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UNITED STATES V. OAKLEY: JUST TO MAKE THE PRACTICE OF MILITARY LAW A LITTLE BIT HARDER

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INTRODUCTION

> Advocacy is a skill and an art; easy to criticize, difficult to fairly appraise. Indeed, a post-mortem of criminal trials, selected at random, would undoubtedly reveal flaws of varying magnitude in the trial techniques of respected members of the bar. Our profession is one in which hindsight is a meager measure of counsel's competency. Trial strategy is seldom viewed with a uniform eye.[1]

An accused's right in military law to the effective assistance of counsel[2] took a curious and questionable turn in the U.S. Army Board of Review decision of *United States v. Oakley*.[3] The decision posed the following rather important questions, worthy of consideration and evaluation: (1) how serious must be the trial errors of defense counsel to enable an accused to procure a new trial because of inadequate representation; and (2) to what extent should trial defense counsel be permitted to exercise his own judgment about trial tactics?

I. A CONFINING APPROACH TO REPRESENTATION

In the *Oakley* case the accused asserted on appeal that he had been inadequately represented at trial.[4] The accused, Chief Warrant Officer Andrew W. Oakley, was convicted of stealing $688.00 in military payment certificates in violation of Article 121, Uniform Code of Military Justice. On the date of the offense the accused had been designated as finance officer to pay certain Army personnel and proceeded to the post finance officer to pick up his bag of money. He signed a receipt for the amount of money contained in the bag. Upon completion of his duty as pay officer he returned the bag of money left over from unpaid personnel to the post finance officer, but was unable to account for the sum of $688.00. He later confessed to criminal investigation agents that he had incurred a number of debts, that he had written checks which had been returned by the bank for lack of sufficient funds, and that he had taken the $688.00 from the payroll to cover these debts.

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1 United States v. Stoecker, 216 F.2d 51, 52 (7th Cir. 1954).

2 The rights accorded to an accused by the Uniform Code of Military Justice closely parallel those rights accorded to defendants in civilian courts. For example, the defendant has the right to be informed of the charges against him, to be confronted by witnesses testifying against him, not to be compelled to incriminate himself, and the right to be represented by counsel. Right to counsel in military law is a two-fold right which includes the right to appointed counsel throughout the proceeding, Arts. 27, 32b, 38b, c and e, 42a, 46 and 70, UCMJ: MCM, 1951, paras. 6, pp. 9-12, 46a and b, pp. 67-68, 61f(1), pp. 86-87, and 102a, pp. 172-73, and the right to his effective assistance, United States v. Gardner, 9 USCMA 48, 25 CMR 310 (1958). The right to effective assistance of counsel is not satisfied by a mere formal appointment of counsel, and where counsel's conduct at trial is considered inadequate, reversal of the conviction is warranted. United States v. Gardner, *supra*.

3 CM 398074, *Oakley*, 25 CMR 624 (1958). In researching a point of military law, the authors "accidentally" came across the disturbing *Oakley* precedent. Since the case had escaped comment in legal periodicals (as do so many interesting military law decisions), and because of its dangerous implications, the authors felt it warranted comment, even at this late date.

4 *Id.* at 625.

During the course of the pretrial interview the accused stated to his counsel, among other things, that the confession was the product of duress, but was never able to convince him that it was inadmissable. Trial defense counsel questioned the criminal investigators who took the statement and became convinced that there was no merit to the accused's contention of duress or to a later claim that he had requested counsel during the CID[5] investigation. Counsel was aware that the prosecution would bring in two experienced CID investigators who took the statement and a military police captain who heard virtually the entire interrogation to refute any claim by the accused that he had been placed under duress or had asked for or had been denied counsel. Counsel therefore concluded that there was little prospect of excluding the statement and that at best an unsuccessful effort along that line would be only a waste of time.

Counsel was also aware that the evidence of accused's guilt apart from his confession was quite convincing. Two witnesses from the military finance office where the accused received his bag of money testified that the amount placed in the bag had been checked and double checked, that the accused had signed and acknowledged receipt for sums including the amount he was short, and that the chance for there to be an error in the amount of money placed in the bag was extremely remote.[6]

With the assent of the accused, counsel arranged to have Mr. Oakley examined by an Army psychiatrist of considerable experience in the field of criminal insanity. On the basis of Mr. Oakley's statements to him the psychiatrist concluded that the accused took the money because of an irresistable impulse[7] and would have done so if the risk of detection were extremely high.[8] However, other Army psychiatrists came to the opposite point of view.[9]

In light of the otherwise overwhelming evidence of the accused's guilt, counsel determined that the most promising strategy would be to defend on the ground of temporary insanity. The accused assented to this strategy. Counsel further determined that it would be bad strategy to challenge the voluntariness of the confession. Not only would a strong rebuttal by three prosecution witnesses be brought to bear against a claim of involuntariness, but in addition evidence of the larceny independent of the confession was quite strong. The most important reason for not challenging the confession was that it would without doubt jeopardize the defense of irresistable impulse. First of all, the court most likely would

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5 Criminal Investigation Department.

6 Record, 3 October 1957, pp. 8-25, CM 398074, *Oakley, supra* note 3.

7 In military law "a person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to *adhere to the right.*" Para. 120b, MCM, 1951, 200. (Emphasis added.)

8 To establish irresistable impulse it must appear that "the compulsion generated by the illness was so strong that the act would have been committed even though the circumstances were such that the accused could expect to be detected and apprehended forthwith when the offense was committed." U.S. Dep'ts of the Army and Air Force, Psychiatry in Military Law, TM 8-240, AFM 160-42, p. 5 (1953). If the medical officer is satisfied that the accused would *not* have committed the act had the circumstances been such that immediate detection and apprehension was certain, he will not testify that the act occurred as the result of an 'irresistable impulse.' No impulse that can be resisted in the presence of a high risk of detection or apprehension is really very 'irresistable'." *Id.* at 6. For an interesting and well written opinion concerning the defense of irresistable impulse, see United States v. Smith, 5 USCM9 314, 17 CMR 314 (1954).

9 Although three psychiatrists had concluded that the accused was, at the time of the alleged offense, capable of adhering to the right, only one of these psychiatrists testified at trial.

question the sincerity of accused's claims regarding his sanity if he attempted to hide an admission of his guilt, and might doubt the truthfulness of his claims if his testimony concerning the voluntariness of the confession were soundly refuted by three strong prosecution witnesses. Moreover, a frank and open admission that the larceny had in fact been committed was more consistent with the theory that the accused would have committed the larceny realizing that the risk of detection was extremely high, than would be an attempt to obscure or deny the fact that he had committed the larceny.

The court found the accused guilty and therefore sane at the time of the offense. However, it is probable that the defense psychiatrist did cast some doubt on the sanity of the accused, in that the sentence of confinement awarded was six months when it could have been five years.[10]

On appeal Mr. Oakley urged, among other things, that he had been denied adequate representation in that counsel had failed to challenge the voluntariness of the confession after his suggestion to do so. The Board of Review agreed with Mr. Oakley, asserting that " . . . counsel is under a duty, *if his client requests*, to raise the issue of the voluntariness of defendant's confession, despite counsel's own considered professional opinion that such action will produce no substantially beneficial result."[11]

II. THE TRADITIONAL CONCEPT OF REPRESENTATION

The harmful effects which the *Oakley* decision might produce are several. If the rule of the case were followed it would have a tendency to stifle the initiative and responsibility of trial defense counsel. It would seem that counsel is important to an accused not simply because of his knowledge of the law, but because of his ability to weigh various theories of defense and to select the best. The United States Supreme Court in *Powell v. Alabama*[12] spelled out the importance of having counsel in a criminal trial. The accused is usually unfamiliar with the rules of evidence, he lacks the skill and knowledge to prepare his defense and requires the guiding hand of counsel at every step in the proceeding. In fact, he faces the danger of conviction because he does not know how to establish his innocence.[13]

10 Para. 127c, MCM, 1951, 223.
11 *Supra* note 3 at 625. (Emphasis added.)
12 287 U.S. 45, 69 (1932).
13 *Ibid.*

It is submitted that legally trained counsel is provided for the accused at a general court-martial not because of his familiarity with the law alone, but because of the quality of his judgment about how best to establish the innocence of his client. Cases are not won on defense by indiscriminate presentation of every conceivable claim or defense.[14] Yet does the *Oakley* court mean to imply that all of these claims must be presented to the court even though counsel knows from experience with the court and similar cases that the accused's position probably would be jeopardized if the claims were presented rather than withheld?

It is the task of trial defense counsel to use his training and his experience to select from among the myriad of defense claims those best calculated to further the interests of his client—either to establish his innocence or to reduce the punishment. If the accused were competent to make all the judgments of trial strategy he would not need counsel. And if the task of counsel is to further the best interests of his client, then it would seem that he should not be placed in a straight jacket by a rule of law which makes it error for him to exercise his judgment. He must be given the responsibility for the presentation of his client's case and the attendant freedom to mould together the facts and theories of defense which will be most beneficial to the accused.

It is most probable that had trial defense counsel followed the accused's suggestion to challenge the confession, he would have done his client a disservice. In effect he would have been asking the court to give equal credence to inconsistent claims. Can it therefore be sensibly urged that counsel inadequately represented Mr. Oakley when he failed to challenge the confession—an issue on which the testimony of his client would have become suspect and serious doubts created as to the sincerity of a plea of insanity?

III. The Problem Of Unwarranted Appeals

The *Oakley* decision again raises the problem of excessive and frivilous appeals that the United States Court of Military Appeals and the federal courts have tried to avoid. The tendency of a convicted person to hunt for a scapegoat has often resulted in his pointing a denunciatory finger at his counsel, and to speculate that pursuance of a different course might have altered the results of his trial. Now, every time an accused has made a request upon his counsel, or perhaps simply a suggestion to follow a certain line of strategy and counsel failed to comply, his hopes for a new trial will be sharply increased. It takes little imagination to envision how the number of reversible cases under such circumstances would multiply. And no measure exists to determine how many trial defense counsel will act contrary to their better judgment by following unwise suggestions by their clients for fear of reversal and censure by an appellate court. And might some counsel be tempted to use the *Oakley* ruling as a "tactic," in an effort to reserve for his client a possible basis for a retrial in the event of conviction?

14 Every counsel is familiar with the type of accused who has an excuse for everything, who suggests some or innumerable ways to "beat the rap."

IV. A MISAPPLIED RULE OF CIVIL LAW

A disturbing aspect of the *Oakley* decision is that the Board, as a basis for its conclusion that Mr. Oakley deserved a new trial, relied principally upon an old rule of civil law which states that ". . . an attorney has the duty to present to the court all claims of his client, unless he knows them to be false."[15] A close examination of these cases shows that the rule was not applied to criminal cases in determining whether the defendant was entitled to a rehearing, but rather was a rule of civil law permitting the defendant to sue for civil damages.[16]

V. THE "EMPTY GESTURE" TEST

In addition to being a rule foreign to criminal law, the Board of Review decision is questionable in that it departs from the traditional test applied to inadequate representation cases by federal criminal courts and the United States Court of Military Appeals. In the case of *United States v. Hunter*[17] the USCMA adopted the rather strict federal rule of *Diggs v. Welch*[18] in judging claims of inadequate representation. Courts have repeatedly held that military due process does not guarantee "perfect" counsel.[19] Indeed, there are few trials free from mistakes of counsel.[20] Before a new trial will be granted the accused must show that ". . . the proceedings by which he was convicted were so erroneous as to constitute a ridiculous and empty gesture, or were so tainted with negligence or wrongful motives on the part of his counsel as to manifest a complete absence of judicial character."[21] In the *Hunter* opinion the court called for a strict adherence to this standard lest every unsuccessful representation be urged as a basis for reversal.[22] Since a convict is not subject to prosecution for perjury, a liberal interpretation of this rule might encourage a flood of petitions from

15 *Supra* note 3 at 625.

16 The annotations in 56 A.L.R. 953 (1928) and 45 A.L.R.2d 17 (1956) discuss a number of old state civil cases (Mass. 1811, Pa. 1841, Ind. 1859, Tex. 1889, Cal. 1918, Ark. 1933, and Minn. 1942) wherein clients were permitted to recover damages from former attorneys where the attorney had been negligent in the prosecution of the case. A typical case was where the client had given instructions to his attorney to sue on a note by a certain date and the attorney failed to follow instructions and let the statute of limitations run. The only criminal case which the Board of Review cites, Jackson v. United States, 221 F.2d 883 (D.C. Cir. 1955), states that a stipulation of fact made by counsel out of his client's hearing and without his consent is not binding on his client. This holding does not seem particularly relevant to the question of whether counsel must challenge a confession if requested to do so. And in that regard, the military rule is that an accused is bound by stipulations made in open court by his counsel during the course of trial if he does not object. United States v. Swigert, 8 USCMA 468, 24 CMR 278 (1957). Also, in the Boese case, ACM S-3923, 6 CMR 608, 609 n. 1 (1952), the court states that ". . . it may be assumed that defense counsel has performed his duties properly, has advised the accused of his rights and the law affecting his case, and that for reasons best known to them, they desire to pursue a certain course (para. 53h, MCM 1951). Accused is charged with knowledge of the legal implications of defense counsel's conduct of the defense, even though the same may, in retrospect, seem ill-advised. . . ."

17 2 USCMA 37, 6 CMR 37 (1952).

18 148 F.2d 667, 669 (D.C. Cir. 1945). In setting out the test, the court stated that the petitioner must show a violation of his constitutional right to a fair trial under the due process clause; and counsel's mistakes at trial will be only one of the factors which the court will consider in determining whether the trial amounted to "a farce and a mockery of justice."

19 *E.g.*, United States v. Bigger, 2 USCMA 297, 8 CMR 97 (1953). In United States v. Hunter, *supra* note 17 at 41, 6 CMR at 41, the USCMA stated, "Undoubtedly, it would be desirable to furnish every accused with a mature and experienced trial lawyer but that is presently an impossibility. The best that can be done is to assure appointment of officers who are *reasonably well qualified* to protect their substantial rights." (Emphasis added.)

20 See generally note 25 *infra*.

21 United States v. Hunter, *supra* note 17 at 41, 6 CMR at 41.

22 *Ibid.*

disappointed prisoners which appellate courts would be required to hear.[23] In cases where the United States Supreme Court has granted a writ of habeas corpus for inadequate representation, the circumstances surrounding the trial have shocked the conscience of the court and made the proceedings a farce and a mockery of justice.[24] Though the USCMA has become divided over the application of the *Hunter* rule in certain recent cases, it has uniformly applied that test to claims of inadequate representation.[25] And although some other recent decisions suggest a slight modification of the *Hunter* rule,[26] not one has stepped as dangerously far afield as the *Oakley* case.

VI. THE IMPONDERABLES OF TRIAL TACTICS

The considerations that form the basis for a tactical decision "are of such subtle nature that their application is as varied as grains of sand on the ocean floor."[27] The court went on to say, "It is this elusive quality which distinguishes the office lawyer from the advocate. It would be capricious and foolhardy for any appellate body to proceed to the trial forum in retrospect there, and with precisely drawn lines, distinguish between the varying shades

23 Diggs v. Welch, *supra* note 18 at 669-70. There the court stated, "It is well known that the drafting of petitions for habeas corpus has become a game in many penal institutions. Convicts are not subect to the deterrents of prosecution for perjury . . . The opportunity to try his former lawyer has its undoubted attractions to a disappointed prisoner. [Writing down his allegations, even though he knows they will not be believed, gives the prospect of a hearing and relief from monotony.] To allow a prisoner to try the issue of the effectiveness of his counsel under a liberal definition of that phrase is to give every convict the privilege of opening a Pandora's box of accusations which trial courts near large penal institutions would be compelled to hear."

24 Id. at 670; Powell v. Alabama, *supra* note 12; United States v. Baldi, 344 U.S. 561 (1953); Avery v. Alabama, 308 U.S. 444 (1940).

25 In United States v. Bigger, *supra* note 19, the USCMA rejected accused's claim of inadequate representation. However, a new trial was granted in United States v. Walker, 3 USCMA 355, 12 CMR 111 (1953) where appointed counsel conceded accused's guilt in a murder case after individual counsel had presented a forceful defense based on the theory of accident. There the court felt that appointed counsel had been so grossly negligent as to come within the "exceptional situation recognized in the *Hunter* case." In rejecting a claim of inadequacy in United States v. Soukup, 2 USCMA 141, 7 CMR 17 (1953), the USCMA stated that there had been no showing that counsel was obviously incompetent and that the accused's argument simply invited an appellate trial of the professional judgment of his counsel.

The USCMA agreed with the accused that his counsel was inadequate in United States v. Parker, 6 USCMA 75, 19 CMR 201 (1955). The accused had been sentenced to death and the court enumerated a great variety of deficiencies on the part of counsel which convinced it that the proceedings manifested a "complete absence of judicial character." United States v. McMahan, 6 USCMA 709, 21 CMR 31 (1956) was another death sentence case which the court decided in the same manner as the *Parker* case, *supra*. The court analyzed inadequacy in terms of due process and noted that any such appeal would be rejected where it showed nothing more than that on hindsight there is a difference of opinion regarding choice of tactics.

In three recent cases, United States v. Allen, 8 USCMA 604, 25 CMR 8 (1957), United States v. Armell, 8 USCMA 513, 25 CMR 17 (1957), and United States v. Elkins, 8 USCMA 611, 25 CMR 115 (1958), the court with Judge Latimer dissenting sent the cases back to the Board of Review for fact-finding determinations on the issue of inadequacy where counsel presented no evidence of mitigation and made no argument following pleas of guilty. In the *Elkins* case, counsel contended that the accused desired no mitigation to be presented, and Judge Latimer noted that it would indeed be a bad rule of law where a "lawyer may be damned if he argues against the will of an accused or damned if he doesn't." In that regard, the USCMA decided in United States v. Gardner, *supra* note 1, that counsel was inadequate where he permitted the accused to take the stand and present evidence which filled the gaps in the prosecution's case. The court rejected three recent appeals of the *Allen* type where no mitigation was presented following a plea of guilty. United States v. Friborg, 8 USCMA 515, 25 CMR 19 (1957); United States v. Williams, 8 USCMA 552, 25 CMR 56 (1957); United States v. Sarlouis, 9 USCMA 148, 25 CMR 410 (1958). There the court reasoned that to present mitigation would bring forth harmful rebuttal and that counsel is not required to choose a course which may result in prejudice to his client.

26 In United States v. Bigger, *supra* note 19 at 302, 8 CMR at 102, while the court applied the *Hunter* rule, it indicated that perhaps an accused had to make an even stronger showing of inadequate representation by its remark, ". . . The most we can command is that [defense counsel] . . . well and truly, and within their capabilities represent the accused." Nevertheless, decisions for some time thereafter applied the "empty gesture" test. See generally note 25 *supra*. However, in United States v. Horne, 9 USCMA 601, 26 CMR 381, 384 (1958), the USCMA noted, "By that broad language [Hunter rule] we did not intend to be understood as saying that the highest degree of professional competency is not to be expected of an appointed counsel." And in a similar vein, in United States v. Kraskouskas, 9 USCMA 607, 610, 26 CMR 387, 390, a decision handed down the same day as the *Horne* ruling, the USCMA said, "The constitutional right to effective assistance of counsel . . . demands a professional and requisite standard of skill. A fair standard of professional competence must be a necessary condition precedent with the professional undertaking of the defense of a person on trial for a crime."

27 CM 360555, *Castillo-Acevedo*, 12 CMR 318, 324 (1952).

of the advocate's art."[28] Any quick condemnation of counsel should therefore be avoided.[29] For while it is an easy task to second guess a lawyer, consideration must be given to the fact that he is in possession of information which never appears in the record. For example he must assess the credibility of the witnesses, including his client, and the record is usually barren on their trustworthiness. Certainly, a lawyer would think twice before sponsoring a witness who is hostile, ill-tempered, "smart-alecky," or prone to being "cornered" by cross-examination. The validity of testimony, and the theory of the case, often turns not only on what has been said—but the way it is said.[30] Also, the thoroughness of trial counsel and the zeal with which he pursues the prosecution of the case will affect a trial defense counsel's strategy. While the accused Oakley could have taken the stand for the limited purpose of testifying as to the voluntariness of his confession[31] the decision by counsel not to pursue this course might very well have been based on imponderables outside the record. And might the suggested course, if pursued, have adversely affected the court in view of its apparant inconsistency with the main line of defense, and the presence of other overwhelming evidence of guilt?[32]

Perhaps had the court been apprised in the *Oakley* case of all the factors which influenced counsel, it would not have disagreed with him in his decision not to challenge the confession.

There are cases in the area of "inadequate representation" where the record often proves adequate. For example, where trial defense counsel has a loyalty to two accused whose interests are conflicting,[33] or where the court has interfered with counsel's attempt at effective representation.[34] The area of trial tactics, however, is one of speculation and conjecture and should not be tampered with unless the "four corners of the record" make the efforts of counsel appear to have been an "empty gesture."

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28 *Ibid.*

29 CM 398157, *Withey*, 25 CMR 593, 596 (1957).

30 In discussing the importance of cross-examination, the distinguished advocate, Lloyd Paul Stryker, in his work *The Art of Advocacy* (1954), on page 87, states, "The general deportment of the witness . . . will give you many clues. Did he hesitate? Did he look off into space? Did he moisten his lips and seem perturbed? Did he stammer and needlessly repeat himself? Was there an honest or shifty expression on his face as he answered? And above all, what is your impression as to how the jury reacted to him? Did they seem to believe him or were there some jurors, at least, whose expressions spelled incredulity?"

31 MCM, 1951, paras. 53i, p. 75, 140a, p. 250, and 149b(1), pp. 279-80.

32 In United States v. McMahan, 6 USCMA 709, 21 CMR 31, 45 (1956) (concurring opinion), Judge Quinn suggests that in appraising inadequacy of representation claims, the court should consider "the overwhelming evidence of guilt." The results of the Oakley retrials lend support to this conclusion. In the two retrials of Oakley (the Board of Review in 27 CMR 560 (1958) reversed the second conviction), though the voluntariness of his confession was put in issue, he was convicted. Records, 27 May 1958 and 2 December 1958, CM 398074, *Oakley*. The third conviction was affirmed by the Board of Review in 28 CMR 451 (1959) and by the United States Court of Military Appeals in 11 USCMA 187, 29 CMR 3 (1960). Adequacy of representation, however, was an issue only in Oakley's first appeal.

33 *E.g.*, United States v. Faylor, 9 USCMA 547, 26 CMR 327 (1958). There the two co-accused were tried for wrongful appropriation of a motor vehicle and were represented by the same counsel. Pleas of guilty were entered and no evidence was presented on the merits. After findings, defense counsel made an unsworn statement on behalf of both accused. He proceeded to point out that the appellant's co-accused (who did not appeal) was only 18 years old and had never been convicted of any offense, and that the appellant was the leader and motivating force of the offense. The court held that appellant was the leader and motivating force of the offense, and that the appellant had been denied effective representation, in that trial defense counsel was buying sympathy for the co-accused at the expense of the appellant. *Cf.* United States v. Lovett, 7 USCMA 704, 23 CMR 168 (1957), where prior representation of government witness by trial defense counsel conflicted with interests of the accused. Para. 48c, MCM, 1951, 68 requires that defense counsel "guard the interests of the accused by all honorable and legitimate means known to law. It is his duty . . . to represent the accused with undivided fidelity, and not to divulge his secrets or confidence." In areas where there is a doubt concerning the equivocal conduct of counsel, it "must be regarded as having been antagonistic to the best interests of his client." United States v. McClusky, 6 USCMA 545, 550, 20 CMR 266, (1955).

34 *E.g.*, ACM S-3514, *Mathis*, 6 CMR 661 (1952) (interference with right to make closing argument).

CONCLUSION

Trial defense counsel should not be hamstrung in their efforts to present the best possible defense. Sufficient protection against an inadequate defense can be provided by the *Hunter* rule, for if the accused discovers during the course of preparation for trial that he simply cannot agree with or trust the judgment of his counsel, he may acquire new counsel. And rejection of the *Oakley* rule would not be inconsistent with the requirement that the accused make the final decision of whether to plead guilty and of what evidence to permit in by stipulation. But to permit the accused a new trial simply because his counsel failed to present one of his claims to the court would seem to be an anomoly in criminal law. Once a considered determination has been made by trial defense counsel as to tactics, a second guessing at an appellate level should be indulged in with great caution lest speculation as to "what might have been" may result in guessing a competent counsel into incompetency.