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# Criminal Procedure—Washington's Standard for Determining Ineffectiveness of Counsel—State v. Jury, 19 Wn. App. 256, 576 P.2d 1302 (1978)

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## CRIMINAL PROCEDURE—WASHINGTON'S STANDARD FOR DETERMINING INEFFECTIVENESS OF COUNSEL—*State v. Jury*, 19 Wn. App. 256, 576 P.2d 1302 (1978).

Defendant, Jerry Jury, crashed into a parked truck while driving with two passengers, Mike Perry and Laura Daarud.[1] Although all escaped serious injury, witnesses claimed that Jury appeared slightly shaken up and perhaps intoxicated. When the police arrived Jury became belligerent and was placed under arrest. While handcuffed and seated in the back of a police car, he kicked out one of the door windows. At the police station, Jury struck a police officer in the face during an argument concerning a breathalyzer test. Jury was charged with first degree malicious mischief[2] for kicking out the car window and third degree assault[3] for striking the officer.[4]

After being convicted of both charges, Jury appealed, alleging, *inter alia*,[5] that he was denied effective assistance of counsel due to trial counsel's inadequate preparation.[6] This allegation was made after defense counsel had met with defendant Jury for half an hour on August 10; had a brief telephone conversation with Perry; spent half an hour analyzing the police report on August 22; met again with the defendant for half an hour on August 24, becoming aware for the first time of a possible insanity defense; took an hour to prepare an insanity plea on August 25, which he

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1. State v. Jury, 19 Wn. App. 256, 258, 576 P.2d 1302, 1304 (1978).
2. WASH. REV. CODE § 9A.48.070(b) (1977).
3. WASH. REV. CODE § 9A.36.030 (1977).
4. State v. Jury, 19 Wn. App. 256, 258, 576 P.2d 1302, 1304 (1978).
5. *See* Brief of Appellant at vi, State v. Jury, 19 Wn. App. 256, 576 P.2d 1302 (1978). Counsel for appellant made nine assignments of error, including charges that the trial court abused its discretion in refusing to grant a continuance or a motion for a new trial; that the evidence was insufficient to support the conviction; that the defendant's absence when the judge, deputy prosecuting attorney, and defense counsel submitted additional instructions to the jury constituted reversible error; that the jury was improperly instructed; and that the state failed to meet its burden of proof.
6. State v. Jury, 19 Wn. App. 256, 258–59, 576 P.2d 1302, 1304–05 (1978). General studies on the right to effective assistance of counsel can be found in: Bazelon, *The Defective Assistance of Counsel*, 42 CIN. L. REV. 1 (1973); Craig, *The Right to Adequate Representation in the Criminal Process: Some Observations*, 22 SW. L.J. 260 (1968); Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970); Katz, *Gideon's Trumpet: Mournful and Muffled*, 55 IOWA L. REV. 523 (1970); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964); Comment, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J.L. & SOC. PROB. 1 (1977); Comment, *Effective Representation—An Evasive Substantive Notion Masquerading as Procedure*, 39 WASH. L. REV. 819 (1964); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965); Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531 (1963).

argued in court with a motion for a continuance on August 30; prepared for trial on August 31 for six hours and had a subpoena issued for Daarud, the second passenger in Jury's car; again sought a continuance on September 1 and, after it was denied, presented his client's case to the jury; and, after the trial, filed a motion for a new trial.[7]

The Washington Court of Appeals affirmed the conviction for third degree assault[8] but reversed the conviction for first degree malicious mischief, finding that trial counsel's lack of preparation denied Jury his sixth amendment right to effective representation.[9] *State v. Jury* thus became the first Washington case in which a conviction was reversed on the grounds of ineffective assistance of counsel.[10]

This note first examines the development of the standards currently applied in Washington for determining whether a defendant has been denied effective assistance of counsel and whether that denial was prejudicial. It then analyzes the *Jury* court's application of the standards, and concludes that the court's interpretation of the standards, while better reasoned than prior Washington case law, is not supported by Washington Supreme Court precedent. Finally, it is suggested that *Jury*'s primary importance is the increased pressure it may place on the Washington Supreme Court to review and clarify this area of Washington law.

## I. PRIOR CASE LAW—CONFUSION IN THE COURTS

### A. *The Development of the Standard for Determining Ineffective Assistance of Counsel*

In 1917 the Washington Supreme Court heard its first defense based on a claim of ineffective assistance of counsel.[11] The court did not, how-

7. State v. Jury, 19 Wn. App. 256, 259, 576 P.2d 1302, 1305 (1978).

8. *See* notes 61–62 and accompanying text *infra*.

9. 19 Wn. App. at 264–65, 576 P.2d at 1307.

10. Prior to *Jury* two convictions in Washington were reversed ostensibly due to ineffective assistance of counsel. State v. Cory, 62 Wn. 2d 371, 382 P.2d 1019 (1963); State v. Hartwig, 36 Wn. 2d 598, 219 P.2d 564 (1950). However, both involved actions of the state which prevented effective representation. In *Hartwig*, defense counsel was appointed an hour and fifteen minutes before trial and the court refused a continuance. The Washington Supreme Court stated that "[t]he constitutional right to have the assistance of counsel, Art. I, § 22, carries with it a reasonable time for consultation and preparation, and a denial is more than a mere abuse of discretion; it is a denial of due process of law in contravention of Art. I, § 3 of our constitution." *Id.* at 601, 219 P.2d at 566 (citations omitted).

In *Cory*, sheriff's officers eavesdropped on conversations between the defendant and his attorney. The court found that privacy is a prerequisite to effective representation. State v. Cory, 62 Wn. 2d at 374, 382 P.2d at 1020. These cases are accordingly distinguishable from *Jury* where the denial of effective representation was caused solely by the conduct of defense counsel.

11. State v. Kelch, 95 Wash. 277, 163 P. 757 (1917).

ever, formulate a definite standard upon which to judge whether a defendant had been denied his constitutional right[12] to effective assistance of counsel until it decided *State v. Mode*[13] in 1961. In *Mode* the Washington Supreme Court held that "[i]t is only when the incompetence or neglect of a lawyer . . . results in the violation of a constitutional right by reducing the trial to a farce that a new trial will be granted."[14] Although no specific constitutional provision was cited, presumably the right referred to rested in the fourteenth amendment due process guarantee.[15]

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12. Prior to 1963 the right to effective assistance of counsel in state prosecutions was grounded on the due process clause of the fourteenth amendment. *See* note 15 *infra*. In 1963, however, the United States Supreme Court incorporated the sixth amendment right to effective assistance of counsel into the fourteenth amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). *See* note 25 *infra*.

13. 57 Wn. 2d 829, 360 P.2d 159 (1961). One reason the Washington Supreme Court failed to formulate a standard prior to *Mode* is that the right to effective assistance of counsel was not recognized as a specific constitutional guarantee until 1932. Powell v. Alabama, 287 U.S. 45 (1932). In *Powell* the Court interpreted the sixth amendment right to counsel to require more than the mere presence of an attorney at the defense table. For a brief summary of the United States Supreme Court decisions in this area, see Beasley v. United States, 491 F.2d 687, 692–93 (6th Cir. 1974). *See also* Waltz, *supra* note 6; Comment, *Ineffective Assistance of Counsel: Who Bears the Burden of Proof?*, 29 BAYLOR L. REV. 29, 29–32 (1977).

14. 57 Wn. 2d at 833, 360 P.2d at 161 (footnote omitted). The "farce" terminology arose from the 1945 case of Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945), in which the court determined the right to effective assistance of counsel was grounded on the fifth amendment guarantee of due process of law rather than the sixth amendment right to counsel. The court stated:

> It is clear that once competent counsel is appointed his subsequent negligence does not deprive the accused of any right under the Sixth Amendment. All that amendment requires is that the accused shall have the assistance of counsel. It does not mean that the constitutional rights of the defendant are impaired by counsel's mistakes subsequent to a proper appointment.
>
> The petitioner here must, therefore, rely upon the due process clause of the Federal Constitution which guarantees him a fair trial.

148 F.2d at 668–69.

15. If the Washington court was resting the right on the federal constitution, it must have been contemplating the fourteenth amendment. As one commentator stated prior to the United States Supreme Court's decision in Gideon v. Wainwright, 372 U.S. 335 (1963):

> A federal attack on competence of counsel in a state criminal prosecution must find its basis in the fourteenth amendment. It is now settled law that the sixth amendment guarantee of representation by counsel runs only to those who are defendants in a federal prosecution. . . . The present rule, as announced by the Supeme Court in the case of Betts v. Brady, [316 U.S. 455 (1942)] is that there is no absolute federally guaranteed right to counsel in a state trial, the existence of the right being dependent upon the special circumstances of the particular case and found in the requirement of the fourteenth amendment concepts of fundamental fairness implicit in due process.

Hanley, *Federal Habeas Corpus and Incompetence of Counsel in State Prosecutions*, 33 WASH. L. REV. 303, 304–05 (1958).

It is possible that the court was relying on the Washington Constitution, which gives the accused in criminal prosecutions "the right to appear and defend in person, and by counsel." WASH. CONST. art. I, § 22. This seems unlikely, however, because the provision was not cited and the cases used as precedent were based on the due process clause. *See* MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Johns v. Smyth, 176 F. Supp. 949 (E.D. Va. 1959); People v. De Simone, 9 Ill. 2d 522, 138

Although the standard set forth in *Mode* was used by some Washington courts as late as 1975,[16] a "new"[17] standard was in the process of being formulated by the supreme court eight months after it decided *Mode*.[18] In *State v. Lei* the court stated that the test for determining whether counsel has provided effective assistance is whether, after consideration of the entire record, it appears that "the accused [was] afforded a *fair* trial."[19] The court cited no authority for this proposition, nor did it indicate whether this test was intended to be a departure from the "farce" standard developed in *Mode*.[20] Because both the *Mode* and *Lei* tests are grounded in a defendant's fourteenth amendment due process right to a fair trial rather than her sixth amendment right to effective representation,[21] it is likely that the *Lei* court did not establish a new test, but merely reworded the *Mode* "farce" standard.[22]

In 1967, however, in *State v. Thomas*,[23] the Washington Supreme Court cited *Lei* as precedent for the following test: "After considering the *entire record,* can it be said that the accused was afforded an *effective representation* and a *fair* and *impartial* trial?"[24] This formulation recognizes a defendant's right to effective representation in addition to his right to a fair trial and thus appears to be a departure from *Mode*.[25]

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N.E.2d 556 (1956). *But see* Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943) (also cited by the *Mode* court, but relying on art. I, § 13 of the Indiana Constitution and the sixth amendment of the United States Constitution).

16. State v. Wilkinson, 12 Wn. App. 522, 530 P.2d 340 (1975). The court of appeals stated that "[t]he general rule is that only when the incompetence and neglect of counsel results in a violation of a constitutional right by reducing a trial to a farce, will a new trial be granted." *Id.* at 524, 530 P.2d at 341–42 (footnote omitted).

17. It is not certain that a new standard has in fact been formulated. *See* notes 26, 64–73 and accompanying text *infra*.

18. State v. Lei, 59 Wn. 2d 1, 365 P.2d 609 (1961).

19. *Id.* at 6, 365 P.2d at 612 (emphasis added).

20. *Lei*'s language was again used by the Washington Supreme Court in State v. Roberts, 69 Wn. 2d 921, 421 P.2d 1014 (1966). The court of appeals in *Jury* cited *Roberts* as support for what the court considered the new standard. It therefore follows that the new standard, according to the *Jury* court's analysis, was actually formulated in the same year that the Washington Supreme Court adopted the farce standard in *Mode*.

21. Evidence that both standards are founded in the fourteenth amendment is indicated by their emphasis on the trial as a whole rather than on trial counsel's performance. Moreover, *Lei* was decided two years prior to *Gideon*. *See* notes 12 & 15 *supra* and note 25 *infra*.

22. The failure of the *Lei* court to recognize that it had formulated a different standard along with the similar focus of both standards indicates that the court believed it was using the *Mode* standard, though slightly reworded. *See* note 21 *supra*.

23. 71 Wn. 2d 470, 429 P.2d 231 (1967).

24. *Id.* at 471, 429 P.2d at 232 (emphasis in original).

25. The conclusion that *Thomas* is a departure from *Mode* is buttressed by the fact that in the interval between *Mode* and *Thomas* the United States Supreme Court decided Gideon v. Wainwright, 372 U.S. 335 (1963). *Gideon* recognized that the right to effective representation is grounded on the sixth amendment and made obligatory on the states through the fourteenth amend-

At no time, however, has the Washington Supreme Court recognized it as such.[26] As *Lei* and *Mode* appear to be the same standard, citation of *Lei* in support of the different standard of *Thomas* indicates the confusion of the Washington Supreme Court in this area. It is therefore not surprising that prior to 1975 the *Mode* and *Thomas* standards were used interchangeably and concurrently by Washington's Supreme Court and Courts of Appeals.[27]

The only court prior to *Jury* to state that the *Thomas* standard is a departure from, and thus replaces, the *Mode* test was the Washington Court of Appeals, Division One, in *State v. White*,[28] a 1971 decision. The *White* court viewed the *Thomas* standard as more liberal than the *Mode* test,[29] requiring a higher level of competence on the part of an attorney. Although Division Two of the court of appeals has applied the *Thomas* standard exclusively, that court has never stated whether it considered that standard to be different from the *Mode* test.[30] Division Three has

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ment. Emphasis thus shifted from an examination of the trial as a whole to a more focused look at defense counsel's performance.

26. There is strong support for the argument that the Washington Supreme Court did not intend to develop a new standard. Only a month after it decided *Thomas*, the court cited *Mode* for the conclusion that "a judgment will not be reversed on the grounds of incompetence of counsel unless such incompetence appears affirmatively on review so clearly as to show that the accused was thereby deprived of a constitutionally fair trial." State v. Piche, 71 Wn. 2d 583, 591, 430 P.2d 522, 527 (1967). The use of *Mode* as support for the assertion that all the accused is entitled to is a "constitutionally fair trial" (note the similarity of this language with the *Lei* standard) indicates that the court interpreted *Lei* as only a clarification, and not a modification, of *Mode*. If so, *Thomas* is simply a further clarification of the original *Mode* farce standard. *See* notes 64–73 and accompanying text *infra*.

27. *See, e.g.*, State v. Gibson, 79 Wn. 2d 856, 490 P.2d 874 (1971); State v. Queen, 73 Wn. 2d 706, 440 P.2d 461 (1968); State v. Wilkinson, 12 Wn. App. 522, 530 P.2d 340 (1975); State v. Dimmer, 7 Wn. App. 31, 497 P.2d 613 (1972).

28. 5 Wn. App. 283, 487 P.2d 243 (1971), *rev'd on other grounds*, 81 Wn. 2d 223, 500 P.2d 1242 (1972). The court of appeals stated:

> Definitions of "effective assistance of counsel" have been attempted many times. At one time, our state defined the phrase as "incompetence . . . [which reduces] the trial to a farce . . ." *State v. Mode*, 57 Wn. 2d 829, 833, 360 P.2d 159 (1961). The currently accepted definition is, on its face, a more liberal one and directs us to inquire if the accused was accorded a "fair and impartial trial." State v. Robinson, *supra* at 233, quoting State v. Thomas, 71 Wn. 2d 470, 429 P.2d 231 (1967).

*Id.* at 286–87, 487 P.2d at 245.

29. *Id.* at 287, 487 P.2d at 245.

30. State v. Darnell, 14 Wn. App. 432, 542 P.2d 117 (1975); State v. Hess, 12 Wn. App. 787, 532 P.2d 1173 (1975), *modified on other grounds*, 86 Wn. 2d 51, 541 P.2d 1222 (1975). There are indications that Division Two did consider the *Thomas* standard as distinct from *Mode*. In *Darnell*, the court interpreted *Thomas* to require "reasonably competent and effective counsel." 14 Wn. App. at 436, 542 P.2d at 119.

The federal courts generally perceive the "farce" standard and the "reasonably competent counsel" or "normal competency" standard as distinct. The "farce" standard is based on the due process clause. *See* note 14 *supra*. *But see* note 73 *infra*. The "reasonably competent counsel" standard is

used the two standards as one, often citing both before 1975.[31] Since 1975 the Washington courts have consistently used the *Thomas* standard, though rarely recognizing it as a "new" test.[32]

Whether the *Thomas* standard is indeed "a more liberal one"[33] is difficult to determine from pre-*Jury* cases, because prior to *Jury* no Washington conviction had been reversed on a claim of ineffective assistance of counsel under any standard.[34] Also, there has been no discernible difference in the analysis used by the courts under the different standards.[35]

### *B. The Requirement of Showing Prejudice*

While not always treated as distinct issues,[36] both ineffectiveness of counsel and resulting prejudice must be proved before a conviction will be reversed.[37] Unfortunately, there is little Washington case law discussing the requisite degree of prejudice which must be shown and on

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grounded in the sixth amendment. *See* Marzullo v. Maryland, 561 F.2d 540, 542–43 (4th Cir. 1977); Rickenbacker v. Warden, Auburn Correctional Facility, 550 F.2d 62, 65–66 (2d Cir. 1976); United States v. Ramirez, 535 F.2d 125, 129–30 (1st Cir. 1976); Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970). *But see* United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976) (when defense counsel fails to exercise "the customary skills and diligence [of a] reasonably competent attorney . . . the proceedings may be said to have been reduced to a 'farce' "). Further, the standards based on the sixth amendment are seen as demanding more from defense counsel. *See* Marzullo v. Maryland, 561 F.2d 540, 542–43 (4th Cir. 1977); Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977); Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970); Fields v. Peyton, 375 F.2d 624, 628 (4th Cir. 1967).

For general discussions of the various standards, see Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 Mo. L. Rev. 483, 493–99 (1976); Lee, *Right to Effective Counsel: A Judicial Heuristic*, 2 Am. J. Crim. L. 277, 283–96 (1974); Comment, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 Colum. J.L. & Soc. Prob. 1, 25–53 (1977); Comment, *A Standard for the Effective Assistance of Counsel*, 14 Wake Forest L. Rev. 175 (1978); Note, *Standard for Effective Assistance of Counsel*, 1976 Wash. U.L.Q. 503, 507–16; Annot., 26 A.L.R. Fed. 218 (1976).

31. State v. Wilkinson, 12 Wn. App. 522, 530 P.2d 340 (1975); Fleetwood v. Rhay, 7 Wn. App. 225, 498 P.2d 891 (1972); State v. Dimmer, 7 Wn. App. 31, 497 P.2d 613 (1972).

32. State v. Adams, 91 Wn. 2d 86, 586 P.2d 1168 (1978); State v. Myers, 86 Wn. 2d 419, 545 P.2d 538 (1976); State v. Rhodes, 18 Wn. App. 191, 567 P.2d 249 (1977); State v. Price, 17 Wn. App. 247, 562 P.2d 256 (1977).

33. State v. White, 5 Wn. App. 283, 287, 487 P.2d 243, 245 (1971).

34. *See* note 10 *supra*.

35. Because courts frequently cite both the *Thomas* and *Mode* cases when resolving ineffective assistance of counsel claims, it is difficult to identify differences in analysis under the two standards. *See* notes 27–31 and accompanying text *supra*.

36. *See* notes 81–84 and accompanying text *infra*.

37. *See, e.g.*, State v. Myers, 86 Wn. 2d 419, 545 P.2d 538 (1976); State v. Queen, 73 Wn. 2d 706, 440 P.2d 461 (1968); State v. Stockman, 70 Wn. 2d 941, 425 P.2d 898 (1967); State v. Rhodes, 18 Wn. App. 191, 567 P.2d 249 (1977).

whom the burden of proof rests.[38] Because no court before *Jury* found trial counsel's assistance to be ineffective, few courts have found it necessary to discuss prejudice. However, in *State v. Queen*[39] the Washington Supreme Court explicitly addressed the issue, stating that it is important to determine if an error is "prejudicial or merely harmless"[40] and that an error is prejudicial if it "affect[s] the result."[41] This language was interpreted by the court of appeals in *State v. White*[42] to mean that the defendant must establish "that substantial prejudice resulted [from the lack of effective assistance of counsel] which probably would have changed the result of the trial."[43] In the few cases which have touched on the issue of prejudice, the courts have impliedly incorporated the result-oriented analysis set forth in *White*.[44] Thus, in Washington, at least until *Jury*, the burden of proving prejudice was placed on the appellant, who was required to show that the result at trial would probably have been different had he not been denied effective assistance of counsel.

## II. THE *JURY* COURT'S REASONING

The *Jury* court found the *Mode* "farce" standard outdated[45] and concluded that the controlling test for determining whether a defendant has

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38. For a discussion of the role prejudice plays in the resolution of ineffective assistance of counsel claims, see Bazelon, *supra* note 6, at 29–33; Comment, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J.L. & SOC. PROB. 1, 71–87 (1977); Comment, *Ineffective Assistance of Counsel: Who Bears the Burden of Proof?*, 29 BAYLOR L. REV. 29 (1977).

39. 73 Wn. 2d 706, 711–12, 440 P.2d 461, 464–65 (1968). While other Washington Supreme Court cases have touched on the issue of prejudice, the discussion terminated when no prejudice was shown. The court did not reach the issues of the degree of prejudice necessary to grant a new trial or on whom the burden of proof is placed. *See* State v. Adams, 91 Wn. 2d 86, 586 P.2d 1168 (1978); State v. Myers, 86 Wn. 2d 419, 545 P.2d 538 (1976).

40. 73 Wn. 2d at 711, 440 P.2d at 464.

41. *Id.*, 440 P.2d at 465 (quoting State v. Britton, 27 Wn. 2d 336, 341, 178 P.2d 341, 344 (1947)).

42. 5 Wn. App. 283, 487 P.2d 243 (1971), *rev'd on other grounds*, 81 Wn. 2d 223, 500 P.2d 1242 (1972).

43. *Id.* at 289, 487 P.2d at 247. It is important to note, however, that this particular interpretation was not compelled by precedent. The burden could have been placed on the state to prove that the error was harmless. *See, e.g.*, United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973). Furthermore, a showing that the denial might have changed the result could have been deemed adequate. *See* notes 90–92 and accompanying text *infra*.

44. *See* note 39 *supra*.

45. The court stated:

> For a time, our Washington courts held that counsel's representation was ineffective only if it made a farce or mockery of justice. . . . However, our Supreme Court now has devised the following test: After considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?

19 Wn. App. at 262, 576 P.2d at 1306 (citations omitted).

been denied effective assistance of counsel is the *Thomas* standard.[46] The court stated that this test requires the defendant to prove two things: "first, considering the entire record, that he was denied effective representation; and second, that he was prejudiced thereby."[47] The *Jury* court found that the *Thomas* standard requires closer scrutiny of trial counsel's conduct than does the *Mode* test, and entitles the defendant to "reasonably competent assistance of counsel."[48]

The court then applied the *Thomas* standard to determine whether Jury had been afforded effective representation. Defense counsel was accorded the presumption that court-appointed counsel is competent,[49] but the presumption was deemed rebutted by a showing that "counsel made virtually no factual investigation of the events leading to defendant's arrest, nor did he properly support either his motion for continuance or motion for new trial with any affidavits."[50] Some reliance was also placed on defense counsel's own admission that he was unprepared.[51] The court concluded that defense counsel's lack of preparation was "so substantial

46. *Id.*

47. *Id.* at 263, 576 P.2d at 1307. Although a prior Washington Court of Appeals decision is not cited for this assertion, the *Jury* court's language bears a strong similarity to the following statement:

> For a defendant . . . to successfully claim he was denied a fair trial by lack of effective assistance of counsel, he must establish: (1) That if submission of the defense was a question of deliberate tactical choice or judgment, no reasonable lawyer would have acted as his counsel did or that failure to submit his defense was the result of ignorance or inadequate pretrial investigation and, (2) that substantial prejudice resulted therefrom which probably would have changed the result of the trial.

State v. White, 5 Wn. App. 283, 289, 487 P.2d 243, 246–47 (1971) (footnote omitted), *rev'd on other grounds*, 81 Wn. 2d 223, 500 P.2d 1242 (1972).

48. 19 Wn. App. at 263, 576 P.2d at 1307. *See* note 30 *supra* (discussion of the distinction between analysis under the farce standard and analysis under the reasonably competent assistance of counsel test).

49. Washington courts from the beginning have presumed court-appointed counsel is competent. State v. Kelch, 95 Wash. 277, 278, 163 P. 757, 757 (1917). The modern case most frequently cited for this proposition is State v. Piche, 71 Wn. 2d 583, 430 P.2d 522, *cert. denied*, 390 U.S. 912 (1967), where the court stated:

> Where the court appoints a licensed and practicing member of the bar to appear for and represent an indigent defendant in a criminal case, a strong presumption of competence arises from (1) the fact of his appointment by the judge of a trial court, (2) from the fact that counsel is a member of the bar of the highest court of the state, and (3) from the fact that the attorney is regularly and actively engaged in the practice of law. These three factors create a presumption that may be overcome only by a clear showing of incompetence derived from the whole record.

*Id.* at 591, 430 P.2d at 527.

50. 19 Wn. App. at 264, 576 P.2d at 1307. Actually, this statement is incorrect because one of the motions for a continuance was supported by the affidavit of defendant Jury stating that he suffered from " 'strong feelings of claustrophobia,' and 'a possible state of shock from being in an injury accident.' " *Id.* at 259, 576 P.2d at 1305.

51. *Id.* at 264, 576 P.2d at 1307.

that no reasonably competent attorney would have performed in such manner" and therefore Jury had been denied effective representation.[52]

Finally, the court questioned whether the denial of effective representation was prejudicial.[53] To meet his burden of proof, Jury was required to show prejudice for both the first degree malicious mischief conviction and the third degree assault conviction.[54] Addressing the first degree malicious mischief conviction first, the court did not find the requisite prejudice from defense counsel's failure to interview and subpoena witnesses, stating that such a finding would be too speculative.[55] However, the requisite prejudice was shown when the trial record demonstrated that defense counsel's lack of preparation caused him to ignore completely a potential defense.[56] This conclusion was based on trial counsel's failure to object to a clearly erroneous jury instruction[57] which the court presumed misled the jury.[58] After noting that even with a correct instruction the evidence was sufficient to sustain a conviction,[59] the court found that "a properly instructed jury could as easily conclude"[60] on the same evidence that the defendant was guilty of a lesser-included offense. The court

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52. *Id.*

53. *Id.* Although the *Jury* court noted that "some courts have placed the burden on the state to show absence of prejudice once the defendant produces evidence of ineffectiveness," it determined that the Washington Supreme Court has placed the burden on the defendant to show actual prejudice, citing State v. Myers, 86 Wn. 2d 419, 545 P.2d 538 (1976). 19 Wn. App. at 264, 576 P.2d at 1307. Because the *Myers* court did not expressly discuss on whom the burden is placed, it lends little support for *Jury's* assertion. The *Jury* court's interpretation, however, might have been inferred from the statement in *Myers* that "[i]t is well established . . . that there must be some prejudice to a defendant before a denial of the effective assistance of counsel based on joint representation will be found." 86 Wn. 2d at 424, 545 P.2d at 541–42.

54. 19 Wn. App. at 264–69, 576 P.2d at 1307–10.

55. *Id.* at 265, 576 P.2d at 1308. While recognizing that incompleteness of the record may have been due to trial counsel's ineffectiveness, the court held it could not determine whether the incompleteness was prejudicial unless the missing evidence was supplied. Two methods of supplying the missing evidence were mentioned. One method involves submitting evidence extrinsic to the record by affidavit on a motion for a new trial. The other method involves submitting evidence extrinsic to the record in a personal restraint petition and hearing. *Id.* at n.2, 576 P.2d at 1308 n.2.

56. *Id.* at 266, 576 P.2d at 1308. Trial counsel ignored the defense that because of defendant's claustrophobia he lacked the requisite intent and capacity to commit first degree malicious mischief.

57. Although the jury was appropriately instructed on the three degrees of malicious mischief during the trial, the error occurred when the court gave the "elements" instruction. This instruction described the intent required for third degree malicious mischief when defining the elements for first degree malicious mischief, thus reducing the burden of proof of intent for first degree malicious mischief to the intent required for third degree malicious mischief. *Id.* at 266–67, 576 P.2d at 1309.

58. *Id.* at 268, 576 P.2d at 1309.

59. *Id.* This assertion was a response to defendant's contention that the evidence was insufficient to support the verdict. Brief of Appellant at 38–41, State v. Jury, 19 Wn. App. 256, 576 P.2d 1302 (1978).

60. 19 Wn. App. at 268, 576 P.2d at 1309–10.

reversed the first degree malicious mischief conviction and granted a new trial.

The court dealt only briefly with the third degree assault conviction, finding that the requisite prejudice had not been shown. The record indicated that all witnesses to the assault had testified and that defendant's mental condition was not at issue.[61] Further, trial counsel effectively examined and cross-examined the witnesses on this charge, took exception to the instructions, and argued his client's theory to the jury.[62] Thus, Jury failed to meet his burden of proof and the third degree assault conviction was affirmed.

## III. ANALYSIS OF THE COURT'S REASONING

Although the *Jury* court inferred that Washington law in this area is well-settled, the discussion of Washington court decisions above indicates that is not the case. Part III–A compares the *Jury* court's interpretation and application of the *Thomas* standard with the Washington Supreme Court's analysis and concludes that assumptions made by the *Jury* court were not justified by Washington Supreme Court precedent. Part III–B analyzes both the *Jury* court's separate treatment of the prejudice and ineffectiveness of counsel issues and its interpretation of Washington law concerning the degree of prejudice which must be shown and on whom the burden of proof is placed and concludes that the *Jury* court's analysis is better reasoned than prior Washington case law.

### *A. The Thomas Standard and its Application*

The *Jury* court viewed *Thomas* as replacing the *Mode* test with a standard requiring greater competence on the part of defense counsel by specifically focusing on counsel's performance.[63] It is not clear, however, whether the Washington Supreme Court shares this view.[64] In no case has the supreme court explicitly stated that the *Thomas* standard replaces

61. The court believed that the preparation of counsel plays a more important role where the degree of a crime varies with different types of intent because " '[t]he accused may not be aware of the significance of facts relevant to his intent in determining his criminal liability or responsibility.' " *Id.* at 266, 576 P.2d at 1308 (quoting ABA Standards, THE DEFENSE FUNCTION § 4.1, commentary (Approved Draft, 1971)).

62. *Id.* at 269, 576 P.2d at 1310.

63. *See* notes 36–39 and accompanying text *supra*. The *Jury* court did not look at any aspect of the trial on the issue of ineffectiveness (though it did on the prejudice issue), finding ineffectiveness on the lack of pretrial preparation alone. Clearly, the *Jury* court focused on counsel's conduct rather than on the trial or even on the conduct's effect on the trial.

64. *See* note 26 *supra*.

that of *Mode*. Further, in *State v. Adams*,[65] decided after *Jury*,[66] the Washington Supreme Court declined "to decide whether to adopt a *new* standard."[67] The standard proposed by defense counsel in *Adams* required that defendant receive "reasonably effective assistance"[68] and focused attention directly on counsel's conduct.[69] If the *Mode* standard has been replaced by the *Thomas* standard, and *Thomas* requires a close examination of defense counsel's performance to determine whether a defendant received "reasonably competent assistance,"[70] as the *Jury* court assumed,[71] it is difficult to understand why the supreme court would view the standard proposed by defense counsel in *Adams* as "new."[72] The supreme court's belief that the standard proposed by defense counsel in *Adams* is a "new" standard can be fully explained if the supreme court views *Thomas* as merely clarifying, rather than replacing the *Mode* standard, with the focus still on the trial as a whole.[73] Thus, the *Jury* court's assumption that the *Mode* standard is outdated is not supported by Washington Supreme Court decisions.

Whether justified by precedent or not, the *Jury* court did scrutinize defense counsel's performance more strictly under the *Thomas* standard

65. 91 Wn. 2d 86, 586 P.2d 1168 (1978).

66. *Jury* was decided on February 14, 1978 and *Adams* on November 22, 1978.

67. 91 Wn. 2d at 89, 586 P.2d at 1170 (emphasis added). The *Adams* court did not specifically reject the standard but merely declined to decide whether to adopt it, finding that on the facts "appellant *did* receive effective assistance of counsel at his criminal trial under either standard." *Id.* (emphasis in original).

68. *Id.* at 90, 93, 586 P.2d at 1170, 1172.

69. The full standard urged by defense counsel in *Adams* required the defendant to receive "counsel reasonably likely to render and rendering reasonably effective assistance." *Id.* at 90, 586 P.2d at 1171 (emphasis omitted) (quoting Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974)). The wording of the standard and its failure to mention the right to a fair trial indicates it would be used to examine counsel's conduct and not the trial as a whole.

70. State v. Jury, 19 Wn. App. at 263, 576 P.2d at 1307.

71. The court stated: "It is clear that the departure from the 'farce and mockery' standard is an attempt to more closely scrutinize trial counsel's performance." *Id.*

72. An alternative analysis exists which might explain why the Washington Supreme Court viewed the test proposed in *Adams* as a new standard. The standard urged in *Adams* would require that defense counsel "perform at least as well as a lawyer with ordinary training and skill in the criminal law." 91 Wn. 2d at 90, 586 P.2d at 1171 (quoting Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974)). Perhaps the court thought this language required even more of counsel than was required in *Jury*. This seems doubtful, however, in light of the high standard of competence required by the *Jury* court. Additionally, the *Adams* court's emphasis was on the words "counsel reasonably likely to render and rendering reasonably effective assistance" rather than on the words quoted above. *Id.*

73. Because of the United States Supreme Court's holding in Gideon v. Wainwright, 372 U.S. 335 (1963), the test can no longer be based exclusively on the fourteenth amendment. *See* note 25 *supra*. Some courts, however, still examine the trial as a whole, often using the "farce" standard, rather than focusing specifically on defense counsel's conduct. *See* United States v. Madrid Ramirez, 535 F.2d 125, 129 (1st Cir. 1976); United States *ex rel.* Marcelin v. Mancusi, 462 F.2d 36, 42 (2d Cir. 1972); United States v. Benthiem, 456 F.2d 165, 167 (1st Cir. 1972).

than would have been justified under the *Mode* test. Even though defense counsel filed and argued at least six motions,[74] met with the defendant twice, interviewed at least one witness, analyzed the police report, and spent an additional six hours preparing for trial,[75] the court found that counsel's lack of preparation denied defendant effective representation.[76] This finding was based solely on counsel's lack of pretrial preparation, without an examination of its effect on courtroom performance.[77] Clearly there is much which defense counsel did not do.[78] The finding of ineffective assistance of counsel in *Jury* under the *Thomas* standard, however, despite the work counsel performed on defendant's behalf, is the most significant aspect of the case. It indicates that, despite prior decisions,[79]

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74. Brief of Appellant at 1–7, State v. Jury, 19 Wn. App. 256, 576 P.2d 1302 (1978). Appellant's brief indicates that the following motions were filed by defense counsel: a motion for entry of plea of not guilty by reason of insanity, two motions for continuances, a motion for a new trial, a motion for bail, and a motion for arrest of judgment. A timely notice of appeal also was filed although it is not clear from appellant's brief that this was action taken by trial counsel. The State did not contest appellant's factual contentions. Brief of Respondent at 1, State v. Jury, 19 Wn. App. 256, 576 P.2d 1302 (1978).

75. 19 Wn. App. at 259, 576 P.2d at 1305.

76. While this degree of preparation may appear deficient on its face, Washington courts in the past have been extremely deferential towards the conduct of trial counsel. *See* note 79 *infra*.

77. The effect of counsel's lack of preparation on courtroom performance is examined when the court determines whether the defendant was prejudiced thereby. *See* notes 56–57 and accompanying text *supra*.

78. The *Jury* court pointed out that defense counsel did not support any motions with affidavits other than those from the defendant. No affidavits from family or friends familiar with Jury's history supported his claim of claustrophobia, nor were any statements or affidavits from persons medically qualified to diagnose Jury's psychiatric problems introduced. Defense counsel did not obtain statements from witnesses concerning Jury's condition at the scene of the accident, nor was Dr. Burden, who treated Jury two to three days after the accident, contacted. Neither of the two passengers in Jury's car were served with a subpoena, nor was one of them even interviewed by defense counsel. Defense counsel moved for a new trial claiming that there were three witnesses available who could testify as to defendant's condition shortly before and after the accident, yet he failed to support this motion with affidavits from the potential witnesses. As the court stated: "The general tenor of the record is that counsel made no substantial effort to research the law and the facts of the case until several days before the trial." 19 Wn. App. at 259, 576 P.2d at 1305.

79. An example of the extreme deference Washington courts accord to defense counsel is State v. Darnell, 14 Wn. App. 432, 542 P.2d 117 (1975). In *Darnell* the defendant appealed from a conviction of armed robbery alleging the following in support of the claim that counsel provided ineffective representation:

> 1. Counsel failed to make any real objection to any evidence introduced by the prosecution, and in particular counsel failed to object to the use of a witness whose name was not on the list of witnesses furnished by the prosecution prior to trial.
>
> 2. Counsel complimented the State's fingerprint expert witness at the conclusion of his cross-examination.
>
> 3. Counsel was "curt" with defendant while he was testifying in his own behalf.
>
> 4. Counsel introduced inflammatory, prejudicial, and irrelevant testimony concerning defendant's prior criminal record, including prison time he had previously served, suspended sentences, probation revocations, and defendant's entire FBI "blow back."

at least one Washington court is willing to put teeth into the standard and give defendants a substantive right to effective representation.

### *B. The Burden of Proving Prejudice*

In Washington a defendant has always been required to prove that she was prejudiced by defense counsel's ineffectiveness before her conviction would be overturned.[80] However, it has not always been clear whether prejudice is an issue separate from ineffectiveness. The Washington Supreme Court stated in *State v. Myers*[81] that "there must be some prejudice to a defendant before a denial of the effective assistance of counsel . . . will be found."[82] This language indicates that counsel's performance is not ineffective, regardless of the degree of incompetence exhibited by an attorney, if by happenstance the defendant was not prejudiced. The court's approach in *Jury* is better reasoned.[83] By finding trial counsel ineffective without first finding prejudice, the court made a logical distinction between two distinct issues. Certainly counsel can be ineffective with no prejudice to the defendant, as may be the case when there is overwhelming evidence of the defendant's guilt.[84] Although the

5. Counsel asked: "Do you have any vocation other than stealing?"
*Id.* at 433, 542 P.2d at 118.

Although no allegation was denied, the court managed to come up with a "reasonable" explanation for trial counsel's conduct on each charge. As to the question concerning defendant's "vocation," the court found that "it provided a more or less humorous transition to defendant's legitimate business pursuits . . . ." *Id.* at 441, 542 P.2d at 122.

80. *See* note 37 and accompanying text *supra*.

81. 86 Wn. 2d 419, 545 P.2d 538 (1976).

82. *Id.* at 424, 545 P.2d at 541–42. The court's full statement was: "It is well established, however, that there must be some prejudice to a defendant before a denial of the effective assistance of counsel based on joint representation will be found." Although the language is limited to cases claiming ineffective assistance of counsel based on joint representation, there is no logical reason for a distinction.

Further, the Washington Supreme Court in other cases has failed to draw a clear line between the issues. In State v. Stockman, 70 Wn. 2d 941, 425 P.2d 898 (1967), defense counsel released all exhibits following trial, thereby failing to protect defendant's right to appeal. The court stated: "We are not approving of this procedure, but no prejudice has been shown. . . . A consideration of the entire record convinces us that appellant received a fair trial and was adequately represented by his counsel." *Id.* at 947, 425 P.2d at 901–02. Thus, although the case seems to turn on failure to prove prejudice, rather than failure to prove ineffectiveness, the court still stated the defendant was "adequately represented."

83. The *Jury* court draws a clear line between the two issues. A finding of ineffectiveness is not dependent on a showing of prejudice. *See* 19 Wn. App. at 262–64, 576 P.2d at 1306–07.

84. A case in which defense counsel fell asleep during the examination of witnesses highlights the absurdity of not separating the two issues. United States v. Katz, 425 F.2d 928 (2d Cir. 1970). The court found there was no ineffective assistance because "the testimony during the periods of counsel's somnolence was not central to [the accused's] case . . . ." *Id.* at 931. A defense attorney sleeping through trial unquestionably denies a defendant's right to effective representation, even if it is not prejudicial.

result reached under either approach may be the same, the *Jury* court's approach lends clarity to the analysis.

In *State v. Queen*[85] the supreme court stated that the defendant must prove that the ineffectiveness of counsel affected the result of the trial before a conviction will be reversed.[86] Although the supreme court has not clarified its language in *Queen,* the court of appeals in *State v. White*[87] interpreted it to mean that the defendant must show the result of the trial *probably* would have been different had he been afforded effective assistance of counsel.[88] The *Jury* court, however, did not follow the *White* analysis,[89] finding sufficient prejudice on a showing only that the result *might* have been different.[90] This analysis in *Jury* is more in line with the Washington Supreme Court's application of *Queen* in *State v. Nist,*[91] where the alleged error was the wrongful admission of evidence. In *Nist* the supreme court cited *Queen* in support of the proposition that "[w]hen the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless."[92]

Thus, not only does the *Jury* court scrutinize defense counsel's conduct more strictly than have Washington courts in the past, but it also requires a less stringent showing of prejudice.

## IV. CONCLUSION

Although the *Jury* court states that the *Thomas* standard replaces *Mode,* the Washington Supreme Court apparently does not believe this

85. 73 Wn. 2d 706, 440 P.2d 461 (1968).

86. *Id.* at 711, 440 P.2d at 464–65.

87. 5 Wn. App. 283, 487 P.2d 243 (1971), *rev'd on other grounds,* 81 Wn. 2d 223, 500 P.2d 1242 (1972).

88. *Id.* at 289, 487 P.2d at 246–47. *See* note 43 and accompanying text *supra.*

89. It is not clear why the *Jury* court failed to follow *White* when resolving the prejudice issue, since *White* is one of the few cases which speaks directly to the issue of prejudice in ineffective assistance of counsel cases. Also, the *Jury* court cited *White* extensively when analyzing the issue of ineffectiveness. Although *White* was reversed by the Washington Supreme Court, the reversal was not based on the *White* court's analysis of the prejudice issue. Therefore, *Jury's* reliance on *White* to help resolve the ineffectiveness issue while ignoring *White* when determining prejudice is unexplained. The *Jury* court may not have followed *White* on the prejudice issue because of a lack of precedent supporting *White's* analysis. *See* note 43 *supra. See also* notes 91–92 and accompanying text *infra.*

90. While the court did not state this proposition expressly it was implicit in its analysis of the prejudice issue. *See* notes 56–60 and accompanying text *supra.*

91. 77 Wn. 2d 227, 461 P.2d 322 (1969).

92. *Id.* at 234, 461 P.2d at 326 (quoting State v. Martin, 73 Wn. 2d 616, 627, 440 P.2d 429, 437 (1968)).

substitution has taken place. Further, while the court in *Jury* views the prejudice and ineffectiveness issues as distinct, the Washington Supreme Court has not always dealt with the issues separately. Finally, the *Jury* court places the burden of proving prejudice on the defendant and requires a showing that the result of the trial might have been different had he not been denied effective assistance of counsel. The Washington Supreme Court, however, has not specifically addressed the issues of the degree of prejudice which must be shown or on whom the burden of proving prejudice falls.

*State v. Jury* reaches a manifestly reasonable result. However, because of the lack of clarity in the opinions of the Washington Supreme Court, and the differing interpretations of these opinions by the various divisions of the court of appeals, it is difficult to predict what impact *Jury* will have in the resolution of future ineffective assistance of counsel cases. *Jury's* most important impact may be that it will increase pressure on the Washington Supreme Court to review and clarify this area of Washington law.

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