CRIMINAL PROCEDURE—DEFENDANT MAY NOT BE REQUIRED TO BEAR THE BURDEN OF PROOF AS TO PREJUDICE WHERE COUNSEL COMMITS A SUBSTANTIAL VIOLATION OF AN ARTICULATED DUTY—*United States v. DeCoster*, No. 72–1283 (D.C. Cir. Oct. 19, 1976).

On the evening of May 27, 1970, Roger Crump was accosted by three men who stole his wallet, allegedly at knifepoint.[1] Plainclothes officers Box and Ehler witnessed the incident, pursued the assailants and apprehended Willie DeCoster, Jr. in the D.C. Annex Hotel.[2] DeCoster, along with suspects Douglas Eley and Earl Taylor, was arrested and subsequently arraigned "on charges of armed robbery, robbery, and assault with a deadly weapon."[3] At the arraignment proceeding, counsel was appointed to represent DeCoster.[4]

Prior to trial, there were several disagreements between DeCoster and his appointed counsel as to certain of the latter's legal judgments.[5] A jury of the United States District Court for the District of Columbia found DeCoster guilty of armed robbery as well as

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[1] United States v. DeCoster, 487 F.2d 1197, 1199 (D.C. Cir. 1973). Although Mr. Crump testified that he was robbed at knifepoint, the only weapon found on any of the assailants was a straight razor. United States v. DeCoster, No. 72–1283, slip op. at 2, 3 (D.C. Cir. Oct. 19, 1976).

[2] United States v. DeCoster, No. 72–1283, slip op. at 2 (D.C. Cir. Oct. 19, 1976). The victim identified his three assailants immediately following their apprehension but was unable to make an identification at trial because of a subsequent vision impairment, suffered in an unrelated automobile accident. *Id.*

[3] Brief for Appellant at 1, United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973), [hereinafter cited as Brief for Appellant]. DeCoster testified that earlier in the afternoon he had been with Roger Crump at a local bar. He further stated that after leaving the bar he proceeded to his hotel, at which time he was arrested. United States v. DeCoster, No. 72–1283, slip op. at 3 (D.C. Cir. Oct. 19, 1976). This was contradicted by the testimony of Officer Box, who indicated that he witnessed Eley holding the victim while DeCoster went through the victim's pockets. Taylor served as a lookout. Brief for Appellant, *supra* at 7.

[4] United States v. DeCoster, No. 72–1283, slip op. at 3 (D.C. Cir. Oct. 19, 1976).

[5] The defendant's initial grievance with counsel's performance was his failure to file promptly a motion for bond review. United States v. DeCoster, No. 72–1283, slip op. at 3–4 (D.C. Cir. Oct. 19, 1976). The original motion was filed on November 9, 1970, approximately thirty days after the defendant was accepted by The Black Man's Development Center for pre-trial custody. *Id.* Furthermore, the motion failed to mention the Center's willingness to accept third-party custody. *Id. See generally* Supplemental Brief for Appellant at 16, United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973) [hereinafter referred to as Supplemental Brief for Appellant].

Other matters of controversy included counsel's failure to investigate the disposition of the charges against Eley and Taylor, his failure to seek and interview witnesses and his failure to object to the prison garb worn by the appellant at trial. *Id.* at 18–23.

the lesser included offense of assault with a dangerous weapon.[6] On appeal, in *United States v. DeCoster (DeCoster I)*,[7] the District of Columbia Circuit raised the issue, sua sponte, of whether DeCoster was denied his sixth amendment right to effective assistance of counsel at the trial level.[8] Chief Judge Bazelon, writing for the majority, remanded the case for a hearing on appointed counsel's effectiveness based upon a defendant's right "to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."[9] Although the strategic and tactical decisions of counsel were not at issue,[10] the trial record presented substantial questions concerning "counsel's preparation and investigation."[11]

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[6] United States v. DeCoster, No. 72-1283, slip op. at 1-2 & n.1, 3 (D.C. Cir. Oct. 19, 1976). DeCoster received a sentence of two to eight years for the armed robbery conviction. *Id.* at 1 & n.1. Conviction for the lesser included offense was vacated because it arose out of the same act. *Id.*

[7] 487 F.2d 1197 (D.C. Cir. 1973).

[8] United States v. DeCoster, No. 72-1283, slip op. at 1-2 (D.C. Cir. Oct. 19, 1976). The court's power to raise an issue on its own accord is derived from FED. R. CRIM. P. 52(b) (Plain Error). This rule provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The primary function of the provision is to eliminate "errors that 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.' " 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 856, at 374 (1969). Inherent in this consideration is a clear concern for the rights of the defendant. *Id.*

[9] 487 F.2d at 1201-02 (emphasis deleted). Prior to *DeCoster I*, the test in the District of Columbia Circuit for determining when a defendant had been denied his sixth amendment right to effective assistance of counsel was whether "there ha[d] been gross incompetence of counsel and that this ha[d] in effect blotted out the essence of a substantial defense." Bruce v. United States, 379 F.2d 113, 116-17 (D.C. Cir. 1967); *see* note 54 *infra* and accompanying text.

[10] 487 F.2d at 1201. Traditionally, the court has never questioned the tactical decisions of counsel, nor his errors in judgment. *See* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 300-01 (1964). Adherence to this view "requires only that every tactical decision and every deviation from the rules be based on a reasoned and informed judgment." Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811, 826 (1976). This is the position taken by the *DeCoster I* court. 487 F.2d at 1201.

[11] 487 F.2d at 1201. Although counsel had "announced he was ready" to go to trial, United States v. DeCoster (DeCoster II), No. 72-1283, slip op. at 5 (D.C. Cir. Oct. 19, 1976), it was found that he was not prepared to offer the names and addresses of prospective alibi witnesses. 487 F.2d at 1201. The Government had previously served a written notice of alibi demand which, pursuant to the local rule requires the defense to inform the prosecution, within twenty days of the demand, of its intention to set forth an alibi defense as well as the names and addresses of those witnesses to be relied upon. 487 F.2d at 1200-01. By comparison, the Federal Rules of Criminal Procedure provide ten days within which to respond. FED. R. CRIM. P. 12.1(a). During a discussion with the trial judge, counsel stated that because the twenty days had not elapsed, he desired a continuance. However, when reminded that he had announced that he was ready, counsel indicated that he would not rely on an alibi defense. 487 F.2d at 1200.

On remand, the trial court found no denial of adequate assistance of counsel[12] and denied appellant's motion for a new trial.[13] The conviction was reversed, however, by the United States Court of Appeals for the District of Columbia in *United States v. DeCoster (DeCoster II)*.[14] Chief Judge Bazelon, again writing for the majority, held that in view of the probable deleterious effect of counsel's total failure to conduct an investigation, the omission constituted a violation of DeCoster's sixth amendment right to effective assistance of counsel.[15] In light of the central role such a constitutional right plays in the adjudicative process, the burden of establishing the harmlessness of ineffective counsel was placed upon the Government.[16] Since

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Furthermore, counsel was not aware of the disposition of the cases against Eley and Taylor until the trial judge informed him that evidence was introduced at their trial. DeCoster II, slip op. at 5; Supplemental Brief for Appellant, *supra* note 5, at 18. The case against DeCoster was severed from that of the other defendants because he had absconded upon being conditionally released and was not returned to custody until after Eley's and Taylor's trial had begun. *See* DeCoster II, slip op. at 4.

[12] *See* United States v. DeCoster, No. 2002-71 (D.D.C. Apr. 23, 1975), *rev'd*, United States v. DeCoster, No. 72-1283 (D.C. Cir. Oct. 19, 1976). The district court had concluded that "counsel did raise the only defense available to him, which defense was putting the government to its proof." United States v. DeCoster, No. 2002-71, slip op. at 19. Judge Waddy stated that

> while it might appear that defense counsel was less than a "diligent conscientious advocate," the weight of the government's case at trial and supported on the hearing on remand convinces this Court that DeCoster was not prejudiced thereby and not denied the "reasonably competent assistance of an attorney" under the circumstances.

Id. at 20.

Thus, the trial court analyzed the facts of this case, applied the law as established in *DeCoster I*, and concluded that the defendant's sixth amendment right to effective assistance of counsel was not abridged. *Id.* at 19-20.

[13] United States v. DeCoster, No. 72-1283 (D.C. Cir. Oct. 19, 1976); *see* United States v. DeCoster, No. 2002-71 (D.D.C. filed Apr. 23, 1975) (order denying motion for new trial).

[14] No. 72-1283 (D.C. Cir. Oct. 19, 1976) (appeal heard by Bazelon, C.J., Wright, J., and MacKinnon, J.).

[15] *Id.* at 22-23.

[16] *Id.* at 24-25. The inherent difficulty in the harmless error concept lies in assessing the impact that a constitutional or evidentiary error may have had on the outcome of a trial. The primary problem is determining what standard to use as a measure of harmlessness. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 988-90 (1973).

In the development and application of standards to be used in judging the harmlessness of error, the American system of criminal justice has historically distinguished between constitutional and non-constitutional errors. For example, it has been held by the Supreme Court that a constitutional error could never be harmless. Hamilton v. Alabama, 368 U.S. 52, 55 (1961). However, Professor Saltzburg suggests that a rational harmless error test should focus on the type of case (*i.e.*, civil or criminal) in which the error arises. Saltzburg, *supra* at 989. He bases this proposition on the difference in the quantum of proof required by the plaintiff to secure a judgment in a criminal case as

the Government failed to discharge this burden, the conviction was reversed.[17]

The ultimate issue before the *DeCoster II* court—whether a defendant who alleges a denial of his sixth amendment guarantee to effective assistance of counsel bears the burden of establishing prejudice from such a denial—is one which strikes at the very heart of the adversarial process. Fundamental to our common law jurisprudence is an underlying assumption that an accused in a criminal proceeding must be afforded assistance of counsel to maintain the necessary equilibrium in an adversarial proceeding.[18] Although it is difficult to precisely define this sixth amendment right, its importance has nevertheless been recognized by the Supreme Court.

Powell v. Alabama[19] was the Supreme Court's first explication of the right to effective assistance of counsel. In that case, seven defendants who had been convicted of rape and sentenced to death had not been given an opportunity to retain private counsel nor was counsel appointed until the day of trial.[20] The Court held that such late appointment constituted a denial of due process[21] and expressly recognized for the first time that assistance of counsel is one of the " 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' "[22] It was further implied that effectiveness of counsel's assistance was an inherent element of this sixth amendment right.[23] Thus, relying on the due process clause

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opposed to civil. *Id.* at 991–95; *see* In re Winship, 397 U.S. 358, 364 (1970) (a crime must be proven "beyond a reasonable doubt").

Reasoning that appellate review should guarantee "the same high degree of certainty" of the verdict as in the proceeding below, Saltzburg advocates the imposition of a "reasonable-possibility standard" to measure harmlessness in *all* criminal cases. Saltzburg, *supra* at 1021–28. Moreover, he believes that as a corollary to this standard, the government must bear "the risk of error." *See id.* at 994–95. Thus, error would necessitate reversal unless the Government can show beyond a reasonable doubt that such an error did not influence the resulting verdict. For a discussion of a uniform standard as an alternative approach, see R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 55–81 (1970).

[17] DeCoster II, slip op. at 25.

[18] The sixth amendment provides that an "accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

[19] 287 U.S. at 45 (1932).

[20] *Id.* at 49–53, 56.

[21] *Id.* at 71.

[22] *Id.* at 67 (quoting from Herbert v. Louisiana, 272 U.S. 312 (1926)).

[23] *See* 287 U.S. at 58, 71. Justice Sutherland noted that although counsel was present at trial, no investigation was made nor was any opportunity provided to do so. *Id.* at 58. This absence of preparation and investigation had been characterized by Chief Justice Anderson, dissenting from the Alabama supreme court decision, as resulting in a

of the fourteenth amendment, the Supreme Court provided the basis from which the concept of effectiveness of counsel could be expanded and articulated.[24]

Since *Powell*, federal courts have labored to establish a workable definition of "effective assistance" in determining whether there has been a violation of this sixth amendment right. The traditional test, emphasizing the guarantees of the fifth amendment due process clause,[25] required that the defendant prove counsel's ineffectiveness by showing that the lack of assistance resulted in a "farce or mockery" of justice.[26] The Court of Appeals for the District of Columbia adopted the "farce and mockery" test in *Diggs v. Welch*,[27] where the defendant alleged that he had been coerced into pleading guilty by his appointed counsel.[28] This decision was significant in the historical development of the right to effective assistance of counsel in two important respects. First, the court explicitly identified the right to effective assistance as one derived from the due process clause—specifically, the right to a fair trial.[29] Second, the court stated that

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" '*pro forma*' " defense rather than a " 'zealous and active' " one. *Id.* at 58 (italics in original). Therefore, the Supreme Court concluded that the right to counsel was not provided "in any substantial sense." *Id.*

[24] *See id.* at 71; Gideon v. Wainwright, 372 U.S. 335, 343 (1963). Even though the holding in *Powell* was limited to capital offenses, it should be noted that the Supreme Court, in Argersinger v. Hamlin, 407 U.S. 25 (1972), relying on *Powell* and *Gideon*, prohibited imprisonment "for any offense" unless the defendant was represented by an attorney. *Id.* at 32–33, 37. The Court maintained that the rationale of both *Powell* and *Gideon* "has relevance to any criminal trial, where an accused is deprived of his liberty." *Id.* at 32.

[25] For want of a more definitive standard, courts have relied upon a defendant's right to a fair trial pursuant to the due process clause of the fifth amendment in evaluating effective assistance. *See, e.g.*, Diggs v. Welch, 148 F.2d 667, 668–69 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945). In consideration of this inexactitude, one court has expressly admitted that ineffective assistance claims "raise questions of extreme difficulty in the administration of justice." Jones v. Huff, 152 F.2d 14, 15 (D.C. Cir. 1945).

[26] This traditional test was, at one time, adopted by all of the circuit courts. Recent Development, *Criminal Defendants Entitled to Reasonably Competent Assistance of Counsel*, 12 AM. CRIM. L. REV. 193, 197 n.28 (1974). The First, Second and Tenth Circuits continue to adhere to this test. *E.g.*, Gillihan v. Rodriguez, 551 F.2d 1182, 1187 (10th Cir. 1977); Rickenbacker v. Warden, Auburn Correction Facility, 550 F.2d 62, 65 (2d Cir. 1976); United States v. Madrid Ramirez, 535 F.2d 125, 129 (1st Cir. 1976).

[27] 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945). In affirming the lower court's dismissal of a petition for habeas corpus, the court of appeals held that to justify a hearing on the issue of the ineffectiveness of counsel, the circumstances surrounding the proceeding must have rendered the trial "a farce and a mockery of justice." 148 F.2d at 669.

[28] 148 F.2d at 668.

[29] *Id.* The court construed the sixth amendment as requiring only the presence of counsel at trial. It did not consider the right to assistance of counsel to be "impaired by counsel's mistakes subsequent to a proper appointment." *Id.* at 668.

the test was to be construed literally to avoid creating a situation whereby every conviction would result in a post-conviction hearing on counsel's effectiveness.[30]

This traditional test has been superseded in a majority of the circuits by a reasonableness standard[31] as exemplified by the Third Circuit in *Moore v. United States*.[32] The *Moore* court confronted a situation in which a member-attorney of the " 'Voluntary Defender's Office' " failed to confer with the defendant until one day before the trial.[33] The defendant had been represented by another attorney at the arraignment.[34] In determining whether the defendant was effectively assisted, the court stated that "the standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place."[35] Comparison of this standard with the "farce and mockery" test indicates a shift from evaluating the fairness of the trial to appraising the

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[30] *Id.* at 669–70. The court felt that such a strict interpretation of the term "ineffectiveness," *i.e.*, only extreme circumstances justifying relief, was necessitated by the practicalities of review. *Id.* It was further stated that

> [t]here are no tests by which it can be determined how many errors an attorney may make before his batting average becomes so low as to make his representation ineffective. The only practical standard for habeas corpus is the presence or absence of judicial character in the proceedings as a whole.

Id. at 670.

[31] The Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits have adopted what can generally be categorized as a reasonableness test. *E.g.*, Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976); United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 641 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973); West v. Louisiana, 478 F.2d 1026, 1033 (5th Cir. 1973); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

[32] 432 F.2d 730 (3d Cir. 1970).

[33] *Id.* at 732.

[34] *Id.*

[35] *Id.* at 736. This test was alluded to by the Supreme Court four months before *Moore* was decided. *See* McMann v. Richardson, 397 U.S. 759, 770–71 (1970). In *McMann*, the Court was confronted with an allegation of counsel inadequacy. Specifically, counsel was accused of misadvising the defendant to plead guilty—advice which was based upon the mistaken belief that a prior confession was admissible. *Id.* at 768–70. Justice White maintained that

> a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends . . . on whether that advice was within the range of competence demanded of attorneys in criminal cases.

Id. at 770–71 (footnote omitted).

quality of counsel's services in deciding whether counsel provided effective assistance.[36] Concomitantly, the court relied upon the sixth amendment as the source of the right to effective assistance of counsel rather than the traditional fifth amendment due process clause test.[37]

Although the *Moore* court did not consider whether a constitutional violation necessarily requires reversal, that issue had been considered by the Supreme Court of the United States in *Chapman v. California*.[38] There, the Court held that constitutional error does not mandate automatic reversal, but rather treats as "harmful" only those "errors that 'affect substantial rights.' "[39] *Chapman* further required that "someone other than the person prejudiced by [the error must bear the] burden to show that it was harmless."[40] Such a showing

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[36] *See* 432 F.2d at 735, 737. "The adequacy of the representation which petitioner received . . . can only be decided on an evaluation of the services rendered on his behalf." *Id.* at 735; *cf.* United States v. Wade, 388 U.S. 218, 227 (1967) (*Powell* requires an evaluation of counsel's ability to prevent defendant's rights from being abridged). The *Moore* court further maintained that such a determination, in light of "the level of normal competency," was the basis upon which a claim of ineffectiveness can be adjudicated. 432 F.2d at 737. Moreover, this finding was determinative without deciding the issue of prejudice. *Id.*

[37] 432 F.2d at 737.

[38] 386 U.S. 18 (1967).

[39] *Id.* at 23 (quoting from FED. R. CRIM. P. 52(a)). Prior to *Chapman*, the Supreme Court either ignored the precept that a constitutional error could be harmless or expressly refuted such a finding. *Compare* Gideon v. Wainwright, 372 U.S. 335 (1963) (did not consider the possibility of harmless error) *with* Hamilton v. Alabama, 368 U.S. 52, 55 (1961) (where a defendant has been denied the assistance of counsel at a critical stage in the proceeding, "we do not stop to determine whether prejudice resulted"). In an earlier case Glasser v. United States, 315 U.S. 60 (1942), the court had stated that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Id.* at 76.

This concept of automatic reversal has been sustained in post-*Chapman* decisions with respect to a certain category of cases. *E.g.*, Beasley v. United States, 491 F.2d 687 (6th Cir. 1974). In *Beasley*, the court held that "[h]armless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel." *Id.* at 696; *cf.* United States v. Crowley, 529 F.2d 1066, 1071 (3d Cir.) (under particular facts of cases absence of counsel at hearing on motion to withdraw a plea was harmless), *cert. denied*, 425 U.S. 995 (1976).

For a further discussion on the developments of the rule of automatic reversal, see Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 537–56 (1969).

[40] 386 U.S. at 24. The *DeCoster II* court refers to the burden placed upon the Government as the burden of establishing the harmlessness of "the constitutional violation." DeCoster II, slip op. at 23. Noting that many courts speak in more general terms, *i.e.*, placing or shifting "the burden of proof," it must be recognized that this ambiguous term can be interpreted to mean one of three specific burdens—the burden of pleading, the burden of producing evidence, or the burden of persuasion. *See* MCCORMICK'S

must be "beyond a reasonable doubt."[41]

The Third Circuit, in *United States ex rel. Green v. Rundle*,[42] expounded upon the reasonableness test set forth in *Moore*, and like the *Chapman* Court, recognized that only harmful errors mandate reversal.[43] However, the court arrived at a conclusion contra to *Chapman* as to which party must bear the burden of proof as to prejudice or lack thereof.[44] Judge Gibbons, writing for the majority, maintained that where the claimed ineffectiveness of assistance is based on counsel's failure to present specific evidence at trial, "it is reasonable . . . to put on [defendant] the burden of showing that the missing evidence would be helpful."[45] Where it is impossible to make such a showing, or where circumstances have changed since the time of the constitutional violation such that the availability of evidence is outside the control of the defendant, a finding of ineffective assistance will be the sole determining factor in requiring a new trial.[46] In these

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HANDBOOK OF THE LAW OF EVIDENCE §§ 336–337 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

The burden of pleading generally falls upon the plaintiff or that party "seek[ing] to change the present state of affairs." *Id.* § 337. Similarly, the placement of this burden often guides the apportionment of the burdens of introducing evidence and persuasion to the plaintiff. *Id.*; *see* Lykes Bros. S.S. Co. v. United States, 459 F.2d 1393, 1401 (Ct. Cl. 1972).

The burden of introducing evidence, sometimes referred to as the burden of going forward, is particularly important in jury trials because it is a mechanism by which the judge controls the jury. 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2487, at 278–79 (3d ed. 1940) [hereinafter cited as WIGMORE]. A decision upon a factual issue "does not fall to the jury as a matter of course," *Id.* § 2487, at 278 (emphasis deleted), rather the judge must be satisfied that the proffered evidence is sufficient to form a "reasonable basis" from which the jury can produce a verdict. *Id.* § 2487, at 279. If this burden is not met, the failing party will lose without availing the jury an opportunity to resolve the issues. *Id.*

The final burden is the burden of persuasion, *i.e.*, "persuading the trier of fact." MCCORMICK, *supra* § 336. It is the presiding judge's function to establish which party bears the burden at the time the jury is instructed. *Id.* He will instruct the jury to find against the party bearing this burden, if they are in a state of equipoise. *Id.* Again, there is no absolute rule as to which party must bear this burden, but it can be assumed generally that the burden will fall upon that party setting forth an affirmative contention to which the fact in question is essential. 9 WIGMORE, *supra* § 2486, at 274–75.

[41] 386 U.S. at 24.

[42] 434 F.2d 1112 (3d Cir. 1970). Appellant's petition below, for habeas corpus relief from a conviction of aggravated robbery and conspiracy, alleged a denial of effective assistance of counsel. It was claimed that counsel, provided by the Philadelphia Voluntary Defender's Association, failed to ask for a continuance to present an alibi witness or available records which would have supported an alibi defense. *See id.* at 1115.

[43] *Id.* at 1115.

[44] *Compare* 386 U.S. at 24 *with* 434 F.2d at 1115.

[45] 434 F.2d at 1115.

[46] *Id.* For a detailed discussion of the burden of proving prejudice as it relates to the harmless-error rule, see Note, *Effective Assistance of Counsel: A Constitutional*

situations, prejudice need not be shown by the defendant.[47]

Unlike the approach taken in *Green*, the Fourth Circuit, in *Coles v. Peyton*,[48] placed the burden of showing a lack of prejudice upon the Government.[49] In that decision, the court adhered to a reasonableness test, affirmatively setting forth certain duties owed to an indigent defendant which are specifically regarded as elements of effective assistance.[50] When any of these enumerated duties have been neglected, the burden of showing a lack of prejudice will be placed upon the Government.[51] Unless this burden is met, the approach of the Fourth Circuit is to hold that there has been a sixth amendment violation from which the petitioner should be accorded appropriate relief.[52]

Right in Transition, 10 VAL. L. REV. 509, 545–49 (1976). The author discusses three approaches to the allocation of the burden of prejudice. The first is the advocation of the *Chapman* rule; the second position is strictly opposed to *Chapman*, *i.e.*, placing the burden upon the defendant; and the third is the position adopted by the court in *Green*. The author characterizes this last approach as one

> tak[ing] a more flexible position than either the advocates of the strict *Chapman* rule or its opponents. Recognizing the problems inherent in placing the burden of proof absolutely on either the prosecution or the defendant, this approach opts instead for a more equitable sharing of the burden of proof. Such a policy of flexibility permits the exigencies of each case to determine who carries the burden of proof.

Id. at 548 (footnotes omitted) (italics in original).

[47] *See* 434 F.2d at 1115.

[48] 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968). The claim of ineffective assistance in this case was based upon counsel's total failure to investigate. 389 F.2d at 226. Aside from conducting several interviews with the petitioner, the appointed attorney also failed to question witnesses who had previously been ascertained. *Id.*

[49] 389 F.2d at 226.

[50] *Id.* The duties owed by counsel to an indigent defendant were noted by the court as follows:

> Counsel . . . should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

Id.

[51] *Id.*

[52] *Id.* Judge Craven, in a dissenting opinion, stated:

> Switching the burden of proof does not make these startling defenses true but it does put upon the state the exceedingly awkward, if not unbearable, burden of proving the negative. And it is not suggested that the state can prove the negative of such matters more easily than petitioner can prove the positive —the usual reason for switching the burden.

Id. at 230.

The *Coles* decision presaged two significant but divergent decisions in the District of Columbia Circuit and the Eighth Circuit concerning the burden of proof as to prejudice where there has been a sixth amendment violation of the right to effective assistance of counsel. The District of Columbia Circuit, in *DeCoster I*, distinguished cases in which the claim of ineffective assistance arose upon collateral attack from those in which the issue was presented on direct appeal.[53] Chief Judge Bazelon maintained that ineffective assistance cases arising on direct appeal were not being decided in accordance with the appropriate standards of the circuit.[54] As a result, *DeCoster I* created a distinct and less stringent test of reasonableness, applicable only to claims on direct appeal.[55] This analysis was consistent

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[53] 487 F.2d at 1201–02. Ineffectiveness can be raised either directly, by motion of the defendant pursuant to FED. R. CRIM. P. 33 (New Trial), or indirectly in a separate civil action pursuant to 28 U.S.C. § 2255 (1970) (federal custody; remedies on motion attacking sentence). United States v. Brown, 476 F.2d 933, 935 & nn.11–12 (D.C. Cir. 1973) (per curiam). The thrust of § 2255 is to attempt to reduce the extraordinary number of habeas corpus applications in the jurisdiction in which the defendant is confined. United States v. Hayman, 342 U.S. 205, 219 (1952). *See* 2 C. WRIGHT, *supra* note 8, § 589, at 579–80. This is accomplished by hearing the § 2255 motion in the court of conviction. 342 U.S. at 219; 2 C. WRIGHT, *supra* § 589, at 580.

In essence, there are two important distinctions between these methods of pursuing a remedy. A § 2255 motion is generally based upon a constitutional deprivation while a motion for a new trial can be founded upon other grounds. *See* 2 C. WRIGHT, *supra* § 552, at 485. Moreover, a Rule 33 motion must be made within seven days of the verdict as compared to an unlimited time within which a § 2255 motion can be made. 2 C. WRIGHT, *supra* § 552, at 485.

[54] 487 F.2d at 1201–02. The specific standard alluded to by the court was enunciated in Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967). Judge Leventhal, writing for the majority in *Bruce*, maintained

> that an accused may obtain relief under 28 U.S.C. § 2255 if he shows both that there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense either in the District Court or on appeal.

Id. at 116–17 (footnotes omitted).

Although the *Bruce* court specifically limited this test to habeas corpus proceedings, it did provide that the petitioner need not present such a "powerful showing" to be successful "on direct appeal." *Id.* at 117. However, the court failed to interpret this language in terms of an identifiable quantum of proof. *See id.* Similarly, cases have been decided since *Bruce* in which courts have relied upon this collateral/direct distinction as it related to the burden of proof. *E.g.*, United States v. Haywood, 464 F.2d 756, 763 n.7 (D.C. Cir. 1972); Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970) (per curiam); United States v. Hammonds, 425 F.2d 597, 600 (D.C. Cir. 1970); Harried v. United States, 389 F.2d 281, 284 (D.C. Cir. 1967). Yet, it was not until *DeCoster I* that a pragmatic interpretation of the lesser burden on direct appeal was set forth.

[55] 487 F.2d at 1202–04. In tracing the historical development of this circuit's effective assistance standard, it is important to consider the underlying philosophical and legal origins as contemplated by the court over the years, *i.e.*, what the sixth amend-

with the concept previously set forth in the District of Columbia Circuit, that a claim brought on direct appeal required less of a showing of counsel's incompetency to establish a sixth amendment violation than would be necessary to demonstrate the same in a collateral proceeding.[56] In defining this newly adopted reasonableness test, the court followed *Coles* in two important respects. It first promulgated general and specific duties to be performed by counsel in providing effective assistance.[57] As a corollary, the court held that if "a substan-

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ment has meant to the judiciary. In 1958, the District of Columbia Circuit continued to adhere to the "farce and mockery" approach. Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958). The *Mitchell* court, in substantiating its position, considered the meaning of "effective assistance." 259 F.2d at 793. Judge Prettyman, writing for the majority, explained that the defendant's constitutional rights did not guarantee that counsel's performance would meet "a standard of skill," but rather emphasized that his rights were procedural in nature, based upon the requirement of a fair trial. *Id.* at 790. He reiterated: "the [Supreme] Court has not itself undertaken, nor has it imposed upon the inferior federal courts, the duty of appraising the quality of a defense." *Id.* It was thus held that

> the term "effective assistance" . . . does not relate to the quality of the service rendered by a trial lawyer . . . except that, if his conduct is so incompetent as to deprive his client of a trial in any real sense—render the trial a mockery and a farce is one descriptive expression,—the accused must have another trial.

Id. at 793.

This position was opposed by Judge Fahy, dissenting, who construed the constitutional right as requiring "a standard of skill." *Id.* at 794. He deferred to the Supreme Court's view "that the right to counsel is required in a 'substantial sense.' " *Id.* at 795 (quoting from Powell v. Alabama, 287 U.S. at 58).

The District of Columbia Circuit departed from the "farce and mockery" test in Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967). It was there held that relief could be obtained under 28 U.S.C. § 2255 (1970) by showing "that there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense." 379 F.2d at 116–17. Although the right to effective assistance was still considered essential to assure a fair trial, *id.* at 116, the court stated that even in the absence of gross incompetence, relief should be afforded the petitioner where he is prejudiced by counsel's misadvice, *id.* at 121–22. This consideration of the quality of counsel's services, in conjunction with Judge Fahy's dissent in *Mitchell*, presaged the *DeCoster I* approach. *See* Recent Development, *supra* note 26, at 199.

Finally, in Scott v. United States, 427 F.2d 609 (D.C. Cir. 1970) (per curiam), the court explicitly stated that the right to effective assistance of counsel is not derived from the due process clause of the fifth amendment. Instead, it is a sixth amendment right which has "more stringent standards than the Fifth Amendment." *Id.* at 610. Thus, the procedural-substantive transition was completed.

[56] *See* note 54 *supra* and accompanying text.

[57] 487 F.2d at 1203–04. The following duties were outlined by the *DeCoster I* court:

> *In General*—Counsel should be guided by the American Bar Association Standards for the Defense Function. They represent the legal profession's own articulation of guidelines for the defense of criminal cases.
>
> *Specifically*—(1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client.

tial violation of any of these requirements" is shown, the Government must bear the burden of showing that the error was harmless.[58] Chief Judge Bazelon expressed the view that such a shift in the burden was required by the "constitutionally prescribed" presumption of innocence.[59]

Shortly after *DeCoster I*, the Eighth Circuit addressed the burden of proof issue in *McQueen v. Swenson*.[60] Confronted with an allegation that trial counsel totally failed to investigate the facts surrounding the incident in question,[61] the court applied the "farce and mockery" test and implemented a two-step approach in determining whether the defendant's conviction should be reversed, based on his right to effective assistance of counsel.[62] The threshold question was whether counsel had breached a duty deemed necessary to provide effective assistance.[63] The second step consisted of an analysis of

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(2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. Many rights can only be protected by prompt legal action. The Supreme Court has, for example, recognized the attorney's role in protecting the client's privilege against self-incrimination. . . . Counsel should also be concerned with the accused's right to be released from custody pending trial, and be prepared, where appropriate, to make motions for a pre-trial psychiatric examination or for the suppression of evidence.

(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that "all available defenses are raised" so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.

Id. (citations and footnotes omitted).

[58] *Id.* at 1204.

[59] *See id.*; Bazelon, *supra* note 10, at 824–25. Chief Judge Bazelon indicated that:

> Recognizing that merely specifying the requirements for defense counsel alone will not give force to the sixth amendment, the court in *DeCoster* held further that once a substantial and unjustified violation of any of defense counsel's duties is demonstrated, the court must reverse the conviction unless the Government can show that the defendant was not prejudiced.

Id.

[60] 498 F.2d 207, 214 (8th Cir. 1974). The *McQueen* court invoked the "farce and mockery" test but was careful to indicate that such a standard would not be interpreted so as to allow permissiveness within the profession. *Id.* at 214 & n.10. It was further stated that "[i]t was not intended that the 'mockery of justice' standard be taken literally, but rather that it be employed as an embodiment of the principle that a petitioner must shoulder a heavy burden in proving unfairness." *Id.*

[61] *Id.* at 209.

[62] *Id.* at 218.

[63] *Id.* Regarding this question, the defendant must overcome the Eighth Circuit's presumption "that counsel is competent." *Id.* at 216; *e.g.*, Crowe v. State, 484 F.2d

whether the defendant was prejudiced by counsel's failure to perform that essential duty.[64]

In framing this issue of prejudice, the court relied upon *Chapman v. California*, but only to the extent of recognizing the possibility of harmless constitutional error. Beyond this, the court refused to adopt the harmless error rule set forth in *Chapman* which placed the burden of showing harmlessness upon the party benefiting from the error.[65] The *McQueen* court instead adopted the *Green* approach by placing the initial burden of showing prejudice upon the defendant unless he can demonstrate an impossibility of producing evidence on that issue.[66] Upon such a showing, the burden would shift to the Government.[67] Thus, while both the Eighth and District of Columbia Circuits have held that counsel's total failure to investigate constitutes a sixth amendment violation, their positions differ regarding the placement of the burden of proving prejudice.[68]

Guided by the reasonableness test and accompanying standards established in *DeCoster I*,[69] the majority in *DeCoster II* enumerated a three-step approach to determine whether there was a violation of the sixth amendment right to effective assistance and whether this violation mandated relief.[70] The analysis required a resolution of the following issues: "did counsel violate one of his articulated duties; was the violation 'substantial'; and was the substantial violation 'prejudicial.' "[71]

In addressing the first of these three issues, the court found that

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1359, 1361 (8th Cir. 1973), *cert. denied*, 415 U.S. 927 (1974); United States v. Schroeder, 433 F.2d 846, 852 (8th Cir. 1970), *cert. denied*, 401 U.S. 943 (1971).

[64] 498 F.2d at 218.

[65] *Id.* at 218–19. It was suggested that the *Chapman* rule, placing the burden of proof as to prejudice upon the Government, need not apply to ineffective assistance of counsel cases. Considering this type of constitutional error to be "*sui generis*," the court concluded that an application of the *Chapman* principle "would penalize the prosecution for acts over which it can have no control." *Id.*

[66] *Id.* at 219–20. For a more detailed discussion of the *McQueen* approach as to the burden of proof as to prejudice, see 43 FORDHAM L. REV. 310 (1974).

[67] *Compare* 498 F.2d at 219–20 *with* 434 F.2d at 1115. *See also* notes 44 and 46 *supra* and accompanying text.

[68] *Compare* 498 F.2d at 220 *with* 487 F.2d at 1204. For an excellent discussion of these divergent approaches, see Note, *supra* note 46, at 540–49.

[69] *See* note 57 *supra* and accompanying text.

[70] DeCoster II, slip op. at 11. The court relied on *DeCoster I* which "contemplat[ed] a three step inquiry." *Id.* (citing DeCoster I, 487 F.2d at 1204).

[71] DeCoster II, slip op. at 11. This three-step analysis—discussed generally in DeCoster I, 487 F.2d at 1204—is an appraisal of the "minimal components" of effective assistance. DeCoster II, slip op. at 11.

counsel for the defendant had violated his duty to investigate.[72] This finding was based upon counsel's failure to interview not only the victim, but also Officer Box, co-defendant Taylor, and possible witnesses at the bar and hotel.[73] Moreover, counsel did not interview co-defendant Eley until the trial had already begun,[74] nor did he obtain the preliminary hearing transcripts.[75] Commenting upon these omissions, the court carefully reasoned that the failure to interview is distinguishable from the failure to call a witness; the former is a duty while the latter is discretionary.[76] The crucial distinction lies in the majority's belief that regardless of whether any appropriate defenses could be developed, investigation is essential in gathering the information necessary to properly advise a client.[77] Such informed advice by the attorney would give the client an opportunity to make an intelligent choice between plea bargaining or proceeding to trial and would lessen the possibility of introducing perjured testimony.[78]

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[72] DeCoster II, slip op. at 19. In its inquiry as to the value of investigation and preparation, the court initially focused on the standards set forth by the American Bar Association. *Id.* at 12–13. The American Bar Association takes the following position with regard to investigation:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, COMPILATION § 4.1 (1974) [hereinafter cited as ABA STANDARDS].

Interviewing actual and potential witnesses has been viewed by several circuits as an essential element of effective assistance. *E.g.*, United States v. Fisher, 477 F.2d 300, 303 (4th Cir. 1973); Johns v. Perini, 462 F.2d 1308, 1315 (6th Cir.), *cert. denied*, 409 U.S. 1049 (1972); Gomez v. Beto, 462 F.2d 596, 597 (5th Cir. 1972) (per curiam); United States *ex rel.* Washington v. Maroney, 428 F.2d 10, 14–15 (3d Cir. 1970). For a more detailed discussion of counsel's duty to investigate, see Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1245–49 (1970).

[73] DeCoster II, slip op. at 6, 16–19.

[74] *Id.* at 14.

[75] *Id.* at 19 n.28.

[76] *Id.* at 15. In making this distinction, the court asserted that "there is less need or room for tactical decisions in deciding who not to interview than . . . in deciding who not to call." *Id.* Where the decision is tactical, it will not comprise a substantial violation unless "manifestly unreasonable." *Id.*; *see* Campbell v. United States, 377 F.2d 135, 136 (D.C. Cir. 1966) (per curiam) (motion for new trial based on counsel's failure to call alibi witness should be denied where such a failure is considered a tactical decision).

[77] DeCoster II, slip op. at 19, 22–23.

[78] *Id.*

Having answered the initial issue affirmatively, the *DeCoster II* court proceeded to inquire whether the violation was a substantial one.[79] The implications of the word "substantial" as discussed in its earlier decision, *United States v. Pinkney*,[80] were helpful to the *DeCoster II* court in analyzing the second step.[81] The *Pinkney* court, adhering to the *DeCoster I* standards, had observed that counsel's omissions would be "inconsequential" if the evidence, which had gone undiscovered because of the omission, could not have formulated a viable defense.[82] *Pinkney* then adopted the *DeCoster I* precept that if such a defense would have been available to the defendant but for counsel's omission, the Government must bear the burden of showing a lack of prejudice.[83] *DeCoster II* equated the term "consequential" with "substantial" and distinguished a substantial violation of an articulated duty from a harmful error which would mandate reversal.[84] This distinction, in essence, mandated the second and third steps of the *DeCoster II* test. Thus, if the defendant meets the burden of establishing the substantiality of the violation, the Government's burden of proof as to prejudice—showing that the error was harmless—must be met in order to deny relief.[85]

Commenting upon the defendant's burden of showing a substantial violation, the *DeCoster II* majority indicated that such a burden could, "[i]n certain circumstances," be met by a presumption where the likelihood of an impaired defense exists.[86] The court limited these

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[79] *Id.* at 19–23.

[80] 543 F.2d 908 (D.C. Cir. 1976). In *Pinkney*, the defendant alleged that he was denied effective assistance of counsel as a result of counsel's failure to inform him of certain passages in the prosecution's "allocution memorandum." *Id.* at 913–14. This memorandum linked the defendant to dealings in narcotics, a charge of which he was unaware, and which resulted in a sentence of three to nine years. *Id.* at 911. The defendant further alleged that counsel never disputed the accusations set forth in the memorandum. *Id.* at 914.

[81] DeCoster II, slip op. at 19–20.

[82] 543 F.2d at 916–17 & n.60. In affirming the judgment below, the court noted that the appellant did not provide any evidence which would refute the uncontested allegations made by the Government. *Id.* at 917 & n.60. It therefore reasoned that counsel's omission "was inconsequential." *Id.* at 917 n.60.

[83] *Id.*

[84] DeCoster II, slip op. at 19 & n.32, 20, 23–25. The court stated that it "distinguish[es] between the question of whether counsel's violations were consequential, *i.e.*, impaired the defense, and the question of whether the impairment was harmful, *i.e.*, affected the outcome. [It] avoid[s] using the term 'prejudice' because it blurs these two inquiries." *Id.* at 21 n.32 (citation omitted).

[85] *Id.* at 23.

[86] *Id.* at 20. The evidentiary function of a presumption is "to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent." 9 J. WIGMORE, *supra* note 40, § 2491, at 289 (emphasis in original).

"circumstances" to situations where, in addition to the likelihood of an impaired defense, the defendant would have great difficulty proving actual impairment.[87] In support of invoking such a presumption in the present case, the court analogized the total failure to investigate to those situations where counsel is not appointed until immediately prior to the commencement of the trial.[88] The latter circumstance has already commanded the invocation of a rebuttable presumption of an impaired defense in other circuits.[89] Consequently, the court did invoke a rebuttable presumption in DeCoster's favor.[90] It necessarily follows that the *DeCoster II* majority believed that a total failure to investigate, in all likelihood, would impair a viable defense and pose a problem of proof to the defendant in establishing the impairment.[91] This analysis led the court to conclude that DeCoster's constitutional right to effective assistance of counsel had been violated.[92]

The remaining issue to be addressed was whether this constitutional violation mandated a new trial—contingent upon the Govern-

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In addition to the shift in the burden of introducing evidence, there is a split of authority as to whether a presumption serves to shift the burden of persuasion. Professor Thayer supports the view that this burden never shifts. He maintains "that the burden of going forward with evidence may shift often from side to side; while the duty of establishing [a] proposition is always with the [pleader] . . . ." J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 378 (1898).

Edmund Morgan, however, is of the opinion that a presumption not only shifts the burden of introducing evidence but also establishes the burden of persuasion. Morgan, *Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 67–83 (1933). The former position is presently the view in many jurisdictions. *See* MODEL CODE OF EVIDENCE rule 704, Comment on Paragraph (2), at 314–15 (1942).

[87] DeCoster II, slip op. at 20. This prerequisite is in accord with existing evidentiary principles:

> Generally . . . the most important consideration in the creation of presumptions is probability . . . . Usually . . . a presumption is based not only upon the judicial estimate of the probabilities but also upon the difficulties inherent in proving that the more probable event in fact occurred.

MCCORMICK, *supra* note 40, § 343, at 807.

[88] DeCoster II, slip op. at 21.

[89] *See, e.g.*, Garland v. Cox, 472 F.2d 875, 878–79 (4th Cir.), *cert. denied*, 414 U.S. 908 (1973). The majority further believed that where a conflict of interest clearly exists, a presumption of an impaired defense should similarly be imposed. DeCoster II, slip op. at 21. Both the late appointment situation and the existence of an indisputable conflict of interest were considered by Chief Judge Bazelon to be " 'inherent[ly] prejudic[ial].' " *Id.*

[90] DeCoster II, slip op. at 20–23.

[91] *See* DeCoster II, slip op. at 20–21. Chief Judge Bazelon noted that "[i]nvestigation is so central to the defense function that, except in the most extraordinary circumstances, a gross violation of the duty to investigate will adversely affect a defendant's rights." *Id.* at 21.

[92] *See id.*

ment's failure to establish harmlessness.[93] This burden, which requires a quantum of proof beyond a reasonable doubt,[94] is a difficult one, especially where a presumption allows the appellant to forego proffering pertinent evidence which supposedly would have been discovered but for counsel's lack of diligence.[95] It is important to note, however, that where the appellant must and does meet his burden of showing a substantial violation without benefit of a presumption, the Government's burden, as viewed by the majority, "will not be an onerous [one]: by comparing what the defendant shows should have been produced with the evidence that was adduced at trial, it should be readily apparent whether a reasonable doubt exists."[96] The extremely difficult burden placed upon the Government in this situation, where the defendant had benefited from a presumption, was deemed necessary by the majority in order to prevent the defendant from being punished for the wrongdoing of another—his appointed counsel.[97]

Judge MacKinnon, dissenting in *DeCoster II*, rejected the majority's placement of the burden of proof as to prejudice, maintaining that not only did it significantly interfere with the privileged attorney-client relationship, but that it was also totally unwarranted.[98] The thrust of the dissent's argument was directed at the majority's interpretation of the terms "substantial," "consequential" and "prejudicial." Judge MacKinnon believed that these words were given new meaning by the majority in order to circumvent prior case law which had placed the burden of showing prejudice on the defendant.[99] Proposing that the words "substantial," "consequential" and "prejudicial" are synonymous, the dissent adhered to the view that the defendant's burden of showing a substantial violation is tantamount to requiring a showing of prejudice.[100]

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[93] *Id.* at 23.

[94] *Id.* at 24. The *DeCoster I* decision failed to establish the quantum of proof required by the Government to show lack of prejudice. One writer, commenting upon that decision, specifically alluded to the absence of this quantum of proof and indicated that "[b]ecause of this lack of precision the standard may be subject to entirely inconsistent applications." Recent Development, *supra* note 26, at 207–08.

[95] DeCoster II, slip op. at 24.

[96] *Id.* at 24.

[97] *Id.* at 25.

[98] *Id.*, dissenting op. at 2. Prior to commenting upon the substantive issues in question, Judge MacKinnon criticized the majority's attempt to change the "settled law of this circuit" without the case being heard *en banc*. *Id.*, dissenting op. at 1. He believed that "absent an *en banc* decision . . . both opinions which switch the burden of proof are nullities." *Id.*

[99] *Id.*, dissenting op. at 53–54.

[100] *Id.* In addition to discussing the case law within the circuit which had estab-

In addition to the criticism of the majority's semantics, the dissent asserted that the majority-imputed presumption was really a recognition of inherent prejudice, devised to place the burden of showing a lack of such prejudice upon the Government.[101] Judge MacKinnon, however, considered the term "inherent prejudice" to be ambiguous and emphasized that a claim of inherent prejudice, without a showing by the defendant of a serious impairment, should not be enough to obtain relief.[102] For these reasons, he criticized the majority's analogy of *DeCoster II* to situations where counsel's appointment is delayed until the eve of trial, and stressed that the facts

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lished the burden of proof as to prejudice as resting with the defendant, *see generally* note 54 *supra* and accompanying text, the dissent relied upon several Supreme Court holdings in developing what it believed to be the controlling principles on the allocation of the burden. Said decisions were based upon claims other than a denial of the right to effective assistance. *Id.*, dissenting op. at 48–50. In particular, the dissent cited Murphy v. Florida, 421 U.S. 794, 796–97 (1975), in which the defendant alleged that the trial setting and the process of selecting the jury were prejudicial to his case. DeCoster II, dissenting op. at 50. In *Murphy*, the Court held that the burden of establishing such prejudice was on the defendant. 421 U.S. at 803. In relying upon this decision, Judge MacKinnon indicated that "[w]ith regard to the sixth amendment issue of effectiveness of counsel, there [was] no possible reason for holding that the rule that defendant show prejudice mysteriously discontinues." DeCoster II, dissenting op. at 50.

With this as his basis, Judge MacKinnon proceeded to attack the majority's use of the terms substantial, consequential and prejudicial:

> The key to ineffectiveness of counsel, per the majority in *DeCoster I*, is "substantial" violation of the precepts. Now we are told here in *DeCoster II* that "substantial" means "consequential." What an exercise in elementary semantics. What my colleagues are trying to do is to skate around the "prejudicial" requirement and make it appear as though they have invented a new standard. But their discovery in reality merely adds up to a failure to recognize that when they are talking about "substantial" and "consequential" they are doing nothing more than describing essential ingredients of "prejudice." To have prejudice the causative factor must be "substantial" and sufficiently related to the result in a causal relationship so that the result may correctly be considered a consequence of that factor, i.e., "consequential." Actually, "substantial" and "consequential" in the abstract, and divorced from "prejudice," as my colleagues apparently try to isolate them are meaningless. They are merely adjectives standing alone. Error that is just "substantial" and not "prejudicial" is of no moment. And error that is "consequential" (and what error is not a consequence of some causative factor?), without being prejudicial, is immaterial. Thus, to be relevant at all, the neglect must be of sufficient substance so that it may be found to be both a consequence of the alleged failure and prejudicial.

Id., dissenting op. at 53–54 (citation omitted) (italics in original).

[101] DeCoster II, dissenting op. at 30–34. Judge MacKinnon opined that the majority had transformed the general guidelines established in *DeCoster I* into duties which are to be closely scrutinized by the judiciary. Moreover, it appeared to him that the majority considered a breach of one of these enumerated duties to approach an "instantaneous constitutional violatio[n]." " *Id.*, dissenting op. at 31.

[102] *Id.*, dissenting op. at 33–34.

must be considered and prejudice proven in each case *"except in exceptional circumstances."*[103]

In furtherance of the proposition that the circuit's own precedent supported placing the burden of showing prejudice upon the defendant, the dissent set forth an alternative interpretation of the *Pinkney* decision.[104] The *Pinkney* court had considered the allegation of ineffective assistance of counsel as it would any other motion for a new trial—the determinative factor being newly discovered evidence.[105] Judge Robinson, writing for the majority, had equated the defendant's burden of disclosing newly discovered evidence with the *DeCoster I* showing of substantiality.[106] After this disclosure by the defendant, "the Government's burden is to demonstrate lack of prejudice therefrom."[107]

The dissent in *DeCoster II* believed the importance of the *Pinkney* analysis to be the omission of any "mention of absolving [the] defendant of the initial duty to show *prejudice*—because no such absolution is possible."[108] The Government's burden should thus be relegated to that of "going forward" after a showing of prejudice by the

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[103] *Id.*, dissenting op. at 34 (emphasis in original). The dissenting opinion criticized the majority's reliance upon this analogy because its ultimate effect is to "ignor[e] the facts here present." *Id.*, dissenting op. at 33. The dissent further maintained that the determination of whether counsel's violation has impaired a defense is a subjective one. For this reason, a substantial violation cannot be "inherent or obvious [but] must be proved." *Id.*, dissenting op. at 34; *see* Coles v. Peyton, 389 F.2d 224, 230 (4th Cir.) (Craven, J., dissenting), *cert. denied*, 393 U.S. 849 (1968).

Inherent prejudice has been discussed by the Supreme Court with specific reference to the late appointment of counsel. The Court maintained that

> we are not disposed to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel or to hold that . . . an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel.

Chambers v. Maroney, 399 U.S. 42, 54 (1970) (italics in original).

Chambers has been interpreted to "permi[t] adoption of either a presumption or a totality of the circumstances approach." Garland v. Cox, 472 F.2d 875, 877 (4th Cir.), *cert. denied*, 414 U.S. 908 (1973). Consequently, there is some diversity on the issue of whether late appointment constitutes an inherently prejudicial violation. *Compare* 472 F.2d at 879 (stating that "[w]here a petitioner demonstrates late appointment of counsel, we will continue to employ the presumption of ineffective assistance of counsel") *with* Rastrom v. Robbins, 440 F.2d 1251, 1252–54 (1st Cir.), *cert. denied*, 404 U.S. 863 (1971) (recognizing that counsel's experience is one of several variables that must be considered in determining the amount of time necessary to prepare a case, the presumptive approach is rejected in favor of a totality of the circumstances test).

[104] DeCoster II, dissenting op. at 41–48.

[105] 543 F.2d at 916; *see* note 53 *supra* and accompanying text.

[106] 543 F.2d at 916 & n.59, 917 & n.60.

[107] *Id.* at 916 n.59.

[108] DeCoster II, dissenting op. at 47 (emphasis in original).

defendant.[109] Continuing this analysis, Judge MacKinnon maintained that if the newly created "substantiality" test is, in fact, equivalent to the requisite of showing prejudice, then the *Chapman* harmless constitutional error rule is inapplicable.[110] This followed because *Chapman* dealt with a situation where a substantial violation of the constitution had already been shown to exist, whereas in *DeCoster II*, the existence *vel non* of a constitutional violation was at issue.[111]

The placement of the burden of proof as to prejudice upon the Government appears to underscore the importance of the right to effective assistance of counsel. Yet, closer analysis of the court's three-step approach reveals that it is only where counsel has egregiously violated a duty that the defendant's constitutional right mandates a shift in the burden of proving prejudice. This result occurs because the issue of prejudice is not reached unless the defendant meets the burden of showing the substantiality of the violation.[112] The defendant is relieved of this burden where "the magnitude of counsel's violation and its probable effect" are such that a constitutional violation can be presumed.[113] Thus, an egregious violation, likely to have impaired a defense, will trigger a presumption of substantiality and allow the court to reach the third step which requires the Government to bear the burden of showing a lack of prejudice.[114]

Although the majority clearly distinguishes between the burden of proving the substantiality of the violation and the burden of proof as to prejudice, the practical application of the second step may be

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[109] *Id.*

[110] *Id.*, dissenting op. at 55–57.

[111] *Id.*, dissenting op. at 55. For a detailed discussion of the *Chapman* principle, see notes 38–41 *supra* and accompanying text.

[112] *See* DeCoster II, slip op. at 23. To view the defendant's right to effective assistance as not being significantly altered by the *DeCoster II* approach is to equate the term "substantially" with "prejudice." In effect, when counsel's violation is presumed to be substantial, the burden of introducing evidence on the issue of prejudice is placed upon the Government. However, in the absence of a presumption, this burden remains with the defendant. For a more detailed discussion of the use of the terms substantial and prejudicial, compare note 99 *supra* and accompanying text with DeCoster II, slip op. at 20 n.32.

[113] DeCoster II, slip op. at 23.

[114] *See id.* at 20–23. The language of the majority opinion clearly limited the imposition of a presumption of substantiality to those circumstances where the likelihood of an impaired defense is apparent. *Id.* This limitation is further emphasized by the court's reliance upon cases in which a late appointment of counsel gave rise to a presumption of an impaired defense. *Id.* at 21 & n.33. The court explained that it was counsel's total failure to investigate which made the analogy of the existing facts to late appointment cases appropriate. *Id.* at 21. For a discussion of the evidentiary principles underlying the application of a presumption, see notes 86–87 *supra* and accompanying text.

considered the equivalent of an allocation of the burden of proof as to prejudice. The placement of this burden would be contingent upon the presence or absence of a rebuttable presumption of an impaired defense.[115] Therefore, the Government will be called upon to meet the burden of proving a lack of prejudice only if the defendant succeeds in overcoming the difficulties of proving an "impaired defense," or where circumstances dictate that such an impairment should be presumed.[116] In effect, then, the second step successfully eliminates frivolous claims of ineffective assistance while protecting the defendant where there is an obvious impairment of a defense. In any event, whether substantiality must be proved by the defendant or is presumed by the court, the majority's position is that a substantial violation is essentially harmful per se. Though the per se approach was not expressly adopted, the court's position is compatible with a per se approach since the Government is required to show a lack of prejudice beyond a reasonable doubt.[117]

With respect to those circuits which distinguish between the issues of competency and prejudice, a conflict exists as to which party bears the burden of proof as to prejudice.[118] For example, the Dis-

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[115] *See* note 112 *supra* and accompanying text.

[116] *See* DeCoster II, slip op. at 23.

[117] *Id.* at 24. One commentary has discussed *Chapman* in connection with the proposition that a finding of ineffective assistance of counsel can never be harmless error. 83 HARV. L. REV. 814, 816 & n.18, 820–21 (1970). The relevant language in the *Chapman* decision is the following:

> We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy v. Connecticut*. . . . There we said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." . . . Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, this statement in *Fahy* itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention not to treat as harmless those constitutional errors that "affect substantial rights" of a party.

386 U.S. at 23 (footnote and citations omitted) (italics in original).

The above commentary advocated automatic reversal where counsel has been found to be ineffective and further reasoned that it is impossible to determine the import that missing evidence would have on the outcome of a prosecution. Because of this difficulty in determining whether "the error was harmless," automatic reversal was deemed necessary. 83 HARV. L. REV., *supra* at 821. For a more detailed discussion of the concept of automatic reversal when precipitated by a constitutional error, see Saltzburg, *supra* note 16, at 999–1002, 1018 (suggestion that "[r]equiring the prosecution to overcome a presumption of prejudice is tantamount to mandating automatic reversal whenever there are errors during trial"); Mause, *supra* note 39, at 540–47.

[118] *Compare* DeCoster II, slip op. at 23–25 *and* Coles v. Peyton, 389 F.2d at 226 *with* United States *ex rel.* Green v. Rundle, 434 F.2d at 1115 *and* McQueen v. Swenson,

trict of Columbia Circuit and the Fourth Circuit place the responsibility to demonstrate a lack of prejudice upon the Government while the Third and Eighth Circuits place the burden of proof as to prejudice upon the defendant unless a change in circumstances makes it impossible for this burden to be met.[119] Despite this obvious conflict, it is questionable whether these divergent approaches necessarily mandate differing results.

For example, application of the Third Circuit approach, although placing the threshold burden of showing minimal prejudice upon the defendant,[120] is not dissimilar to the position of the *DeCoster II* court. Illustrative of the application of the Third Circuit approach is *United States ex rel. Moore v. Russell*[121] where the petitioner alleged that counsel's failure to produce an alibi witness was prejudicial.[122] The court denied habeas corpus relief, holding that the petitioner failed to prove that the missing evidence would have been helpful.[123] If the *DeCoster II* test were to be applied to the facts of this case, the same result could be reached. Although calling a witness is not one of the specific duties articulated by the ABA[124] or *DeCoster II*,[125] the court may still consider this failure to be a breach of a duty owed to the defendant because such enumerated duties are only guidelines.[126] However, under *DeCoster II*, the defendant must show, in addition, that the failure to call a particular witness substantially impaired his defense.[127] Thus, since the circumstances in *Russell* did not warrant a presumption of an impaired defense, it can be assumed

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498 F.2d at 214, 220. For a detailed discussion of the burden of proof as to prejudice as addressed in the above cases, see notes 42–68 *supra* and accompanying text.

[119] *E.g.*, United States v. Hurt, 543 F.2d 162, 168 (D.C. Cir. 1976); Thomas v. Wyrick, 535 F.2d 407, 413–14 (8th Cir. 1976); United States *ex rel.* Johnson v. Johnson, 531 F.2d 169, 177 (3d Cir.), *cert. denied*, 425 U.S. 997 (1976); United States v. Crowley, 529 F.2d 1066, 1070 (3d Cir.), *cert. denied*, 423 U.S. 876 (1976); Stokes v. Peyton, 437 F.2d 131, 137 (4th Cir. 1970).

[120] 434 F.2d at 1115; *see* notes 42–46 *supra* and accompanying text.

[121] 330 F. Supp. 1074 (E.D. Pa. 1971).

[122] *Id.* at 1078–79.

[123] *Id.* at 1079–80. This finding was based upon testimony at a post conviction hearing establishing that the alibi witness was unreliable, in conjunction with the identification of the petitioner by two victims of the robbery in question. *Id.*

[124] *See* ABA STANDARDS, *supra* note 72, § 5.2(b). The American Bar Association clearly provides that "[t]he decisions on what witnesses to call . . . are the exclusive province of the lawyer after consultation with his client." *Id.*

[125] DeCoster II, slip op. at 10–11. For the articulated duties adopted by *DeCoster II*, see note 57 *supra*.

[126] DeCoster II, slip op. at 11. For a discussion of the comparison of a failure to call a witness with the failure to interview, see note 76 *supra* and accompanying text.

[127] DeCoster II, slip op. at 19–20.

that a judge of the District of Columbia Circuit could similarly find that the defendant has failed to show that the testimony of the alibi witness would have established a valid defense.

A further illustration of the comparison of these divergent tests is *United States ex rel. Hart v. Davenport*.[128] In this Third Circuit case, the denial of habeas corpus was reversed because of defense counsel's conflict of interest. Only a minimal showing by the petitioner was required to find counsel's representation constitutionally defective.[129] This threshold burden did not require specific proof of prejudice, but rather was satisfied by a showing of possible prejudice regardless of its remoteness.[130] Under the *DeCoster II* test, the facts of this case could possibly give rise to a presumption of an impaired defense.[131] The record established obvious conflicting interests, and showed clearly that counsel did not attempt to differentiate the petitioner's involvement in the crime from that of his codefendants.[132] Obviously, any negation of one defendant's connection would logically emphasize

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[128] 478 F.2d 203 (3d Cir. 1973).

[129] *Id.* at 210–11. The petitioner, convicted of possessing unlawful lottery slips, engaging in bookmaking and operating a lottery, alleged that he was deprived of his right to effective assistance of counsel. This claim was based upon the fact that one attorney represented the petitioner in addition to five codefendants. *Id.* at 204. Furthermore, the record indicated that counsel's closing argument failed to differentiate the involvement of the petitioner from that of his codefendants. Therefore, because the circumstances were such that an exoneration of any defendant(s) would necessarily implicate the others, a conflict of interest was apparent. *Id.* at 208–09.

[130] *Id.* at 210. In support of this minimal threshold burden, the *Hart* court relied upon Walker v. United States, 422 F.2d 374 (3d Cir.) (per curiam), *cert. denied*, 399 U.S. 915 (1970) which held "[t]here must be some showing of a possible conflict of interest or prejudice, *however remote*, before a reviewing court will find the dual representation constitutionally defective." *Id.* at 375 (emphasis added). This minimal standard of prejudice was applied with deference being given to the *Moore* standard of normal competency and the *Green* approach as to the placement of the burden of proof as to prejudice. 478 F.2d at 210; *see* notes 32–37, 42–47 *supra* and accompanying text.

[131] This follows initially from the general duty counsel owes to his client to "be guided by the American Bar Association Standards for the Defense Function . . . ." DeCoster II, slip op. at 10. Those standards provide in part:

> Conflict of Interest.
>
> (a) At the earliest feasible opportunity defense counsel should disclose to the defendant any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him.
>
> (b) . . . [A] lawyer . . . should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another.

ABA STANDARDS, *supra* note 73, § 3.5, at 123.

A presumption of an impaired defense may be attributable to counsel's apparent awareness of the circumstances giving rise to the conflict; his refusal to terminate such joint representation; and the inherently prejudicial effect this situation is likely to have upon the defendant. *See* note 89 *supra* and accompanying text.

[132] 478 F.2d at 208.

the extent to which his codefendant was responsible for the criminal activity.[133] Under these circumstances, the flagrancy of counsel's disloyalty may be sufficient to presume a substantial violation and place the burden of showing a lack of prejudice upon the prosecution.[134] Thus, despite the conflict among the circuits, a degree of compatibility does exist between these divergent approaches.

Aside from the burden of proof as to prejudice, the *DeCoster II* court indirectly raised two subsidiary issues: specifically, whether a breach by counsel should be distinguished from a governmental error, such as late appointment, and whether privately retained counsel should be distinguished from appointed counsel. By analogizing the present case to a situation where there exists a late appointment of counsel, the majority implies that either a breach by counsel or a governmental error should be afforded the same analysis in order to protect the defendant's constitutional right. This viewpoint obtains despite the possibility of unjustly burdening the prosecution in the latter situation.[135]

With regard to the "retained-appointed" distinction, the traditional view has been that privately retained counsel could not be the subject of an ineffectiveness claim.[136] *DeCoster II* appears to disregard this distinction by adopting the contemporary precept that it is immaterial whether counsel was appointed or retained when considering his effectiveness.[137] This position is reflected by the fact that

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[133] *Id.* at 208–09.

[134] *See* notes 88–89 *supra* and accompanying text.

[135] DeCoster II, slip op. at 21. This view visibly relegates the violation itself to a matter of secondary importance while emphasizing the ultimate concern of promoting justice. The Supreme Court has similarly stressed the sum and substance of our adversarial process which is to punish the guilty while protecting the rights of the parties. Herring v. New York, 422 U.S. 853, 862 (1975). *But cf.* Caputo v. Henderson, 541 F.2d 979, 984 (2d Cir. 1976) (in determining the validity of a guilty plea where the defendant was misinformed as to his possible sentence, the court held that "where governmental error is responsible for the misinformation, the government must bear the burden of proof on the issue of reliance").

[136] *E.g.*, United States *ex rel.* Darcy v. Handy, 203 F.2d 407, 426 (3d Cir. 1953), *aff'd*, 351 U.S. 454 (1956); Polur, *Retained Counsel, Assigned Counsel: Why the Dichotomy?*, 55 A.B.A.J. 254, 254 & nn.2 & 3 (1969). In *Darcy*, the court attributed counsel's errors to the defendant through the concept of agency and thus precluded his ineffective assistance claim because of this implication. 203 F.2d at 426. For a more detailed discussion of this agency theory, see Note, *supra* note 46, at 510 n.11. This commentary continues with a discussion of an alternative theory of "state action" which distinguished retained from appointed counsel. *Id.* It notes that "[s]ome courts have concluded that counsel's incompetency is constitutionally significant only when there is positive state action, most notably in the form of court appointment of counsel." *Id.*

[137] *See* DeCoster II, slip op. at 10–11. For cases which adopt this contemporary precept, see United States v. McCord, 509 F.2d 334, 351–52 (D.C. Cir. 1974) (en banc),

regardless of his status, counsel must comply with those duties promulgated by the American Bar Association and the *DeCoster I* decision.[138] Consequently, only those factors directly influencing, or attributable to, counsel's conduct should be relevant to determining the issue of competency.

The ultimate issue is whether the Supreme Court should grant certiorari in a case similar to *DeCoster II* in order to establish a uniform standard of competence, and if so, whether the Court also should proceed to settle the conflict among the circuits as to who must bear the burden of proof as to prejudice. Recent developments within the Eighth Circuit indicate that a uniform standard of competence, standing alone, would not have a significant impact upon this area of the law. That circuit has made a transition from a "farce and mockery" test to a reasonableness standard,[139] but because the former standard had been flexibly applied, the transition lacked import.[140]

Because each standard is subject to being implemented differently in each jurisdiction, the impact of a uniform standard would be negligible unless the Supreme Court were to enumerate specific duties or precisely define the elements of effective representation as required by the sixth amendment. The District of Columbia Circuit has certainly taken the initiative in this area through its particularized analysis of counsel's duties. This model should perhaps serve as an

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cert. denied, 421 U.S. 930 (1975); Fitzgerald v. Estelle, 505 F.2d 1334, 1336 (5th Cir.), *cert. denied*, 422 U.S. 1011 (1975); Goodwin v. Cardwell, 432 F.2d 521, 522 (6th Cir. 1970); United States *ex rel.* Schultz v. Twomey, 404 F. Supp. 1300, 1305 (N.D. Ill. 1975). *Contra*, Williams v. Estelle, 416 F. Supp. 1073, 1078 (N.D. Tex. 1976) (privately retained and court appointed counsel are differentiated by the Texas Court of Criminal Appeals). *See generally* Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1284 (1975) (where the author stated that "[p]ublic defenders are probably more vulnerable than private attorneys to post-conviction proceedings alleging the ineffective assistance of counsel").

[138] DeCoster II, slip op. at 10–11.

[139] *Compare* Thomas v. Wyrick, 535 F.2d 407 (8th Cir. 1976) *and* McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974) *with* United States v. Easter, 539 F.2d 663 (8th Cir. 1976) *and* Crimson v. United States, 510 F.2d 356 (8th Cir. 1975).

[140] *See* 498 F.2d at 214. The *McQueen* court evaluated its standard as follows:

> Stringent as the "mockery of justice" standard may seem, we have never intended it to be used as a shibboleth to avoid a searching evaluation of possible constitutional violations; nor has it been so used in this circuit. It was not intended that the "mockery of justice" standard be taken literally, but rather that it be employed as an embodiment of the principle that a petitioner must shoulder a heavy burden in proving unfairness.

Id.

elementary guideline, capable of being developed further by the Supreme Court.

Although it would be possible for the Supreme Court to attempt to definitively resolve the inconsistencies which exist among the circuit courts with respect to the placement of the burden of proof, this issue is not of critical importance. As has been demonstrated, the same result can be obtained whether the burden of proof as to prejudice is placed on the Government or the defendant.[141] Rather, any decision in this area should concentrate on clearly enunciating the standards by which the effectiveness of counsel is to be judged.

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[141] *See* text accompanying notes 131–34 *supra*.

EDITORIAL NOTE

As of the date of publication, the United States Court of Appeals for the District of Columbia Circuit had reheard the *DeCoster* case *en banc*; decision was still pending.