N.W.2d 513 (1966); People v. Crawford, 16 Mich. App. 92, 167 N.W.2d 814 (1969).

However, a mistrial based on the trial judge's subjective opinion that counsel is incompetent is considered beyond the power of the court and an abuse which threatens the independence of the bar.[66]

Equipped only with an ambiguous set of standards and conflicting decisions interpreting the validity of the indigent's dissatisfaction with assigned counsel, the trial court judge has the burden of making a decision which may be subject to concerted attack on review. He is expected to balance public interests and private rights while weighing assertions of dissatisfaction which are often incapable of accurate measurement. The standard for review of a trial judge's alleged abuse of discretion as stated in *Spalding v. Spalding*[67] may be of some comfort to trial judges, although its application invariably precludes relief for the defendant.

> [An] abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, . . . of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences . . . not the exercise of reason but rather of passion or bias.[68]

Post-Trial Remedies

Often it is only during the contemplation customarily supplied by the penitentiary environment that the indigent reviews the sequence of events that resulted in his confinement and concludes that his conviction ensued from counsel's dereliction of duty. It has been judicially declared that a convicted defendant is entitled to relief upon a showing of a lack of effective assistance of counsel. An avenue of escape apparently so promising could not fail to result in a flood of petitions asserting incompetent counsel. Faced with a dilemma of its own making, the court has devised such rigid requirements for proof of a denial of effective representation that relief has little chance of becoming an actuality for the convicted indigent. As Justice Clark cautioned in his dissenting opinion in *Fay v. Noia:* ". . . each defeat in that struggle (for law and order) chips away inexorably at the base of that very personal liberty which it seeks to protect."[69]

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[66] Smith v. Superior Court, 68 Cal.2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968).

[67] 355 Mich. 382, 94 N.W.2d 810 (1959).

[68] *Id.* at 384-85, 94 N.W.2d at 811-12.

[69] 372 U.S. 391, 447 (1963) (dissenting opinion). *See also* Miller, *Balancing the Rights of the Accused and the Public*, 53 A.B.A.J. 1046 (1967).

It is a truism to all except the convicted indigent that success cannot be equated with effective assistance of counsel, as neither vigor nor skill can overcome truth.[70] The evidence of his guilt is irrelevant to the accused whose sole standard of effective assistance of counsel is the lawyer who obtains his acquittal. Judge Herbert R. Whiting wryly commented:

> Rationally or not, the indigent defendant feels he has been denied a fundamental right when his lawyer refuses to fabricate for him. He fails to realize that subornation of perjury is a luxury in which only the affluent criminal can indulge.[71]

As there is a presumption of competency of court-appointed counsel, the petitioner for post-conviction relief has a heavy burden of proof to show actual incompetence.[72] The petitioner must allege particular facts showing the inadequacy of the representation; generalized conclusions of incompetency will not even entitle him to a hearing.[73] Thus, even though assigned counsel admitted that they were negligent, incompetent, and remiss in their representation, a petitioner was denied relief because he failed to allege the specific acts of the lawyers which constituted ineffective assistance of counsel.[74]

A petitioner successful in showing the incompetence of his lawyer must also show that he was prejudiced by counsel's inadequacy before relief will be granted.[75] By this standard, a lawyer who admitted token representation and who was asleep during the examination of a witness rendered effective representation, as it was held that the testimony given during counsel's somnolence was not essential to the defense.[76] This reasoning may be criticized on the ground that if the right to effective counsel is constitutionally guaranteed, its denial should not be subjected to a prejudice or "harmless error"

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[70] Hester v. United States, 303 F.2d 47 (10th Cir.), *cert. denied*, 371 U.S. 847 (1962); *accord*, United States v. Baca, 451 F.2d 1112 (10th Cir. 1971); Brady v. United States, 433 F.2d 924 (10th Cir. 1970); People v. Pickett, 2 Ill. App.3d 560, 276 N.E.2d 751 (1971); Turner v. State, 208 Kan. 865, 494 P.2d 1130 (1972); State v. Forsness, 495 P.2d 176 (Mont. 1972).

[71] Interview with Hon. Herbert R. Whiting, Judge of The Court of Common Pleas of Cuyahoga County, Ohio, in Cleveland, Ohio, on July 25, 1972.

[72] Poole v. United States, 438 F.2d 325 (8th Cir. 1971); Slawek v. United States, 413 F.2d 957 (8th Cir. 1969); Kress v. United States, 411 F.2d 16 (8th Cir. 1969); State v. Moser, 78 N.M. 212, 430 P.2d 106 (1967).

[73] Dayton v. United States, 319 F.2d 742 (D.C. Cir. 1963); O'Malley v. United States, 285 F.2d 733 (6th Cir. 1961); Turner v. Cupp, 1 Or. App. 596, 465 P.2d 249 (1970); Commonwealth v. Reagan, 212 Pa. Super. 464, 243 A.2d 458 (1968).

[74] Gilpin v. United States, 252 F.2d 685 (6th Cir. 1958); *accord*, People v. Beagle, 6 Cal.3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1971); People v. Saidi-Tabatabai, 7 Cal. App.3d 981, 86 Cal. Rptr. 866 (1970).

[75] People v. Redman, 273 N.E.2d 639 (Ill. App. 1971); State v. Davidson, 252 Or. 617, 451 P.2d 481 (1969); Hern v. Cox, 212 Va. 644, 186 S.E.2d 85 (1972).

[76] United States v. Katz, 425 F.2d 928 (2d Cir. 1970); *accord*, Pineda v. Craven, 327 F. Supp. 1062 (N.D. Cal. 1971).

standard. To excuse defense counsel's substandard performance of his duty when there is no proof that the defendant's right to a fair trial has been harmed is to dilute the strength of our adversary system.[77] Some courts interpret the prejudice standard as requiring that the defendant show that the outcome would have been different but for counsel's incompetence.[78] As even experienced lawyers hesitate to indulge in speculations founded on the vagaries of a jury, it seems folly to expect the defendant to do so unless it is to be inferred that he is more adept at games of chance.

Standards on Appeal

Reviewing courts have steadfastly refused to consider an attorney's trial errors as grounds to set aside a conviction. Trial tactics are considered the exclusive domain of the lawyer. Even though in retrospect the lawyer's actions may appear to have been blunders, they are defendable as an exercise of judgment.[79] Advocacy is a skill so individualistic that it cannot be appraised accurately and fairly in a post-mortem evaluation. To assert defects in the trial procedure is not to show a denial of effective assistance of counsel, only "perfect vision of hindsight."[80] It is not considered ineffective representation for a lawyer to fail to call or interview witnesses if he believes their testimony would not assist in the defense[81] or to fail to make appropriate motions if the lawyer has a reasonable basis for his decision.[82]

Counsel is not required to urge every defense or even to present any defense at all if there is no defense which he intelligently and in good faith believes to be supported by the facts.[83] The extent of the assigned lawyer's duty is to investigate the defense urged by the defendant in order to make an informed judgment as to its merits.[84] Yet it has been suggested that if the defendant is adamant,

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[77] Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

[78] People v. Johnson, 45 Ill.2d 501, 259 N.E.2d 796 (1970); People v. Harper, 43 Ill.2d 368, 253 N.E.2d 451 (1969).

[79] United States v. Stoecker, 216 F.2d 51 (7th Cir. 1954); Patterson v. Slayton, 331 F. Supp. 564 (W.D. Va. 1971); Commonwealth v. Bates, 213 Pa. Super. 71, 245 A.2d 708 (1968); State v. Lopez, 22 Utah 2d 257, 451 P.2d 772 (1969).

[80] Murgia v. United States, 448 F.2d 1275 (9th Cir. 1971); *accord*, United States v. Matalon, 445 F.2d 1215 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971); Ameen v. State, 51 Wis. 2d 175, 186 N.W.2d 206 (1971).

[81] Gray v. United States, 299 F.2d 467 (D.C. Cir. 1962); Winters v. Cook, 333 F. Supp. 1033 (N.D. Miss. 1971); McCall v. State, 257 S.C. 93, 184 S.E.2d 341 (1971).

[82] People v. McWilliams, 2 Ill. App.3d 776, 277 N.E.2d 726 (1972); Quinn v. State, 53 Wis.2d 821, 193 N.W.2d 665 (1972).

[83] Reyes v. Cox, 336 F. Supp. 829 (W.D. Va. 1971); People v. Massie, 66 Cal.2d 899, 428 P.2d 869, 59 Cal. Rptr. 733 (1967); People v. Ross, 268 Cal. App.2d 525, 74 Cal. Rptr. 99 (1969).

[84] United States v. Main, 443 F.2d 900 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); Crowe v. State, 194 N.W.2d 234 (S.D. 1972); ABA CANONS OF PROFESSIONAL ETHICS, DR 6-101 (A)(3) (1969).

counsel should urge even frivolous defenses.[85] However, the lawyer is the tactician of the case and generally the only trial decisions in which the will of the defendant must prevail are whether to plead guilty, whether to waive jury trial, and whether to testify.[86]

Where trial counsel's failure to present a substantial and available defense is the result of neglect or ignorance rather than a deliberate exercise of judgment, an allegation of ineffective representation has been upheld.[87] In instances where counsel is unable to present an adequate defense because defendant resolutely rejects counsel's attempts to communicate and refuses to co-operate, a conviction may be set aside even though the defendant has prevented effective assistance of counsel.[88] However, if the defendant is not so thoroughly recalcitrant as to prevent any defense at all, relief will be denied as the indigent has no right to assigned counsel with whom he agrees.[89]

The court has been willing to find a lack of effective representation where defense counsel is intoxicated or physically or mentally ill on the theory that a lawyer in this condition is incapable of providing effective representation.[90] It is this theory of incapacity which has been extended to include circumstances where counsel's lack of knowledge precluded an informed judgment as to the defense.[91] Even then, the defendant has the burden of proving both lack of knowledge and prejudice resulting therefrom.[92] Should a lawyer be so unwittingly truthful as to admit that his lack of knowledge was the

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[85] State v. Smith, 43 N.J. 67, 202 A.2d 669 (1964), *cert. denied,* 379 U.S. 1005, *reh. denied,* 380 U.S. 938 (1965). However, a lawyer's presentation of a frivolous defense might be considered a violation of ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7 - 4 (1969).

[86] Martinez v. People, 480 P.2d 843 (Colo. 1971) (dictum); *see* People v. Phelps, 51 Ill.2d 35, 280 N.E.2d 203 (1972).

[87] Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967); People v. Rhoden, 6 Cal.3d 519, 492 P.2d 1143, 99 Cal. Rptr. 751 (1972); People v. McDowell, 69 Cal.2d 737, 447 P.2d 97, 73 Cal. Rptr. 1 (1968).

[88] Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970); People v. Moss, 253 Cal. App.2d 248, 61 Cal. Rptr. 107 (1967).

[89] United States v. Parhms, 424 F.2d 152 (9th Cir.), *cert. denied,* 400 U.S. 846 (1970); Shaw v. United States, 403 F.2d 528 (8th Cir. 1968); Hughes v. State, 228 Ga. 593, 187 S.E.2d 135 (1972); People v. Smith, 50 Ill.2d 229, 278 N.E.2d 73 (1972); State v. Rinaldi, 58 N.J. Super. 209, 156 A.2d 28 (1959), *cert. denied,* 366 U.S. 914 (1961).

[90] United States *ex rel.* Freeley v. Ragan, 166 F.2d 976 (7th Cir. 1964) (by implication); Andrews v. Robertson, 145 F.2d 101 (5th Cir. 1944), *cert. denied,* 324 U.S. 874 (1945); Franklin v. State, 471 S.W.2d 760 (Ark. 1971); People v. Davis, 48 Cal.2d 241, 309 P.2d 1 (1957); State v. Keller, 57 N.D. 645, 223 N.W. 698 (1929), *noted in* 64 A.L.R. 434; *cf.* Leeper v. State, 472 S.W.2d 240 (Tenn. Cr. App. 1971). *But cf.* United States *ex rel.* Skinner v. Robinson, 105 F. Supp. 153 (E.D. Ill. 1952).

[91] Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962); Thomas v. State, 251 Ind. 546, 242 N.E.2d 919 (1969).

[92] People v. Armenta, 22 Cal. App.3d 823, 99 Cal. Rptr. 736 (1972); People v. Gonzales, 40 Ill.2d 233, 239 N.E.2d 783 (1968); *see* Childs v. Cardwell, 452 F.2d 521 (6th Cir. 1971); *cf.* State v. Cutcher, 17 Ohio App.2d 107, 244 N.E.2d 767 (1969).

result of his willful failure to investigate, both the indigent and his assigned lawyer will be given a hearing.[93]

In instances where the facts and circumstances indicate that an appeal would probably be successful, counsel's failure to file an appeal or his failure to raise any meritorious arguments on appeal constitutes ineffective assistance of counsel.[94] Further, it is the defendant's right to decide whether or not to appeal a conviction, and a lawyer desiring to withdraw from an appeal he considers frivolous must file a brief in favor of any supportable claim.[95] The lawyer's motion to withdraw will be granted only if the court concludes that the arguments are completely without factual basis.[96] This seems to be an exercise in futility, as an appeal could hardly be considered frivolous if it were possible to raise any meritorious argument.

Dissatisfaction with Privately Retained Counsel

Lest it appear that the possibility of relief for lack of effective assistance of counsel is chimerical for the indigent represented by assigned counsel, it should be noted that the defendant who retains counsel is in a greater predicament. Appropriating the agency theory, the court has held that the defendant who employs counsel has acquiesced in the incompetent performance of his lawyer by his failure to object in open court.[97] It may be argued that the agency theory is misapplied in instances where the "principal" may be ignorant of his constitutional rights and unacquainted with legal proceedings and therefore relies on the advice of his "agent." A defendant, who petitioned for post-conviction relief on the ground that he was deprived of effective assistance of counsel when his retained lawyer failed to file an appeal, was denied relief.[98] The court reasoned that it was not obliged to ensure adequate representation as defendant had given no notice that he was indigent and entitled to the benefits and privileges of such status. Only a few progressive decisions have

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[93] Cross v. United States, 392 F.2d 360 (8th Cir. 1968).

[94] Entsminger v. Iowa, 386 U.S. 748 (1967); Gregory v. United States, 446 F.2d 498 (5th Cir. 1971); Rice v. Davis, 366 S.W.2d 153 (Ky. App. 1963); People v. Lampkins, 21 N.Y.2d 138, 233 N.E.2d 849, 286 N.Y.S.2d 844 (1967).

[95] Anders v. California, 386 U.S. 738, *reh. denied*, 388 U.S. 924 (1967); People v. Bradford, 3 Ill. App.3d 81, 279 N.E.2d 34 (1971).

[96] Hollis v. State, 256 So.2d 42 (Fla. App. 1971); People v. Carr, 3 Ill. App.3d 227, 278 N.E.2d 839 (1971). An argument that punching the prosecutor in the nose in open court was not direct contempt of court would be frivolous.

[97] Kennedy v. United States, 259 F.2d 883 (5th Cir. 1958), *cert. denied*, 359 U.S. 994 (1959); Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944); Rankins v. State, 254 So.2d 355 (Ala. Cr. App. 1971); People v. Underhill, 38 Ill.2d 245, 230 N.E.2d 837 (1967), *cert. denied*, 371 U.S. 912 (1968); People v. Strader, 23 Ill.2d 13, 177 N.E.2d 126 (1961).

[98] *Ex parte* Kallie, 475 S.W.2d 784 (Tex. Cr. App. 1971); *accord*, Johnson v. Commonwealth, 473 S.W.2d 823 (Ky. App. 1971).

recognized that the constitutional right to the effective assistance of counsel extends to those who pay for their representation as well as to those represented by assigned counsel.[99]

Conclusion

Effective assistance of counsel is a prerequisite to a conviction in a society which assumes that justice alone is insufficient to satisfy the constitutional mandate. It is essential that the rights of the individual be protected through a vigorous adversary system. The writer believes that the most effective and efficient representation would be provided through the implementation of a Public Defender program equipped with investigative services, providing lawyers experienced in criminal trials, and unencumbered with the necessity of obtaining a fee.

A restriction of the right to effective representation through the application of a rigid standard on review is inappropriate. The right should not be conditioned on a showing of prejudice nor should it be burdened with an occasionally unwarranted presumption of the competence of court-appointed counsel. Appellate attorneys have not been so hesitant to denounce their fellow lawyers through a hindsight view of trial performance and the court likewise should abandon its outmoded squeamishness. A lawyer is required to assist in maintaining the integrity and competence of the legal profession.[100] Is it not unreasonable to expect the court to co-operate in this endeavor.

The Court in *Powell* has clearly proclaimed the right to effective representation but has defined "effective" only in vague and nebulous terms. The multitude of petitions for post-conviction relief alleging incompetency of counsel may threaten the efficient administration of criminal justice, but they cannot come as a complete surprise. A petition asserting ineffective assistance of counsel is rarely granted a hearing, much less a new trial or relief, and any decrease in the number of complaints could well be the result of the petitioner's recognition of the hopelessness of relief. The indigent is not likely to be satisfied with any representation which results in incarceration, even though his guilt is irrebuttable. The endless processing of these petitions is a time consuming and expensive placebo by which a public comforts itself that the rights of the individual have been protected. The interpretation of "effective assistance of counsel" should be elucidated with greater precision so that the indigent can comprehend the extent of his right and appellate decisions will re-

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[99] Arrastia v. United States, 455 F.2d 736 (5th Cir. 1972); Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957); State v. Rushford, 127 Vt. 105, 241 A.2d 306 (1968); *see* Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969).

[100] ABA CANONS OF PROFESSIONAL ETHICS NO. 1 (1969).

flect greater uniformity as to when there has been a deprivation of the right.

In the past decade the procedures through which a lack of effective representation may be asserted have been developed and extended, but the indigent entitled to this representation remains a theoretical individual. If his satisfaction with his lawyer is of concern, a more realistic appraisal of the indigent is long overdue. It may be that the indigent fails to perceive the extent of his right to effective counsel because this right has no parallel in his milieu. The indigent's arrest is the product of a government's police vigilance. His conviction appears to be the goal of a trenchant government prosecutor. It is difficult for the indigent to believe that the government also will provide a lawyer committed to preventing an adjudication of his guilt, or at least to reducing the penalty. Having acquired no possessory right to his lawyer's dedication by the payment of a fee, the prisoner awaiting trial derisively refers to his assigned attorney as a "state's lawyer."[101] The indigent is familiar with an adversary system played in earnest for survival or the spoils where success is the sole criterion of fair play. How can he fully comprehend the sportsmanlike adversary system of the judicial process with its intricate procedural rules?

Neither his assigned counsel nor the judicial process is singlehandedly responsible for the indigent's imprisonment, but his only alternatives are to serve his term in the penitentiary, to exercise his right to appeal, or to attack the conviction collaterally. The indigent has multiple dissatisfactions which often coalesce in a harangue against the lawyer who failed to obtain his acquittal. He has complex sociological needs which he cannot effectively isolate from his legal difficulties. When a legal process which is limited to the attainment of justice and the protection of inherent rights results in incarceration, it should then operate in concert with more merciful agencies. Social service workers, educators, psychologists, and employers can more adequately satisfy non-legal needs than can a judicial system which adjudges guilt and imposes penalties. These agencies should be available in the penitentiary. One beneficial side effect of their efforts could be a reduction in the number of petitions for relief on the ground of ineffective representation. Society's obligation to one of its members who has failed to adapt to society's standards cannot be satisfied solely through a legal system even though that system protects substantive rights through efficient procedural means.

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[101] Interview, Hurley, *supra* note 52.

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