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## The Attempt to Improve Criminal Defense Representation

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# THE AMERICAN CRIMINAL LAW REVIEW

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## THE ATTEMPT TO IMPROVE CRIMINAL DEFENSE REPRESENTATION

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### I. INTRODUCTION

Improvement of criminal defense representation is one of the most critical problems that faces the criminal justice system. The problem is extensive; some attorneys are frequently ineffective and probably all attorneys are occasionally inadequate because of error, overwork, personal problems or ethical conflicts.<sup>1</sup>

The defendant's only remedy against his attorney's ineffectiveness is through direct appeal or collateral post-conviction attack. This article discusses the reasons why courts cannot improve defense representation through these avenues of review. Deep disagreement among judges about the purpose of post-conviction review has crippled any attempt at improvement.<sup>2</sup> The key unresolved question is

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<sup>1</sup> General statistics on the number of appeals alleging ineffective representation are unavailable, but a study of federal habeas corpus claims in one district court indicates that ineffective representation heads the list of grounds for prisoner requests for relief. See Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 331 (1973).

<sup>2</sup> Compare, e.g., the majority opinion by Judge Prettyman with the dissenting opinion by Judge Fahy in *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958).

One trial court judge has concluded, in one of the best, yet most troubled analyses of his Circuit's search for a standard, that ineffective representation presents the most difficult issue in criminal procedure. See *Garton v. Swenson*, 417 F. Supp. 697, 714 (W.D. Mo. 1976) (Oliver, J.). See also, *United States ex rel. Mandrier v. Hewitt*, 409 F. Supp. 38, 42 (W.D. Pa. 1976) (determining the "adequacy of pre-trial preparation . . . is often . . . illusive and difficult . . . where memories have dimmed . . . and no evidence exists to determine the degree of preparation").

Many reasons explain why courts are reluctant to set a high standard of representation. There may not be enough competent attorneys to appoint to represent indigents. See *Proposed Amendments to the Bail Reform Act of 1966: Hearings on PL 89-465 Before the Subcomm.*

whether the standard for testing an attorney's representation should be designed simply to provide a fair verdict for the individual defendant,<sup>3</sup> or whether it should be designed to prod attorneys to perform better and to encourage trial courts to police counsel's representation.

Deciding the purpose and limits of post-conviction review has thrown the courts into turmoil. The United States Supreme Court has eschewed its responsibility to the lower courts to fashion a constitutional standard; its decisions have even complicated matters by reducing the ways to raise the issue on appeal.<sup>4</sup> The federal courts of appeal differ on the proper standard to apply<sup>5</sup> and some state courts ignore federal law.<sup>6</sup> Lower courts implore their superiors for guid-

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*on Const. Rights of the Senate Judiciary Committee*, 91st Cong. 1st Sess. (1969) (testimony of Chief Judge Hart of U.S. District Court for the District of Columbia). Judges may fear that a higher standard must be applied retroactively, because the attorney's effectiveness bears on the truth-determination process. Retroactive application might require reversal of many convictions on collateral attack. Judges may also not know what to require of attorneys. Questions of ineffective representation could be divided into three parts, with different standards of review applied to each. First, the attorney might fail to protect his client in some matter, like bail or sentencing, that is not part of the guilt-determination process. Second, the attorney might fail to prepare for trial by not consulting with his client, by not investigating the case, or by not making relevant motions. Third, the attorney might make a tactical error during trial. Failures of the first type would not warrant reversal of the conviction, but could justify disciplining the attorney or barring him from receiving appointments. Errors of the second type are the focus of this article. Errors of the third type would not usually require reversal; see note 36 and accompanying text, *infra*.

<sup>3</sup> What constitutes a "fair" verdict is open to interpretation. Is the verdict "fair" if it appears to be reliable? Or, is it "fair" only if the defendant presented his best case and best attack on the government's case?

<sup>4</sup> See notes 105-116 and accompanying text, *infra*.

The Court is aware of the problem of ineffective representation. Chief Justice Burger has written about the appalling ineffectiveness of many trial attorneys. See Burger, *The Special Skills of Advocacy*, 42 *FORDHAM L. REV.* 227 (1973); Burger, *A Sick Profession*, 5 *TULSA L.J.* 1 (1968).

<sup>5</sup> See notes 28-30 and accompanying text, *infra*. Decisions by panels within some courts of appeal, like the Eighth Circuit, are even inconsistent. In some decisions, the circuit tested whether the attorney's conduct was a "farce." See, e.g., *Cardarella v. United States*, 375 F.2d 222, 230 (8th Cir. 1967). In other cases, the court focused on whether the attorney was reasonably competent. See, e.g., *McQueen v. Swenson*, 498 F.2d 207, 215 (8th Cir. 1974). The circuit then welded the two tests together, defining "farce" in terms of reasonable competency, without acknowledging that the tests were different or that the circuit's decisions were ambiguous. See *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976). Judge Oliver painfully discusses the history of the circuit's opinions in *Garton v. Swenson*, 417 F. Supp. 697, 708 (W.D. Mo. 1976) (noting use of at least four different tests).

<sup>6</sup> See *Berry v. Cowan*, 497 F.2d 1274, 1276 (6th Cir. 1974) (Kentucky state courts criticized for adhering to "farce" test; *Garton v. Swenson*, 417 F. Supp. 697, 709 (W.D. Mo. 1976) (state courts in Eighth Circuit either ignored or disregarded Circuit's decision); *Woody v. United States*, 369 A.2d 592 (D.C. 1977) (applying test rejected by the U.S. Court of Appeals for the District of Columbia Circuit in *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973)).

ance,<sup>7</sup> and individual judges viciously criticize their colleagues.<sup>8</sup> Despite constant appellate review and examination by commentators, the answers to basic questions are still unsettled.<sup>9</sup> What sort of representation is constitutionally required? When should the defendant's conviction be reversed for his attorney's ineffectiveness? How does the defendant raise the issue after his conviction? And how does he develop the information needed to evaluate his claim?

This article uses *United States v. DeCoster*,<sup>10</sup> a provocative decision by the U.S. Court of Appeals for the District of Columbia Circuit, as a window through which to observe the interplay of tensions<sup>11</sup> in the attempt to answer these unsettled questions. The history of *DeCoster* illustrates the uncertainty of post-conviction review. As of this writing, *DeCoster* has reached the District of Columbia Circuit twice. In *DeCoster I*, decided in 1973, a panel remanded the case for an evidentiary hearing on defense counsel's ineffectiveness. In *DeCoster II*, decided in 1976, that panel found counsel's representation ineffective and reversed the district court's contrary finding. The

<sup>7</sup> See, e.g., *Garton v. Swenson*, 417 F.Supp. 697, 706 (W.D. Mo. 1976) (Oliver, J.). See also *Thomas v. Wyrick*, 535 F.2d 407, 420 (8th Cir.) (Henley, J., dissenting) (agreeing with Oliver, J.), cert. denied, 429 U.S. 868 (1976).

<sup>8</sup> See, e.g., *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960) (Cameron, J., dissenting), rehearing en banc, 289 F.2d 928 (5th Cir. 1961) (Hutcheson, J., dissenting); *Mitchell v. United States*, 259 F.2d 787, 794 (D.C. Cir.) (Fahy, J., dissenting), cert. denied, 358 U.S. 850 (1958).

<sup>9</sup> Articles cataloging the cases include: *Finer, Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973); *Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964).

Other articles include: *Bines, Remedying Ineffective Representation in Criminal Cases: Departures From Habeas Corpus*, 59 U. VA. L. REV. 927 (1973); *Flynn, Adequacy of Counsel: The Emerging Fair Trial Issue For The Seventies?*, 47 N.Y. ST. B.J. 19 (1975); *Grano, The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970); *Lee, Right to Effective Counsel: A Judicial Heuristic*, 2 AM. J. CRIM. L. 277 (1974); *Comment, Ineffective Assistance of Counsel: Who Bears the Burden of Proof?*, 29 BAYLOR L. REV. 29 (1977); *Note, Ineffective Assistance of Counsel and the Harmless Error Rule: The Eighth Circuit Abandons Chapman*, 43 GEO. WASH. L. REV. 1384 (1975); *Note, Inadequate Representation of Counsel in Criminal Cases: The Need for a New Approach*, 9 U.S.F.L. REV. 166 (1974).

Influential Courts of Appeals judges have also written about the issue of ineffective representation. See *Bazelon, The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811 (1976) [hereinafter *The Realities*]; *Bazelon, The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973) [hereinafter *Defective Assistance*]; *Kaufman, Does the Judge Have a Right to Qualified Counsel*, 61 A.B.A.J. 569 (1975); *Kaufman, The Court Needs a Friend in Court*, 60 A.B.A.J. 175 (1974); *Tamm, Advocates can be Taught—the NITA Way*, 59 A.B.A.J. 625 (1973).

<sup>10</sup> 487 F.2d 1197, (D.C. Cir. 1973) [hereinafter *DeCoster I*] rehearing, No. 72-1283 (D.C. Cir. filed Oct. 19, 1976), [hereinafter *DeCoster II*], vacated March 17, 1977 (*en banc*), consolidated for *en banc* reconsideration with *United States v. Wood*, No. 73-1629 (D.C. Cir., filed June 5, 1973) (ineffective representation claim based on attorney's alleged failure to present insanity defense as forcefully as possible), reargued May 26, 1977.

<sup>11</sup> The United States Court of Appeals for the District of Columbia Circuit [hereinafter "District of Columbia Circuit"] is the federal court of appeals. That court is different from the

court, sitting *en banc*, then vacated *DeCoster II*, ordered that opinion not published, and is currently considering the appeal.

Although prediction is risky, *DeCoster II* will probably not survive *en banc* review. Yet the *DeCoster II* opinion deserves review because it provides the best approach yet fashioned to improve defense representation through the post-conviction standard.<sup>12</sup> It is also important to analyze *DeCoster* because the case concerns an attorney's failure to investigate. Of the many ways attorneys act ineffectively, the failure to investigate is the most difficult error to detect and remedy. Inadequate investigation is rarely apparent to the judge who hears the trial, or to the appellate court that reviews the trial transcript. Yet the failure to investigate can devastate the defendant's ability to contest the government's evidence, or to present his own case.

Even if *DeCoster II* survives review, the decision may not improve defense representation. It is still difficult for the defendant to raise the issue of ineffective counsel on appeal, and to gather the evidence necessary to win reversal at a post-conviction hearing. Post-conviction review probably cannot force an attorney to provide effective pre-conviction representation. As a result, courts must devise some means to prevent ineffectiveness before the verdict is announced.<sup>13</sup>

## II. INEFFECTIVE REPRESENTATION: HISTORY OF THE STANDARD AND THE NEED FOR FURTHER DEFINITION

The Supreme Court has been reluctant to define a standard to test effective representation, preferring instead to address the problem by persuasion and admonition.<sup>14</sup> The Court trumpeted the importance of

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Court of Appeals for the District of Columbia which is the appellate court for the local Superior Court in the District of Columbia.

<sup>12</sup> Whatever its outcome, the decision will be a benchmark for other courts to consider in determining what standard to choose. See *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975) (relying on *DeCoster I* in rejecting "farce" test). Even if it is affirmed, *DeCoster I* and *II* will have little precedential value because Congress has stripped the D.C. Circuit of habeas corpus jurisdiction over convictions from the Superior Court of the District of Columbia. See *Swain v. Pressley*, 97 S. Ct. 1224 (1977).

<sup>13</sup> Chief Justice Burger has appointed a committee to decide whether qualifications should be established as a condition to practice in the federal district courts. See Devitt, *Improving Federal Trial Advocacy*, 16 THE JUDGES' JOURNAL 40 (1977). Specialization and continuing education programs are other ways to inform attorneys of their responsibilities. But none of these approaches will assure that the attorney is carrying out his responsibilities. A way to provide that review is suggested in Part VII of this article.

<sup>14</sup> See, e.g., *Chambers v. Maroney*, 399 U.S. 42, 53-54 (1970) (urging trial courts to appoint counsel early, but affirming conviction even though attorney first met client on day of trial); *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (noting that "if the right to counsel . . . is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys," but rejecting ineffectiveness argument when attorney's erroneous advice prompted plea).

In its 1977 term, the Court may address the issue in *Holloway v. Arkansas*, No. 76-5856,

effective representation in *Powell v. Alabama*,<sup>15</sup> where it held that the fourteenth amendment due process clause required appointment of an attorney in capital cases. In dictum, the Court said that this appointment had to be "effective."<sup>16</sup> Subsequent Supreme Court decisions seem to hold that the *Powell* court was concerned about the effectiveness of the *appointment* of counsel, not with that counsel's effectiveness in defending his client.<sup>17</sup> Lower courts interpreted *Powell* narrowly because they were distressed with the prospect of releasing a convicted defendant because of his attorney's misconduct.<sup>18</sup> Nonetheless, lower courts recognized that the due process clause gave some protection to the defendant against his attorney's conduct no matter how *Powell* was interpreted.<sup>19</sup> They examined whether the attorney's skill and preparation were so horrendous that his actions created a "farce" that rendered the defendant's conviction a "mockery of justice."<sup>20</sup>

In 1970, the Supreme Court, in dictum, implicitly rejected the

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*cert. granted*, April 18, 1977, 22 Cr. L. Rptr. 4025 (1977), a case in which the attorney was unable to convince the trial court of his conflict in representing three co-defendants. The Supreme Court accepted certiorari even though it could have reversed summarily. See *Glasser v. United States*, 315 U.S. 60 (1942) (showing of prejudice unnecessary when conflict in representation apparent).

<sup>15</sup> 287 U.S. 45 (1932).

<sup>16</sup> *Id.* at 71. The Court noted that "the failure of the trial court to make an *effective* appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment." (emphasis added) Appointment by the trial court of the entire defense bar of the community to represent the "Scottsboro boys" was an ineffective appointment because it failed to make any particular attorney responsible for representing the defendants. *Id.* at 56.

<sup>17</sup> See *Reece v. Georgia*, 350 U.S. 85 (1955) (appointing attorney after indictment precluded defendant's attack on grand jury composition); *Glasser v. United States*, 315 U.S. 60 (1942) (appointing one attorney to represent two co-defendants creates potential conflict of interest); *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (trial court's refusal to grant continuance did not deprive defendant of effective assistance).

<sup>18</sup> See, e.g., *Mitchell v. United States*, 259 F.2d 787, 789-91 (D.C. Cir.) (holding that *Powell* required counsel have an opportunity to prepare but did not require review of counsel's skill), *cert. denied*, 358 U.S. 850 (1958); *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir.) (allegation that attorney gave bad advice due to negligence or ignorance insufficient to require hearing), *cert. denied*, 325 U.S. 889 (1945).

<sup>19</sup> See, e.g., *United States v. Reincke*, 383 F.2d 129, 132 (2d Cir. 1967); *United States ex rel. Darcy v. Handy*, 203 F.2d 407, 427 (3d Cir. 1953) (Marris, J., concurring); *Diggs v. Welch*, 148 F.2d 667, 669 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

<sup>20</sup> First announced in *Diggs v. Welch*, 148 F.2d 667, 669 (D.C. Cir.), *cert. denied*, 358 U.S. 859 (1958), the farce test may have been derived from the Supreme Court's disapproval of "sham" proceedings in *Avery v. Alabama*, 308 U.S. 444, 446 (1940). Cases from every circuit using the "farce" test are collected in Comment, *Ineffective Assistance of Counsel: Who Bears The Burden of Proof?*, 29 BAYLOR L. REV. 29, 32 n. 25 (1977) (hereinafter *Ineffective Assistance*). The "farce" test demands so little of counsel that it has been criticized as a mockery itself. Bazelon, *Defective Assistance*, *supra* note 9 at 28. Courts have rejected a more rigorous standard because the attorney was viewed as his client's agent. This justification has been generally rejected. See *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975); Craig, *The Right to Adequate Representation in the Criminal Process: Some Observations*, 22 S.W.L.J. 260, 272 (1968).

“farce and mockery” test by suggesting that the sixth amendment required examination of the defense attorney’s actual performance. In *McMann v. Richardson*,<sup>21</sup> the defendant claimed that he pleaded guilty because of erroneous advice from his attorney that his confession was admissible. The Court held that the guilty plea barred appellate review of counsel’s judgment unless the plea had not been made intelligently. The standard was whether the attorney’s advice, even if wrong, was “reasonably competent” and “within the range of competence demanded of attorneys in criminal cases.”<sup>22</sup> Although the Court has had opportunities to refine the standard, it has declined such invitations,<sup>23</sup> dismissed ineffectiveness issues,<sup>24</sup> or avoided full review of the issue.<sup>25</sup>

The ramifications of other Supreme Court decisions underscore the need to define and ensure effective representation.<sup>26</sup> The Court has drastically restricted the availability of federal habeas corpus review

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<sup>21</sup> 397 U.S. 759 (1970)

<sup>22</sup> *Id.* at 770-71. *Accord*, *Tollette v. Henderson*, 411 U.S. 258, 264 (1973).

<sup>23</sup> *See, e.g.*, *United States ex rel. Johnson v. Johnson*, 531 F.2d 169 (3d Cir.) (reversing district court finding of ineffectiveness when defense attorney failed to find important defense witness and improperly advised client about prior convictions), *cert. denied*, 425 U.S. 997 (1976). In *Chambers v. Maroney*, 399 U.S. 42 (1970), the Court refused to define when an attorney should be appointed and affirmed the Third Circuit’s conclusion that the defendant failed to demonstrate how belated appointment negatively affected the quality of representation. In dissent, Justice Harlan argued that an evidentiary hearing was necessary to explore the attorney’s preparation. *Id.* at 59-60. The Court’s unwillingness to review issues of ineffectiveness is clear from its comment in *McMann* that “[W]e think the matter [of effective representation] . . . should be left to the good sense and discretion of the trial courts . . . .” 397 U.S. 759, 771 (1970).

<sup>24</sup> *See, e.g.*, *United States v. Agurs*, 427 U.S. 97, 102 n.5 (1976) (explicitly holding for first time counsel’s conduct not ineffective but without defining standard of review).

<sup>25</sup> The Court has been helped by attorneys who never debated effectiveness or who dropped that claim and relied on other substantive issues. *See, e.g.*, *Wainwright v. Sykes*, 97 S. Ct. 2497 (1977) (appellate counsel conceded competency of trial attorney who failed to challenge defendant’s confession in federal habeas suit to avoid dismissal for failure to exhaust state remedies; issue had not been raised in state courts); *United States v. Agurs*, 427 U.S. 97 (1976) (issue presented to District of Columbia Circuit but not argued before Supreme Court); *Estelle v. Williams*, 425 U.S. 501 (1976) (appellate counsel dropped issue as alternative ground). *Cf.* *Manson v. Brathwaite*, 97 S.Ct. 2243 (1977) (overlooking possible ineffectiveness claim when counsel failed to object to photo or in-court identification); *Henderson v. Kibbe*, 97 S.Ct. 1730 (1977) (overlooking possible ineffective representation claim based on attorney’s failure to request jury instruction on causation); *Gardner v. Florida*, 97 S. Ct. 1197 (1977) (overlooking possible ineffectiveness claim when attorney failed to request pre-sentence report used to impose death penalty); *Francis v. Henderson*, 425 U.S. 536 (1976) (overlooking possible ineffectiveness claim when attorney failed to challenge grand jury’s composition).

<sup>26</sup> For example, the Court has increased the importance of the attorney’s decision to demand discovery by narrowly defining the government’s constitutional duty to disclose unrequested information to the defense. *See generally* *United States v. Agurs*, 427 U.S. 97 (1976). By expanding the scope of discovery for the prosecution, the Court has also increased the importance of careful planning by defense counsel. *See* *United States v. Nobles*, 422 U.S. 225, 240 n. 15 (1974).

to test the constitutionality of governmental conduct.<sup>27</sup> Failure by an attorney to make a timely objection can bar his client's attack on the government's action in any court. It is important, therefore, to define the attorney's responsibility, both to protect his client and to protect the Court's goal of limiting habeas corpus review.

The federal courts have not handled the responsibility given them by the Supreme Court in a consistent manner. A few retain the "farce" test despite the dictum in *McMann*.<sup>28</sup> Some courts claim that the term "farce" has significance only as a literary metaphor which describes the defendant's "heavy burden."<sup>29</sup> And others, like the *DeCoster* court, have extended the *McMann* tests to cover what they see as the full scope of the problem.<sup>30</sup>

The "farce" test is inappropriate if not unconstitutional. *McMann's* "reasonable competency" test, by definition, requires representation that is better than a "farce."<sup>31</sup> The appropriate test must clearly describe the analysis demanded of the reviewing court, thereby helping courts decide whether a hearing is necessary to air

<sup>27</sup> See *Wainwright v. Sykes*, 97 S. Ct. 2497 (1977); *Francis v. Henderson*, 425 U.S. 536 (1976); *Estelle v. Williams*, 425 U.S. 501 (1976); notes 107-116 and accompanying text *infra*.

<sup>28</sup> First Circuit: *United States v. Benthien*, 456 F.2d 165, 167 (1st Cir. 1972). *But cf.* *Dunker v. Vinzant*, 505 F.2d 503, 505 (1st Cir. 1974) (attorney was effective under either "farce" or stricter test), *cert. denied*, 421 U.S. 1003 (1975).

Second Circuit: *United States v. Joyce*, 542 F.2d 158, 160 (2d Cir. 1976); *United States v. Yanishevsky*, 500 F.2d 1327, 1333 (2d Cir. 1974).

Fourth Circuit: *Bennett v. Maryland*, 425 F.2d 181 (4th Cir.), *cert. denied*, 400 U.S. 881 (1970).

Tenth Circuit: *United States v. Larsen*, 525 F.2d 444 (10th Cir. 1975), *cert. denied*, 423 U.S. 1075 (1976); *Lorraine v. United States*, 444 F.2d 1, 2 (10th Cir. 1971).

<sup>29</sup> See *Thomas v. Wyrick*, 535 F.2d 407, 412 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976); *McQueen v. Swenson*, 498 F.2d 207, 214 (8th Cir. 1974), *modified*, 537 F.2d 976 (1976).

<sup>30</sup> *DeCoster I*, *supra* note 10, 487 F.2d at 1202 ("a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate").

Third Circuit: *Moore v. United States*, 432 F.2d 730, 736 (3d Cir. 1970) ("The exercise of the customary skill and knowledge which normally prevails at the time and place").

Fourth Circuit: *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.) (announcing specific guidelines similar to *DeCoster*), *cert. denied*, 393 U.S. 849 (1968). *But see* *Bennett v. Maryland*, 425 F.2d 181, 182 (4th Cir.) (reverting to the farce standard while ignoring *Coles*), *cert. denied*, 400 U.S. 881 (1970).

Fifth Circuit: *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960) ("counsel reasonably likely to render and rendering reasonably effective assistance").

Sixth Circuit: *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974) ("reasonably likely to render and rendering effective assistance").

Seventh Circuit: *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 641 (7th Cir.) ("legal assistance which meets a minimum standard of professional representation"), *cert. denied*, 425 U.S. 876 (1975).

<sup>31</sup> The *McMann* standard, 397 U.S. at 770-771, grounded in the sixth amendment, requires a higher degree of advocacy than the farce standard, which is based on the due process clause. See *United States v. Smith* 551 F.2d 348 (D.C. Cir. 1976); *Thomas v. Wyrick*, 535 F.2d 407, 411 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976); *Mason v. Balcom*, 531 F.2d 717, 722 (5th Cir. 1976); *Garton v. Swenson*, 417 F.Supp. 697, 706 (W.D. Mo. 1976).



the defendant's challenge. An explicit standard would help the parties present the relevant evidence needed to review the claim,<sup>32</sup> and might reduce the number of federal habeas corpus claims.<sup>33</sup> It certainly would reduce the time and expense necessary to litigate issues of ineffective representation.<sup>34</sup>

Uncertainty regarding the purpose of the test is the greatest stumbling block to easy review. Courts that focus on the fairness of the verdict, rather than on the attorney's conduct, make a visceral judgment of the possible effect of the attorney's failings on the verdict.<sup>35</sup> But if the goal of the courts is to improve representation, the path is more difficult. Courts understandably do not want to second-guess the tactical decisions made by trial counsel, unless his decisions were obviously inept.<sup>36</sup> They are satisfied if the trial attorney has made informed tactical decisions for his client.<sup>37</sup> The standard of represen-

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<sup>32</sup> See *United States ex rel. Greene v. Rundle*, 434 F.2d 1112 (3d Cir. 1970) (mistakenly believing "farce" test applied, neither party introduced evidence relevant to a determination under the salient "reasonable competency" test). Appellate counsel must understand his burden so that he is not attacked as ineffective. See *Founts v. Pogue*, 532 F.2d 1232, 1234 n.40 (9th Cir.), cert. denied, 426 U.S. 925 (1976); *United States ex rel. Mandrier v. Hewitt*, 409 F. Supp. 38, 46 (W.D. Pa. 1976). Appellate counsel runs other risks as well. See *United States v. Hurt*, 543 F.2d 162 (D.C. Cir. 1976) (trial attorney's two million dollar action against appellate counsel for instituting ineffectiveness charge dismissed, but case remanded for second evidentiary hearing because appellate counsel might have been ineffective).

<sup>33</sup> On habeas corpus review, the federal district court may not defer to the state court on the constitutional issue of effective representation if the state used the wrong standard. *Wolfs v. Britton*, 509 F.2d 304, 308 (8th Cir. 1974). If the state court used the wrong standard, the federal district court probably must hold a new evidentiary hearing because the facts will not have been adequately developed previously. See *Founts v. Pogue*, 532 F.2d 1232 (9th Cir.), cert. denied, 426 U.S. 925 (1976); *Franklin v. Wyrick*, 529 F.2d 79 (8th Cir.), cert. denied, 425 U.S. 962 (1976). For a review of the problem confronting federal courts in determining what test the state court has applied, see *Garton v. Swenson*, 417 F. Supp. 697, 718 (W.D. Mo. 1976).

<sup>34</sup> For example, *McQueen v. State*, 475 S.W.2d 111 (Mo. 1972), wound its way from the state appellate system to the federal district court on habeas review, *McQueen v. Swenson*, 357 F. Supp. 557 (E.D. Mo. 1973), to the Eighth Circuit, which remanded for further factual determinations, 498 F.2d 207 (8th Cir. 1974). The district court's remand to the state court was appealed to the Eighth Circuit, *United States ex rel. McQueen v. Wangelis*, 527 F.2d 579 (8th Cir. 1975), where the Eighth Circuit agreed with the district court's decision, but then, on rehearing, ordered the district court to make the factual determinations previously ordered. #76-1163 (8th Cir. July 14, 1976).

<sup>35</sup> Clearly, an attorney is not ineffective simply because his client is found guilty. See, e.g., *Williams v. Beto*, 354 F.2d 698, 705 (5th Cir. 1965).

<sup>36</sup> See *DeCoster II*, *supra* note 10, slip op. at 15 n.25 (no reversal when attorney made informed judgment unless "manifestly unreasonable"); *United States v. Clayborne*, 509 F.2d 473, 479 (D.C. Cir. 1974) ("reversal should never be based upon good faith tactics of defense except upon clearest proof of actual prejudice"); *Bruce v. United States*, 379 F.2d 113, 117 n.5 (D.C. Cir. 1967) (refusing to second-guess trial attorney on "questions of strategy, trial tactics or trial decisions"). But if the totality of tactical error by the attorney is great, courts may reverse. See *United States v. Hammonds*, 425 F.2d 597 (D.C. Cir. 1970).

<sup>37</sup> An attorney may decide not to use a witness, but he must get the information necessary to make that decision. See *Salazar v. Estelle*, 547 F.2d 1226, 1227 (5th Cir. 1977); *United States*

tation used should force the trial attorney to get the legal and factual information he needs to appreciate the decisions he must make.<sup>38</sup>

At a minimum, the standard should oblige the attorney to do three things: consult with his client, investigate both the law and facts, and make all motions necessary to preserve any issue for appeal. Investigation is the most crucial because it helps the attorney decide whether to file motions, how to attack the government's evidence, and how to present his client's case. When the attorney fails to follow some investigative lead, this failure might be shown at the post-conviction hearing if the defendant can produce uninvestigated evidence that could have provided important information.<sup>39</sup> Cases like *DeCoster*, however, present a more difficult situation, because it is impossible to determine, what, if any, information the attorney might have discovered through timely investigation, how the defendant might have used that information, and how that information might have affected the outcome of the case.

### III. UNITED STATES V. DECOSTER

#### A. DeCoster I<sup>40</sup>

A jury convicted Willie DeCoster of assault with a dangerous weapon and aiding and abetting two accomplices in an armed robbery. Two police officers witnessed the robbery. One officer testified that he chased DeCoster into a nearby hotel, and that he arrested DeCoster as he stood near the lobby desk. The victim identified DeCoster immediately after his arrest, but was unable to do so at the trial because his eyesight was impaired by an intervening auto accident.

At his trial, DeCoster denied robbing the victim, but admitted he had been drinking with the victim earlier in a bar near the parking lot where the robbery occurred. At DeCoster's insistence, his attorney called Fred Eley, one of the two alleged accomplices, as a witness. Eley contradicted DeCoster's story and testified that he had seen the defendant fighting with the victim. On appeal, the defendant did not

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v. Benn, 476 F.2d 1127, 1134 (D.C. Cir. 1973) ("The question is not whether counsel would have done better by different choices, but only whether his trial decisions were informed, deliberate and rational.").

<sup>38</sup> See *DeCoster II*, *supra* note 10, slip op. at 12; *Goodwin v. Swenson*, 287 F. Supp. 166, 182-83 (W.D. Mo. 1968) (the best lawyer in the world cannot provide effective representation without the facts.); ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Commentary 224-25 (App. Draft 1971).

<sup>39</sup> Courts have long reversed when the defendant has established that his attorney did not investigate helpful witnesses known to exist. See, e.g., *Jones v. Huff*, 152 F.2d 14, 15 (D.C. Cir. 1945) (using "farce and mockery" test).

<sup>40</sup> *DeCoster I*, *supra* note 10.

raise the issue of ineffective representation, but Chief Judge Bazelon, writing for the majority, sensed the issue's presence.<sup>41</sup> The panel remanded the case for an evidentiary hearing to determine whether the attorney had been ineffective; if the attorney were found ineffective, the lower court was ordered to grant a new trial. Bazelon was particularly concerned with the attorney's apparent lack of preparation, his decision to call Eley as a witness, and his failure to interview the government's witnesses and the defendant's two accomplices.<sup>42</sup>

To guide the court on remand, Bazelon stated that a defendant is entitled to "the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."<sup>43</sup> Bazelon pointed out that the American Bar Association's Standards for the Defense Function helped define this "short-hand label."<sup>44</sup> In general, a defense attorney should investigate the law and the facts of both his own case and that of the government.<sup>45</sup> If the attorney violates these duties substantially,<sup>46</sup> the defendant is entitled to a reversal, unless the government

<sup>41</sup> DeCoster I was not the first time Chief Judge Bazelon raised the issue when it had not been raised by the defendant. *See, e.g.*, *United States v. Benn*, 476 F.2d 1127 (D.C. Cir. 1973); *United States v. Simpson*, 475 F.2d 934 (D.C. Cir. 1973) (Bazelon, C.J., dissenting); *cf.* *United States v. Patterson*, 495 F.2d 107 (D.C. Cir. 1974) (Bazelon, C.J., concurring in part and dissenting in part) (ineffective representation may exist when attorney fails to discover government evidence favorable to the defendant).

<sup>42</sup> Bazelon was also concerned by the attorney's belated filing for bail review and his initial willingness to try the case without a jury to the same judge before whom DeCoster's alleged accomplices had pleaded guilty. (The government refused to waive a jury, and a jury ultimately convicted DeCoster.) The trial attorney's failure to interview at the hotel or bar did not surface until the evidentiary hearing.

<sup>43</sup> DeCoster I, *supra* note 10, 487 F.2d at 1202.

<sup>44</sup> *Id.* at 1203. Bazelon later claimed that the ABA standards were already the law and simply constituted a convenient checklist. *See United States v. Clayborne*, 509 F.2d 473, 488 (D.C. Cir. 1974) (Bazelon, C.J., dissenting). DeCoster I paraphrased *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968), apparently the first case that adopted the ABA standards. The duties counsel owes his client include:

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.

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

. . . .

Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed . . . . 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.

DeCoster I, *supra* note 10, 487 F.2d at 1203-04 (citations omitted).

<sup>45</sup> DeCoster I, *supra* note 10, 487 F.2d at 1204.

<sup>46</sup> The term "substantial" was not defined until DeCoster II, *supra* note 10, slip op. at 19-23.

can demonstrate that the defendant suffered no prejudice and that the violation was therefore harmless error.<sup>47</sup>

Judge MacKinnon dissented in part. He did not disagree with the use of the ABA guidelines, but thought that the government should not have to prove the absence of prejudice.<sup>48</sup> He argued that the defendant held the burden of proving that failure to investigate had prejudiced his case, on the assumption that the defendant had better access to information than his attorney had not investigated.<sup>49</sup>

### B. *The Evidentiary Hearing*

*DeCoster I*'s explanation of the standard was not particularly helpful on remand, because it did not indicate the specific evidence that the parties should develop. Judge Waddy, presiding at the remand hearing, thought that the defendant had the burden of going forward.<sup>50</sup> But *DeCoster*'s appellate counsel claimed that the trial record sufficiently indicated the bases of ineffectiveness,<sup>51</sup> despite *DeCoster I*'s direction to the defendant to present evidence on that issue.<sup>52</sup> The government called the trial attorney as its only witness.<sup>53</sup> The attorney remembered very little of the trial since it had ended almost three years earlier, and he claimed he was no longer able to "pinpoint" the particular case.<sup>54</sup> On cross-examination, he acknowledged that he had not interviewed the victim, the police officers, the accomplice who did not testify, or anyone at the bar or hotel.<sup>55</sup> The attorney claimed to have interviewed Eley once, immediately before Eley testified, but did not remember what Eley had told him, and felt that he would not have put Eley on the stand without knowing what he would say. He believed that he had no reason to interview the police because they claimed to have seen *DeCoster* from the moment of the robbery until he was arrested. Finally, the attorney tried to justify his failure to interview one accomplice and his belated interview of Eley by referring to a letter that he had received from his client on the morning of the trial. In that letter, *DeCoster* admitted, apparently for the first

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<sup>47</sup> *DeCoster I*, *supra* note 10, 487 F.2d at 1204.

<sup>48</sup> *Id.* at 1205. (MacKinnon, J., concurring in part and dissenting in part).

<sup>49</sup> *Id.*

<sup>50</sup> Record of remand hearing at 5 (February 6, 1974) [hereinafter Record]. Judge Waddy also presided at the jury trial.

<sup>51</sup> *Id.* The attorney whose representation was challenged [hereinafter "trial attorney"] was replaced by another attorney [hereinafter "appellate counsel"] who was appointed for *DeCoster*'s direct appeal and also represented him at the remand hearing.

<sup>52</sup> *DeCoster I*, *supra* note 10, 487 F.2d at 1204.

<sup>53</sup> The government did not dispute whether the defendant had met his initial burden of going forward. Record, *supra* note 50, at 13-14.

<sup>54</sup> Record, *supra* note 50, at 20.

<sup>55</sup> *Id.* at 32-44.

time, that he had fought with the victim and that the accomplices had been with him, but reiterated that he had neither assaulted nor robbed the victim.<sup>56</sup>

Appellate counsel called DeCoster to establish that he had been with Eley just before Eley testified, and that he had not seen the trial attorney interview Eley.<sup>57</sup> On direct examination, DeCoster was not asked about the incident itself and he never claimed to be innocent. On cross-examination, the government asked him to explain the inconsistency between his trial testimony and the letter.<sup>58</sup> DeCoster equivocated, first claiming not to remember his trial testimony and then asserting that he had lied in the letter to spur his attorney to visit him.<sup>59</sup> DeCoster admitted that he knew no one at the bar who could testify for him.<sup>60</sup> Although he insisted that he had asked his trial attorney to interview the hotel manager, he never explained what the manager might have said or how his testimony would have aided his defense.<sup>61</sup> Appellate counsel also called Eley, who contradicted the trial attorney's testimony by saying that he had never been interviewed.<sup>62</sup>

On this record, appellate counsel was unable to explain how investigation might have helped DeCoster or what prejudice DeCoster had suffered, except to note that no one would ever know the answers to these questions.<sup>63</sup> At the hearing, appellate counsel debated what the trial attorney should have done when confronted with DeCoster's inconsistent stories.<sup>64</sup> This issue was largely irrelevant since it did not explain why the trial attorney had not investigated before receiving DeCoster's letter.

Judge Waddy denied the motion for a new trial, holding that the only way to have represented DeCoster was to argue that the govern-

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<sup>56</sup> DeCoster had also written to Judge Waddy in early November, 1970, that he was guilty only of "assault by self-defence." DeCoster II, *supra* note 10, slip op. at 24 n.7 (dissent). Neither the trial attorney nor the government knew of this letter to Judge Waddy before the remand hearing. The trial attorney's reaction to DeCoster's startling admissions was never explored at the hearing.

<sup>57</sup> Record, *supra* note 50, at 62.

<sup>58</sup> *Id.* at 68. This line of inquiry was arguably irrelevant since it shifted the focus from the attorney's conduct to a relitigation of the defendant's guilt.

<sup>59</sup> *Id.* at 69, 70-71.

<sup>60</sup> *Id.* at 71.

<sup>61</sup> *Id.* at 71-72.

<sup>62</sup> *Id.* at 92-93. Eley testified that he did not know why he had been brought from jail to court until he was called to testify, even though he had been transported from jail with DeCoster. Judge Waddy questioned the credibility of this testimony. Findings of Fact and Conclusions of Law on Remand at 14 (April 23, 1974) [hereinafter Remand findings].

<sup>63</sup> *Id.* at 100, 112, 119-20. Appellate counsel also had not attempted to investigate to see if any witnesses might have been found. Oral argument, May 26, 1977.

<sup>64</sup> Record, *supra* note 50, at 99-100 (Feb. 13, 1974).

ment had not carried its burden of proof.<sup>65</sup> Although counsel had been "lax in his duty to conduct as thorough a factual investigation as might have been possible," that failure was not a "substantial violation" as defined in *DeCoster I*.<sup>66</sup>

The evidentiary hearing left many questions unanswered. What had DeCoster first told his attorney? Was DeCoster's letter to his attorney his first admission that he had fought with the victim? If so, why had the attorney not searched for witnesses at the bar and hotel before he received the letter? And, how did the attorney determine which "story" was the truth?

### C. DeCoster II

In a split decision, the District of Columbia Circuit reversed Judge Waddy's denial and granted the motion for a new trial.<sup>67</sup> In this second analysis, Chief Judge Bazelon breathed meaning into the three-part test of *DeCoster I*. The duty to investigate required the attorney to investigate all facets of the case, no matter what his client had told him.<sup>68</sup> Analyzing only the record of the evidentiary hearing, Bazelon felt that the trial attorney had done minimal investigation at best, and that his reasons for not investigating further were unconvincing.<sup>69</sup> Bazelon concluded that the attorney had failed to investigate, even though no one had shown that witnesses might have been found, that the attorney would have used them, or that these witnesses would have helped the defense or brought about a different verdict.<sup>70</sup>

Next, Bazelon held that a "substantial" failure to investigate was "consequential"<sup>71</sup> if that failure affected the defendant's presentation of his case. The defendant did not need to show that but for the lack of investigation, the jury might have acquitted him. Instead, he only had to demonstrate that he could have better evaluated his own case or the case of the government had his attorney conducted an investi-

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<sup>65</sup> Remand findings, *supra* note 62, at 19. In effect, Judge Waddy concluded that DeCoster's denial was a lie. Thus, the trial attorney had not been obligated to investigate at the hotel or bar. *Id.* at 18.

<sup>66</sup> *Id.* at 19. Judge Waddy reviewed the entire record and found that counsel's failures had not prejudiced the defense. *Id.* at 20. In effect, Judge Waddy found the attorney's omissions to be harmless error.

<sup>67</sup> DeCoster II, *supra* note 10, No. 72-1283.

<sup>68</sup> *Id.* at 13.

<sup>69</sup> *Id.* at 16-19.

<sup>70</sup> *Id.* at 19.

<sup>71</sup> *Id.* at 20. The term "consequential" first appeared in *United States v. Pinckney*, 543 F.2d 908, 917 n.60 (D.C. Cir. 1976) (counsel's failure to challenge government assertions in allocution memorandum that linked defendant with narcotics trafficking was "inconsequential" because defendant did not indicate evidence that would have refuted assertion).

gation.<sup>72</sup> Bazelon held that the trial attorney's "total failure to investigate" was so inherently prejudicial that adverse consequences could be presumed.<sup>73</sup> Bazelon presumed that any further investigation would have produced useful evidence for the defense.<sup>74</sup> Even if investigation had not uncovered a "scintilla of evidence," investigation might have helped the defendant assess the advantage of seeking a plea bargain, which was a possible ineffectiveness ground that the defendant had not raised at the evidentiary hearing.<sup>75</sup>

This presumption satisfied DeCoster's burden, excused his obligation to produce evidence of adverse consequences, and shifted the burden to show the absence of prejudice beyond a reasonable doubt to the government.<sup>76</sup> Ordinarily, the government would have a good chance to establish harmless error by comparing the evidence that the defendant might have presented with the evidence actually introduced at the trial.<sup>77</sup> But Bazelon admitted that in cases like *DeCoster* the attorney's failure to investigate precluded any evaluation of the omitted evidence. The government could not satisfy its burden easily.<sup>78</sup> And since the government had not tried to show that the failure to investigate did not affect the defense or the verdict, the appellate court reversed DeCoster's conviction.<sup>79</sup>

In a blistering dissent, Judge MacKinnon insisted that the reliabil-

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<sup>72</sup> *DeCoster II*, *supra* note 10, slip op. at 19.

<sup>73</sup> *Id.* at 20-22. The cases cited by Bazelon do not support this argument. Bazelon thought the failure to investigate was loaded with likely prejudice and could be equated to the late appointment of an attorney. *Id.* at 21 & n.33. But in *Chambers v. Maroney*, 399 U.S. 42, 53-54 (1970), the Supreme Court refused to apply a *per se* rule whenever counsel was appointed late, and denied relief because the defendant had not shown what his attorney might have done had he been appointed earlier. Bazelon also sought support from *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968), the first case that, in paraphrasing the ABA guidelines, had established counsel's responsibility to investigate. There, two appointed attorneys had been extraordinarily overworked, and pressures imposed by the trial court interfered with their performance. Moreover, the Fourth Circuit has apparently retreated from *Coles*. See *Jackson v. Cox*, 435 F.2d 1089 (4th Cir. 1970) (denying challenge without citing *Coles*, because defendant had not shown what defense an unsubpoenaed witness would have provided).

<sup>74</sup> *DeCoster II*, *supra* note 10, slip op. at 22.

<sup>75</sup> *Id.* at 22-23. *Cf.* *Francis v. Henderson*, 425 U.S. 536, 554 (1976) (Brennan, J., dissenting) (implying that trial attorney might have been incompetent in not plea bargaining because codefendants pleaded guilty and received eight-year prison terms and defendant went to trial, was convicted of felony murder and sentenced to life imprisonment).

<sup>76</sup> *DeCoster II*, *supra* note 10, slip op. at 23-24.

<sup>77</sup> *Id.* at 24-25. *But see* *United States v. Lucas*, 513 F.2d 509 (D.C. Cir. 1975) (government failed to show attorney's failure to interview defense witness was harmless error).

<sup>78</sup> *DeCoster II*, *supra* note 10, slip op. at 25.

<sup>79</sup> *Id.* This misread the record. The prosecution had reviewed the government's evidence and argued that no prejudice flowed from the trial attorney's failures. Record, *supra* note 50, at 14-15.

ity of the verdict was the key issue.<sup>80</sup> This view freed him to consider materials beyond the hearing<sup>81</sup> and prompted his disagreement over the attorney's duty to investigate and the defendant's burden to establish harm. MacKinnon believed that DeCoster was guilty, not simply because he was found guilty, but because of DeCoster's written admission to his attorney and a statement he had made at his sentencing.<sup>82</sup>

MacKinnon agreed that the ABA standards were useful, but he viewed them only as guidelines whose violation did not necessarily constitute ineffective representation.<sup>83</sup> MacKinnon argued that an attorney must have the discretion to decide when to stop investigating and should be able to do so if he reasonably believes his client is guilty. MacKinnon concluded that once the trial attorney had received DeCoster's letter, he was justified in not investigating further.<sup>84</sup> No attorney is obligated to search to support a fabricated defense, MacKinnon said. MacKinnon also argued that failure to investigate did not, by itself, constitute ineffective representation. The defendant must still establish that this failure caused him "actual prejudice."<sup>85</sup> MacKinnon defined "actual prejudice" as proof that a timely investigation would have uncovered "fruitful evidence . . . that would [have] create[d] a reasonable doubt of guilt."<sup>86</sup> MacKinnon also rejected any presumption of harm because he felt that the defendant had better access to the omitted information.<sup>87</sup>

#### D. *The Purpose and Scope of DeCoster II*

*DeCoster II* recognizes that the defendant must prove ineffectiveness, but breaks new ground with its definition of the defendant's burden and its analysis of how the defendant can meet the burden. No other decision defines the defendant's burden so favorably and no

<sup>80</sup> DeCoster II, *supra* note 10, slip op. at 71 (MacKinnon, J., dissenting).

<sup>81</sup> *Id.* at 15 (MacKinnon, J., dissenting). Because DeCoster's trial counsel had also represented Taylor, the second alleged accomplice, at the preliminary hearing for all three defendants, MacKinnon assumed that counsel knew of Taylor's version of the incident. MacKinnon also assumed that counsel would have learned of Eley's version through conversations with him or his attorney. If MacKinnon is correct, then the trial attorney's decision to call Eley as a witness seems incomprehensible. He should have known that Eley would contradict DeCoster.

<sup>82</sup> *Id.* at 23. At sentencing, DeCoster said he wanted to be rehabilitated and did not assert his innocence. Judge MacKinnon probably read too much into DeCoster's statement. Few defendants assert their innocence at sentencing, because they fear the judge will give them a harsher sentence if they fail to accept responsibility and express remorse.

<sup>83</sup> *Id.* at 41.

<sup>84</sup> *Id.* at 11. MacKinnon did not explain how an attorney reaches that decision, and his argument invites the trial attorney to give his opinion of the defendant's guilt at the hearing.

<sup>85</sup> *Id.* at 50.

<sup>86</sup> *Id.* at 41 (emphasis omitted).

<sup>87</sup> *Id.* at 58.



other decision uses a presumption to excuse the defendant's inability to present the evidence that his attorney failed to find.<sup>88</sup>

Not many courts will adopt *DeCoster II*, whether or not it survives *en banc* reconsideration. Although courts recognize the need for improved defense representation, they often hesitate to attack ineffective representation when the only remedy is to reverse the conviction. The judgment in *DeCoster II* may alarm many courts because any fair analysis of the facts indicates that the defendant was guilty.<sup>89</sup>

The *DeCoster* court could have affirmed the conviction, if it had not used the presumption or if it had held that the attorney's errors were harmless. That result would not have disturbed the three-step analysis or prevented the use of the presumption in an appropriate case. Yet the majority perhaps believed that reversal was necessary to achieve the decision's apparent purpose of providing a prophylactic standard to prevent ineffective representation.<sup>90</sup> By defining counsel's responsibilities, the decision should educate attorneys. By defining the defendant's burden so low, the decision indirectly pressures trial attorneys to perform better to avoid the onus of being found ineffective, and pressures trial courts to devise some way to assure that counsel provides effective representation in order to protect verdicts from post-conviction attack.

*DeCoster II* presents crucial questions. Does the sixth amendment require what the *DeCoster* court apparently hopes to achieve? Even if the decision is constitutionally justifiable, will it actually improve defense representation?

In considering these questions, it is important to note the limits of *DeCoster II*. First, while the three-step analysis applies to all cases, the presumption only applies when no one knows what evidence the investigation missed. In most cases, when the attorney does not investigate specific potential witnesses, the defendant must produce those witnesses at the hearing for the court to assess how they might have

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<sup>88</sup> Other courts, for example, have summarily dismissed claims of total failure to investigate where there was no indication of what investigation would have produced. See note 226, *infra*. Even *DeCoster II* does not indicate whether a general allegation of ineffectiveness would suffice.

<sup>89</sup> A better factual case would have involved the attorney's failure to investigate witnesses named by the defendant who subsequently testify at the evidentiary hearing. If these witnesses testify, some courts have had less trouble finding counsel's representation ineffective. See *United States v. Lucas*, 513 F.2d 509, 511 (D.C. Cir. 1975)(motion for new trial granted when counsel had not interviewed eyewitness).

<sup>90</sup> While this is not apparent from the *DeCoster II* opinion, Bazelon had noted that the threat of reversal will have a prophylactic effect by encouraging trial courts and prosecutors to try to prevent ineffectiveness, by reducing the likelihood that incompetent attorneys will receive appointments, and by inducing unprepared attorneys to refuse to go to trial. Bazelon, *The Realities*, *supra* note 9 at 822 n.51; *Defective Assistance*, *supra* note 9 at 31.

helped the defense.<sup>91</sup>

Second, *DeCoster II* is limited solely to direct appeals and does not apply to collateral attack where the defendant's burden is much greater.<sup>92</sup> On collateral attack, the defendant must prove that his attorney was grossly incompetent, as measured by whether the attorney had "in effect blotted out the essence of a substantial defense;" moreover, the defendant must also claim that he was innocent in order to establish prejudice.<sup>93</sup>

This distinction between collateral and direct review makes sense only as a way to limit the retroactive application of *DeCoster II*.<sup>94</sup> The defendant will not ordinarily be able to raise the issue on direct appeal because the trial transcript does not usually reveal the way in which the attorney acted ineffectively. To accommodate this dilemma, the *DeCoster* court created a way to amplify the record on direct appeal by permitting the defendant to raise the issue initially through a motion for new trial.<sup>95</sup> *DeCoster I* and *II* can be viewed as a package that must be accepted in its entirety in order to accomplish Chief Judge Bazelon's goal and still not burden the government unfairly.<sup>96</sup> But these limitations on the application of the decision also illustrate how difficult it is to prevent ineffective representation through any post-conviction standard.

#### IV. WHAT DOES "EFFECTIVE REPRESENTATION" MEAN?

To assess claims of ineffective representation, courts must interpret *McMann v. Richardson's* standard of the "range of competence demanded of attorneys in criminal cases."<sup>97</sup> As stated, that standard is too broad to provide any practical guidance.

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<sup>91</sup> See *DeCoster II*, *supra* note 10, slip op. at 22 n.36.

<sup>92</sup> *Id.* at 9; See *United States v. Thompson*, 475 F.2d 931, 932 n.3 (D.C. Cir. 1973). *Cf. Garton v. Swenson*, 497 F.2d 1137, 1140 n. 4 (8th Cir. 1974) (suggesting, without deciding, that constitutional standard on collateral appeal may be greater).

<sup>93</sup> In *Bruce v. United States*, 379 F.2d 113, 116-17 (D.C. Cir. 1967), the defendant collaterally attacked his guilty plea based on his attorney's alleged erroneous advice about the elements of the crime. The court found the attorney's advice justified by the facts of the case. Moreover, since the defendant had not testified at the hearing and had made only a "bare assertion of innocence," the court found that he had not established prejudice. *Id.* at 121. *Bruce* indicates that if a defendant has pleaded guilty, he must testify at the hearing that he was in fact innocent.

<sup>94</sup> The retroactive application of *DeCoster* is the two year time period within which to move for a new trial. See *United States v. Butler*, 504 F.2d 220, 223 (D.C. Cir. 1974); *United States v. Clayborne*, 509 F.2d 473, 489 (D.C. Cir. 1974) (Bazelon, C.J., dissenting) (majority held *DeCoster* applicable but found counsel effective).

<sup>95</sup> See notes 210-216 and accompanying text *infra*.

<sup>96</sup> The fear is that the government cannot retry the defendant. *Cf. United States v. Butler*, 504 F.2d 220, 223 n.11 (D.C. Cir. 1974) (retroactive application of *DeCoster* would not overly disrupt administration of justice because of limitation to direct appeal).

<sup>97</sup> 397 U.S. 759, 770-71 (1970).

In attempting to define *McMann's* standard, courts might take judicial notice of current legal practices, call experts to comment on an attorney's performance in a particular case, or adopt some specific definition of the obligations that attorneys owe their clients. None of these approaches will improve defense representation significantly or help courts decide whether the attorney was effective.

Judicial notice does not dictate a standard for lower courts to follow;<sup>98</sup> their decisions may be as arbitrary as those permitted by the "farce" standard.<sup>99</sup> Nor does it tell attorneys what is expected of them. And, judicial notice is difficult to use when a defendant attacks an old conviction collaterally. Should reasonable competence be determined by legal practices that prevail at the time of the appeal *or* at the time of the trial?<sup>100</sup>

Few courts will admit expert testimony because they can take judicial notice of the accepted standard within their jurisdiction.<sup>101</sup> Also, it will be difficult to find attorneys who are willing to evaluate their colleagues, or to decide what qualifies anyone to be an expert on effective representation.<sup>102</sup>

By adopting the ABA guidelines,<sup>103</sup> *DeCoster* takes the most use-

<sup>98</sup> It is also difficult for a federal court on collateral attack to decide what the prevailing practice in a state is. See *Thomas v. Wyrick*, 535 F.2d 407, 413 n. 6 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976). But judicial notice would allow a court to shift its expectations of what counsel should do. Cf. *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976) (effective representation is an "evolving concept") (Henley, J., concurring).

<sup>99</sup> The judge's evaluation of the attorney's representation is a function of his own experience. In *Matthews v. United States*, 449 F.2d 985 (D.C. Cir. 1971), counsel's representation was first found effective, but then ineffective on rehearing after the court discovered that another panel had previously found a similar final argument given by the same attorney ineffective. See also *United States v. Hammonds*, 425 F.2d 597 (D.C. Cir. 1970) ("farce and mockery" due process test). Courts have permitted questionable representation to pass as "normal competency." See, e.g., *United States ex rel. Navarro v. Johnson*, 365 F. Supp. 676 (E.D. Pa. 1973) (attorney not ineffective when he reviewed Defender Association file, conducted some investigation, first met client minutes before the trial, which was his 39th of the week, cross-examined government witnesses badly, and gave no summation).

<sup>100</sup> In *Tollett v. Henderson*, 411 U.S. 258, 269 (1973), the Supreme Court implied that the relevant date was the date of the conviction rather than the appeal. The Court, although suggesting that when the defendant pleaded guilty in 1948 a Tennessee trial attorney would not have questioned the racial composition of grand juries, remanded on that issue.

<sup>101</sup> But, expert testimony may be persuasive. See *Pinnell v. Cauthron*, 540 F.2d 938 (8th Cir. 1976) (co-defendant's attorney testified that defendant's attorney had done very little to help this defendant; conviction reversed for ineffective representation); *Williams v. Beto*, 364 F. Supp. 335, 338-39 (S.D. Texas 1973) (prosecutor at post-conviction hearing testified that, like defense counsel, he would not have called defendant as a witness).

<sup>102</sup> And how would an attorney reach his opinion, assuming he were qualified? Would he listen to the testimony at the hearing? Would he review the case files? Cf. *Jones v. Huff*, 152 F.2d 14 (D.C. Cir. 1945) (trial court asked prominent attorney to act as master and review defendant's allegations, but attorney's conclusion that no basis for relief existed was reversed to force trial court to decide effectiveness issue).

<sup>103</sup> The particular guidelines in question are: section 3.2 (consultation with the client); sec-

ful approach. In considering whether to adopt the guidelines,<sup>104</sup> other courts must decide several questions. Will the guidelines help, given the variety of reasons for ineffective representation? Do the guidelines give enough direction to the attorney without denying him the discretion to decide not to do something? Are the guidelines specific enough so that attorneys and courts can interpret their commands easily?

### A. *Will Adopting the Guidelines Help?*

The guidelines have several obvious benefits. They educate attorneys, inform the parties about the evidence needed at a post-conviction hearing, and provide courts with a framework to assess the attorney's conduct.

Of the three guidelines, the duty to protect the record may help improve defense representation the most. Most attorneys recognize that consultation and investigation are indispensable. Without them, the attorney cannot know his client's position, or how to present that position most effectively. But attorneys frequently fail to appreciate how important motions can be. A hearing on a motion to suppress evidence, for example, can be an invaluable source of information even if it is denied. That hearing might persuade an uncooperative client to plea bargain by showing him the strength of the government's case. That hearing might help the attorney discover other leads, or develop information to impeach a witness later at trial.

Attorneys may also not recognize that the failure to object to some government action may bar the defendant from receiving review by

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tion 3.6 (protection of the record); and section 4.1 (investigation). See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION, (App. Draft, 1971) (hereinafter ABA STANDARDS).

The ABA did not intend its standards to be the test for ineffective representation:

These standards are intended as guides for conduct of lawyers and as the basis for disciplinary action, not as criteria for judicial evaluation of the effectiveness of counsel to determine the validity of a conviction; they may or may not be relevant in such judicial evaluation of the effectiveness of counsel, depending upon all the circumstances.

*Id.*, § 1.1 (f) at 154.

<sup>104</sup> Opinions other than *DeCoster* that have adopted the guidelines include: *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975); *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975). Opinions that have noted the guidelines without adopting them include: *Brescia v. New Jersey*, 417 U.S. 921, 924 n.3 (1973) (Marshall, J., dissenting) (mentions investigation guideline); *Thomas v. Wyrick*, 535 F.2d 407, 413 n.6 (8th Cir.) (mentions guidelines for adequate preparation), *cert. denied*, 429 U.S. 868 (1976); *Wolfs v. Britton*, 509 F.2d 304, 310 (8th Cir. 1975) (cites guideline on need to investigate); *McQueen v. Swenson*, 498 F.2d 207, 216 n.12 (8th Cir. 1974) (guidelines are "highly respected" but not adopted); *Coles v. Peyton*, 389 F.2d 224 (4th Cir.) (anticipates later guidelines); *cert. denied*, 393 U.S. 849 (1968); *Moore v. United States*, 432 F.2d 730, 741 (3d Cir. 1970) (Van Dusen, J., concurring) (suggests ABA standards be used to define federal standard); *Garton v. Swenson*, 367 F. Supp. 1355, 1364 n.5 (W.D. Mo. 1973) (mentions ABA guidelines).

any court of the constitutionality of that conduct. The defendant is barred from raising an issue for the first time on federal habeas corpus where his attorney had, for tactical reasons, deliberately bypassed an objection at trial,<sup>105</sup> or where an adequate, non-federal state ground existed to justify denial of relief.<sup>106</sup> But in recent decisions, the Supreme Court has dramatically raised the barriers to federal habeas review. In the process, the Court has increased the importance of counsel's recognition that he must make objections in order to protect the record for appeal. In *Estelle v. Williams*, the Court held that no constitutional violation had occurred because counsel had not objected to the jail clothes worn by his client at trial.<sup>107</sup> Without counsel's objection, the trial court could assume that counsel had made a tactical decision about the jail clothes, and the trial court had therefore not "compelled" the defendant to wear them.<sup>108</sup> *Francis v. Henderson*<sup>109</sup> and *Wainwright v. Sykes*<sup>110</sup> involved the "adequate state ground" bar to federal habeas review. In each case trial counsel had failed to follow a state procedural rule that required that an objection be made pre-trial. In *Francis*, counsel had not objected to the composition of the grand jury that indicted his client; in *Sykes*, counsel had not objected to the government's use of the defendant's statement. To raise each issue for the first time on habeas attack, the *Francis* Court held that the defendant had to show "cause" why his counsel had not complied with the procedural rule,<sup>111</sup> and to show that counsel's fail-

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<sup>105</sup> See *Fay v. Noia*, 372 U.S. 391, 438 (1963). *Fay* seemed to require that the defendant make a knowing and intelligent waiver. *Id.* at 439. *Henry v. Mississippi*, 379 U.S. 443 (1965), limited *Fay* by suggesting that the attorney could bind his client without consulting him, as long as the decision to do so was tactically based. *Id.* at 451. See also Tigar, *The Supreme Court, 1969 Term—Forward: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 16-18 (1970).

<sup>106</sup> See *Henry v. Mississippi*, 379 U.S. 443 (1965).

<sup>107</sup> 425 U.S. 501 (1976). The Court discussed deliberate by-pass, but did not bar federal habeas review on that ground because the attorney did not make a tactical decision to have his client dressed in jail clothes. Petitioner's Appendix at 47, 58, 73, *Estelle v. Williams*, *ibid.* Counsel did not object because he thought the local practice was for an incarcerated defendant to wear jail clothes, and because he was unaware that the Fifth Circuit had found that practice inherently unfair.

<sup>108</sup> *Id.* at 512-513. Because an objection to the jail clothes involved a "trial-type" decision, *id.* at 514 n.4 (Powell, J., concurring), the trial court was not required to ask the defendant whether he wanted to object. Based on this analysis, the Court in the future could decide that an attorney will be held to have made a tactical decision whenever he might have made one, whether or not he actually did so. *Cf. id.* at 513 (Powell, J., concurring) (no collateral attack where the attorney makes an "inexcusable procedural default").

<sup>109</sup> 425 U.S. 536 (1976).

<sup>110</sup> 97 S.Ct. 2497 (1977).

<sup>111</sup> 425 U.S. at 542. In *Francis*, the Court applied to state defendants the same proof requirements it had imposed on collateral attack of a federal conviction. See *Davis v. United States*, 411 U.S. 233 (1973) (interpreting Rule 12(b)(2) of the Federal Rules of Criminal Procedure). Without explaining how a state defendant established either "cause" or "actual prejudice," the

ure had "actually prejudiced" him.<sup>112</sup>

It appears nearly impossible for a defendant to satisfy the requirements of *Estelle*, *Francis* and *Sykes*. If his counsel did not know he could object, a defendant might avoid *Estelle*. But few attorneys are likely to admit their ignorance since, in effect, they would be confessing to incompetency. Even if the attorney were found incompetent for having failed to object,<sup>113</sup> the defendant would still not gain review where a state procedural rule existed because, under *Francis* and *Sykes*, he also must show "actual prejudice."

Clever defendants might choose to base their appeal initially upon ineffectiveness grounds rather than upon the issue not raised by counsel.<sup>114</sup> Yet it seems inconceivable that the Supreme Court would permit such an easy circumvention of its careful limits on federal habeas corpus jurisdiction. Moreover, if the appellate court decides that the undeclared motion would have been denied, or that any error in admitting the unchallenged evidence was harmless, it is senseless to find that the attorney's failure violated the sixth amendment.<sup>115</sup> To reverse the conviction by finding a sixth amendment violation would force the government to retry the defendant when the appellate court had found that the failure to object, or an incorrect decision by the lower court had counsel made the motion, would have made no constitutional difference.

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*Francis* Court affirmed the Fifth Circuit's denial of relief but remanded the case to the district court to allow the defendant to establish "actual prejudice." 425 U.S. at 542.

<sup>112</sup> 425 U.S. at 542. *Sykes* extended *Francis* in two ways. First, the Court suggested that the defendant could not establish "cause" if his attorney had decided not to object for tactical reasons. 97 S.Ct. at 2507 n.12 and 2508 n.14. The Court seemed to say that if the attorney should have recognized that an objection was appropriate, he will be held to have made a tactical decision not to object, whether or not the record indicates that that was the case.

Second, *Sykes* extended *Francis'* treatment of "actual prejudice." Without defining that term, the Court reviewed the record and held that the defendant could not establish "actual prejudice" on the facts presented. 97 S.Ct. at 2509. In effect, the Court was willing to analyze whether any error was harmless without giving the defendant the opportunity, as it had in *Francis*, to establish "actual prejudice."

<sup>113</sup> Neither *Francis* nor *Sykes* indicates whether the failure to object constitutes ineffective representation, or whether that finding would constitute "cause."

<sup>114</sup> Or, a defendant, after a post-conviction court decides that his attorney's failure to object bars review of the merits of the government's conduct, might *resurrect* his attack as a sixth amendment challenge to his attorney's failure.

<sup>115</sup> *But see Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir.), *rehearing en banc granted*, \_\_\_ F.2d \_\_\_ (9th Cir. 1977) (defense attorney had not moved to suppress evidence, and on collateral attack, district court would not let defendant assert that failure as a sixth amendment claim). The Ninth Circuit held that the sixth amendment claim was independent of the fourth amendment claim, and remanded for determination whether the attorney had been ineffective, but did not explain how the district court was to decide whether failure to object amounted to ineffective representation. The district court could find that failure to object did not prejudice the defendant, or that the failure was a harmless error, essentially the same tests it had applied earlier.

Since the failure to object can have a severe consequence,<sup>116</sup> the importance of the guidelines ordering attorneys to protect the record is obvious. Nevertheless, the practical problems of criminal practice suggest that adoption of the guidelines may not improve defense representation significantly, unless at a point before the verdict there is some way to check whether the attorney did follow them.

### B. *Why Do Attorneys Act Ineffectively?*

The practical realities of criminal practice pressure attorneys to limit their preparation, to encourage plea bargaining, and to avoid going to trial. The work load is frequently very heavy. Public defenders usually cannot limit their caseloads and many private attorneys maintain a heavy caseload because criminal practice is often not lucrative. Because most private attorneys practice by themselves or in a loose association with a few other attorneys, they often have trouble covering every court appearance and try to avoid continuances. They "research" the law by discussing questions with fellow attorneys.<sup>117</sup> If they must go to trial, they do so without adequate preparation or adequate support.<sup>118</sup> Attorneys are frequently unable to hire an investigator to gather witnesses, prepare testimony, or perform the legwork that is invariably necessary.

Many defense attorneys also misunderstand their role.<sup>119</sup> If attorneys think their clients are guilty, they often decide not to speak with them or to investigate their cases. And it is easy for a defense attorney to become insensitive. Because other clients with similar "stories" pleaded guilty, the attorney doubts the truth of the new client's ex-

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<sup>116</sup> *Stone v. Powell*, 428 U.S. 465 (1976), demonstrates another reason why attorneys must understand the importance of deciding whether to object. In *Stone*, the Court barred federal collateral attack when state courts had provided the opportunity for a full and fair hearing of a fourth amendment claim, even if the state decision was wrong. *O'Beery v. Wainwright*, 546 F.2d 1204 (5th Cir. 1977), interpreted *Stone* to mean that federal habeas was barred when the state court had had the opportunity to pass on the merits of a fourth amendment claim, but chose instead to deny the appeal on the adequate state ground doctrine. *Stone* may be expanded to cover other than fourth amendment challenges. See *Stone v. Powell*, 428 U.S. 465, 517-18 & n.13 (1976) (Brennan, J., dissenting); *Brewer v. Williams*, 97 S.Ct. 1232, 1251-54 (1977) (Burger, C.J., dissenting) (claiming *Stone* should apply to fifth amendment issues).

<sup>117</sup> This can lead to ineffectiveness claims if the other attorney's advice is erroneous. See *Heard v. United States*, 419 F.2d 682 (D.C. Cir. 1969) (trial attorney did not explore relationship between client's drug addiction and defense of mental illness because of erroneous advice that addiction was irrelevant when charge was possession of heroin for sale).

<sup>118</sup> Cf. *Bazelon, The Realities*, *supra* note 9 at 815 (discussing problems of preparation common to the criminal bar).

<sup>119</sup> The attorney must be devoted solely to his client. See *Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948); *Glasser v. United States*, 315 U.S. 60, 70 (1942). Misunderstandings occur frequently at sentencing when some attorneys do not realize they must marshal *any* information to help the client. See *United States v. Martin*, 475 F.2d 943, 954-56 (D.C. Cir. 1973) (Bazelon, C.J., dissenting).

planation and decides not to waste valuable time on that case.<sup>120</sup>

The fear of losing future court appointments may also influence a private attorney not to represent a client aggressively before the judge who appointed him.<sup>121</sup> In marginal cases, the attorney might urge his client to plea bargain. He might forego objections on motions he was uncertain he could win. He might not ask the court to appoint investigators or experts, especially if he feared that the judge might subtract any money spent on those resources from the remuneration he receives.

Given these practical considerations, adoption of the ABA guidelines will improve defense representation only if attorneys rethink the way in which they represent their clients,<sup>122</sup> or if courts determine in advance of the verdict whether the attorney has followed the guidelines.

### C. *Problems with Adopting the Guidelines: What Questions Are Not Answered?*

There are several problems with defining the attorney's obligations in terms of the ABA guidelines. The guidelines are incomplete; consultation, investigation, and protecting the record do not fully describe the attorney's responsibilities. Moreover, the guidelines offer little help in answering specific questions. Ordering an attorney to speak with his client, to investigate, or to object does not tell him how far he must go or when he may stop. The guidelines cannot strip the attorney of the power to decide that further investigation would be fruitless or that a motion is clearly meritless. On the other hand, courts cannot give the attorney complete power to make those decisions. It would be far too easy for him to concoct some justification

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<sup>120</sup> See *United States v. Hurt*, 543 F.2d 162 (D.C. Cir. 1976), Transcript of hearing at 38-9, May 18, 1976 (on remand, trial counsel justified asking defendant to find witnesses rather than searching for them himself, because defendant told him "the same old thing, saying that he was just an innocent bystander").

<sup>121</sup> Judges often decide who to appoint, what compensation to pay, or the number of billable hours. See, Joint Committee of the Judicial Conference of the District of Columbia Circuit and the District of Columbia Bar (Unified), *Report on Criminal Defense Services in the District of Columbia* (April, 1975) 58-60 (hereinafter *Austern-Reznick Report*); Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 81-2 nn. 50 & 52 (1974).

<sup>122</sup> Unless they are adopted as counsel's duties, few attorneys are likely to follow the guidelines because they are inconsistent with the way many attorneys try cases. In *Commonwealth v. Saferian*, 315 N.E. 2d 878 (Mass. 1974), the trial attorney testified that his usual approach was to forego pre-trial preparation and proceed through impromptu cross-examination. Although his technique of a "bludgeoning frontal attack" on the witness might be effective, it could not prevent him from avoiding traps set by the prosecution. *Id.* at 881. See also *United States v. Smith*, 551 F.2d 348, 353-54 n.7 (D.C. Cir. 1976) (finding no strategic reason for attorney's failure to object other than to avoid unnecessary delay and maintain "amicable relations with the trial judge").



for his failure to investigate or to object. Balancing these considerations will not be easy for either the attorney or the post-conviction court. After reading *DeCoster II* and reviewing the ABA guidelines, what should the attorney decide to do in the following situations and how does a post-conviction court decide whether he acted "effectively?"

1. *Consultation with the client.* Ordering an attorney to speak with his client can clash with the attorney's power to control presentation of the defense case. Because of his supposed experience and intelligence, the attorney is expected to make all decisions concerning the defense case.<sup>123</sup> The attorney may believe that he must keep certain information from his client because he fears that the client will disagree with the attorney's decision.<sup>124</sup> For example, does an attorney act properly if he withholds information in the following cases?

a. The attorney believes his client will not accept a favorable plea bargain if the elements of the crime are explained to him.<sup>125</sup>

b. The attorney thinks his client should not testify. To ensure that he does not insist upon testifying, the attorney decides not to explain a possible challenge to the government's use of the defendant's prior convictions for impeachment.<sup>126</sup>

c. The attorney receives information that might undercut the government's case, but fears that its presentation might backfire and hurt the defense. The attorney cannot verify the accuracy of this information to his satisfaction and decides against mentioning it to his client, fearing that the defendant will nonetheless insist upon using it.<sup>127</sup>

d. The attorney believes his client will concede nothing, and de-

<sup>123</sup> See, e.g., *United States v. Birrell*, 286 F. Supp. 885, 894 (S.D.N.Y. 1968); *People v. Gardner*, 71 Cal. 2d 843, 851, 457 P.2d 575, 580, 79 Cal. Rptr. 743, 748 (1969).

<sup>124</sup> ABA Defense Function standard 5.2 reinforces this dilemma by authorizing the attorney to make any tactical decision, but only after consultation with his client. See also *United States v. Moore*, 554 F.2d 1086 (D.C. Cir. 1976).

<sup>125</sup> Cf. *Henderson v. Morgan*, 426 U.S. 637 (1976) (defendant's guilty plea involuntary when attorneys did not explain elements of charge to him, because they thought he would not understand and would not plead if informed; question of ineffectiveness not raised).

<sup>126</sup> Cf. *United States v. Brown*, No. 76-162 (D.D.C. May 31, 1977) (unpublished memorandum order) (defendant claimed he chose not to testify because he feared impeachment; conviction not reversed because court accepted attorney's testimony that he had recommended that client not testify for other reasons).

<sup>127</sup> See *United States v. Moore*, 554 F.2d 1086, 1091-92 (D.C. Cir. 1976) (attorney learned defendant's wife possibly involved with principal government witness, but could not verify this information and decided not to inform client; no ineffective representation but counsel's decision not to discuss matter with client criticized). Cf. *United States v. Edmonds*, 535 F.2d 714 (2d Cir. 1976) (violent argument between defendant and attorney in front of jury about whether to call and accuse a particular person as informant).

cides not to tell him of a possible motion to suppress which the attorney is sure will be denied.

The answers to the first two examples are clearest. The defendant, rather than the attorney, must ultimately decide whether to plea bargain,<sup>128</sup> testify,<sup>129</sup> or waive a jury trial.<sup>130</sup> The attorney should discuss all options with him. The last two situations seem to fall within the attorney's sphere of power. Yet some attorneys have been criticized for deciding not to share that kind of information with their clients.<sup>131</sup> After all, it is the defendant, and not the attorney, who goes to jail after a guilty verdict. If the defendant is willing to risk irritating the judge by insisting on a meritless motion, why should he be unable to decide what motions will be made? On the other hand, should the attorney try to protect the defendant against making bad tactical judgments?<sup>132</sup> As long as the power arrangement between the attorney and client remains unclear, ordering the attorney to consult with his client may increase ineffectiveness appeals without clearly improving the quality of representation.

2. *Investigation.* The relationship that an attorney has with his client and with the court can be further strained if the attorney must be ordered to investigate. What options does the attorney have in the following situations?

a. The attorney believes that investigation is a waste of time. His representation began long after the crime occurred and his client does not know of any witnesses. Formal discovery reveals no leads. If the attorney must investigate, where does he begin? Must he, as in *DeCoster*, go to the hotel and bar?<sup>133</sup>

<sup>128</sup> See *Boykin v. Alabama*, 395 U.S. 238 (1969).

<sup>129</sup> ABA STANDARDS, THE DEFENSE FUNCTION, *supra* note 103 § 5.2(a)(iii). But see *Poe v. United States*, 352 F.2d 639 (D.C. Cir. 1964) (counsel can stop defendant from testifying for tactical reasons, but not because he incorrectly thought government could impeach the defendant with prior statements). Often, attorneys urge clients not to testify because the government could impeach them with prior convictions, but they do not move to suppress the government's use of those convictions. Is this failure to object ineffective representation? See *United States ex rel. Johnson v. Johnson*, 531 F.2d 169 (3d Cir.), cert. denied, 425 U.S. 997 (1976) (no); *United States v. Brown*, No. 76-162 (D.D.C. May 31, 1977) (no).

<sup>130</sup> See *Brookhart v. Janis*, 384 U.S. 1 (1966).

<sup>131</sup> See *United States v. Moore*, 554 F.2d 1086 (D.C. Cir. 1976).

<sup>132</sup> A problem arises when counsel and defendant disagree about the defense to present. Must an attorney honor his client's desire not to present a certain defense, or must he present that defense to protect his client? But if he raises the defense on his own, does he violate the attorney-client privilege? See *Taylor v. State of Alabama*, 291 Ala. 760, 287 So. 2d 901. (1973)(counsel thought defendant should argue self-defense, but defendant insisted upon an alibi defense and counsel acceded to client's demand. After conviction, defendant moved for a new trial on the ground that counsel should not have presented alibi defense; the court of appeals agreed, but state Supreme Court reinstated the conviction).

<sup>133</sup> An attorney cannot decide not to interview a witness because he thinks the witness will

b. The defendant tells his attorney that someone witnessed the incident but he does not know the person's name or address. Must the attorney search for this person, or can he tell his client that he will interview the witness once his client finds him?<sup>134</sup> What must the attorney do if his client fails or does not even attempt to locate that witness?

c. Is the attorney, on the basis of his experience in other cases, precluded from deciding not to investigate? The attorney may have found that co-counsel rarely permit interviews of their clients, that police officers uniformly refuse to discuss the case, and that victims are not only reluctant to talk, but become more hostile if approached.<sup>135</sup>

d. The attorney fears that investigation may uncover information that will undercut his client's story. He is also uncertain whether he must confront his client with this information and fears confrontation will destroy his uneasy relationship with the client. Must he investigate? If he investigates and confronts his client, but is not satisfied that his client is telling the truth, does the attorney suborn perjury if he permits his client to testify inconsistently with the information from his investigation?

If the defendant contradicts an earlier statement made to his attorney, must the attorney investigate to see which story is true? Is it unethical for the attorney to investigate, because he appears to be working against his client?<sup>136</sup> Should investigation prove one story incorrect, is the attorney ethically obligated to confront his client?

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not help, *Stokes v. Peyton*, 437 F.2d 131 (4th Cir. 1970); because he thinks that the witness would not remember the incident, *Gomez v. Beto*, 462 F.2d 596 (5th Cir. 1972); or because he thinks the witness has already truthfully discussed the incident with the police, *DeCoster II*, *supra* note 10, slip op. at 17 n.27.

<sup>134</sup> See *United States ex rel. Johnson v. Johnson*, 531 F.2d 169 (3rd Cir.), (finding no ineffectiveness when attorney searched unsuccessfully for witnesses but did not request investigative help), *cert. denied*, 425 U.S. 997 (1976). *But see* *McLaughlin v. Royster*, 346 F. Supp. 297 (E.D. Va. 1972) (fact that counsel of record not paid and that defendant was not helpful does not excuse defense attorney's failure to investigate).

<sup>135</sup> *Cf. United States v. Moore*, 529 F.2d 355 (D.C. Cir. 1976) (attorney cannot decide not to interview because he expects witness will refuse to talk); *McQueen v. Swenson*, 498 F.2d 207, 216 (8th Cir. 1974) (condemning attorney's policy not to interview government witnesses because he feared accusation of bribery or unethical conduct).

<sup>136</sup> At the remand hearing in *DeCoster I*, Judge Waddy thought investigation might be unethical. The attorney would be investigating to find information to impeach his own client. If the attorney found inconsistent information, he might be suborning perjury if he let the defendant testify to the version proved wrong. Record, *supra* note 50, at 99, 110. Chief Judge Bazelon, on the other hand, thought the attorney was ethically obligated to investigate and to confront his client with that inconsistent information to prevent the defendant from perjuring himself in the way that *DeCoster* had almost surely done. *DeCoster II*, *supra* note 10 at 19. But Bazelon does not explain what the attorney should do if he is uncertain which version is the truth. Can the attorney evaluate which version the jury is more likely to accept?

Can the attorney permit his client to testify to the version which was proven false?<sup>137</sup> What happens if the defendant, when confronted with the investigation, acknowledges that his first story was a lie, but insists that the second version is true? Is this enough for the attorney to let him testify to the second version?

The problems presented by these and other questions are well known,<sup>138</sup> but most attorneys prefer to avoid confronting them. Ostrich-like, they choose not to investigate, or decide that the defendant is stalling to get the best offer possible before pleading guilty, or testing the attorney to see if he can be trusted. If the defendant insists on a trial, these attorneys select between the inconsistent stories by asking the defendant questions that are designed to cement the defendant to the more convincing version. Do the ABA guidelines condemn this kind of pragmatic approach?

e. The attorney believes that his client is lying and that he both should and will be found guilty. Must he still investigate, either to support his client's position or to undercut the government's case? Is his decision not to investigate justified if the government's witnesses appear truthful and the government's case seems unassailable? Is it justified if the defendant is ambivalent or switches stories? Or, does the attorney abrogate the jury's role if he can decide whether his client is lying?<sup>139</sup>

If the defendant has admitted guilt, but is willing to risk trial, is the attorney obligated to prepare all defenses ethically available?<sup>140</sup>

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<sup>137</sup> See *Thornton v. United States* 357 A.2d 429 (D.C. 1976) (defendant switched his defense from attempt to explain his presence at the scene to an alibi; counsel thought switch in stories was a lie, and moved to withdraw because he believed client intended to perjure himself. Motion was denied but counsel did not argue client's story in summation. On appeal, defendant claimed attorney was ineffective because he did not believe change in story. Held: defense counsel recognized ethical duty not to argue perjured testimony and had vigorously represented client by attacking the government's evidence).

<sup>138</sup> See generally, M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* (1975).

<sup>139</sup> The issue underlying the questions posed in this section is whether the attorney's role is to help the jury reach an accurate verdict or to help his client challenge the government's case in the best way possible. Because Judge MacKinnon apparently believes the former, he argued that the attorney has no obligation to investigate to support a fabricated defense. *DeCoster II*, *supra* at 10, slip op. at 11 (MacKinnon, J., dissenting). While no one would dispute that argument, MacKinnon begs the question of how an attorney decides that his client is lying. As the questions in this section suggest, defense attorneys must live with more uncertainty than MacKinnon seems to assume exists. Chief Judge Bazelon would appear to choose the latter definition of the attorney's role. See Bazelon, *Defective Assistance*, *supra* note 9 at 2. With a disagreement so basic, it is understandable why judges clash in deciding when counsel's decisions about investigation amounts to ineffective representation.

<sup>140</sup> See *Jones v. Cunningham*, 313 F.2d 347, 352 (4th Cir. 1963) (attorney is obligated to investigate). See also ABA STANDARDS, *THE DEFENSE FUNCTION*, *supra* note 103, § 4.1 (attorney's obligation to investigate is independent of client's statements concerning guilt).

Must the attorney search for witnesses to shake the government's case, even if he cannot offer evidence to support his client's lie?

3. *Raising objections.* Given the Supreme Court's restrictions on habeas corpus review, the careful attorney may object on all possible bases. Would he be ineffective if he decided not to do so, because he believed that some motions would fail, that they would not reveal new information, or that constant objections would only irritate the judge.<sup>141</sup> Should not the duty to preserve the record only require the attorney to consider whether to object? If it demands any more, one can imagine an attorney under-cutting this command by explaining to the judge that the motion he just made is mandated by *DeCoster*, thereby flagging his assessment of the motion's merits and inviting the judge to deny it.<sup>142</sup>

#### V. IS *DeCoster II*'S DEFINITION OF THE DEFENDANT'S BURDEN CONSTITUTIONALLY CORRECT?

The defendant cannot meet his burden of establishing ineffective representation simply by showing that his attorney violated one of the ABA guidelines.<sup>143</sup> In defining his burden, courts can choose between two approaches. They could make it relatively easy for the defendant to establish a constitutional violation, but refuse to reverse the conviction if the attorney's failures were harmless error. Or, they could require the defendant to make a significant showing of prejudice caused by his attorney's failures,<sup>144</sup> and reverse automatically, without considering harmless error, if the defendant met that burden. *DeCoster II* chose the first approach. In *Beasley v. United States*,<sup>145</sup>

<sup>141</sup> See, e.g., *United States v. Smith*, 551 F.2d 348 (D.C. Cir. 1976) (defense counsel can decide not to make certain motions if he believes they will lose); *Harried v. United States*, 389 F.2d 281, 286 (D.C. Cir. 1967) (defense attorney not required to "make every motion in the book"). Cf. *Anders v. California*, 386 U.S. 238 (1967) (appellate counsel may decline to press an appeal, but must note why he thinks possible issues are not meritorious).

<sup>142</sup> See *Thornton v. United States*, 357 A.2d 429, 433 (D.C. 1976) (defense counsel told trial court he believed defendant's *pro se* motion was meritless, but urged court to hear motion to protect the record).

<sup>143</sup> *United States v. DeCoster*, *supra* note 10, slip op. at 11. See *State v. Harper*, 57 Wis. 2d 543, 205 N.W.2d 1 (1973) (adopting ABA standards as partial guidelines but finding effective representation when attorney first interviewed client shortly before trial, did not review police reports or seek alibi witnesses, or move to suppress certain evidence; court did not say whether the defendant was harmed in any way by attorney's conduct).

<sup>144</sup> A finding that the attorney's representation was a "farce" usually assumed that the defendant had been prejudiced. See, e.g., *United States ex rel. Mathis v. Rundle*, 394 F.2d 748, (3d Cir. 1968), *overruled* on other grounds by *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970). The "reasonable competency" test requires that the defendant prove he was prejudiced by his attorney's representation. See, e.g., *United States ex rel. Johnson v. Johnson*, 531 F.2d 169 (3d Cir.) (no ineffective representation when the defendant had not shown how unlocated witness could have helped), *cert. denied*, 425 U.S. 997 (1976).

<sup>145</sup> 491 F.2d 687 (6th Cir. 1974).

the Sixth Circuit chose the second approach in a decision where that circuit also rejected the "farce" test.

In choosing between *DeCoster II*'s and *Beasley*'s approaches, courts must resolve two issues concerning the purpose of post-conviction review. First, should courts try to protect only the individual defendant against an unfair verdict, or should they try to prod all attorneys to provide better representation? Second, is a trial fair if the verdict appears reliable, or is it fair only if the defendant had a full opportunity to present his own case and to dispute the government's case?

In *Beasley*, the defense attorney neither interviewed nor subpoenaed several eyewitnesses who were unable to identify the defendant, and another witness whom the defendant claimed would have provided him with an alibi.<sup>146</sup> The attorney thought the government was required to call the eyewitnesses. The only defense witness was an F.B.I. agent who was called for the bizarre purpose of showing that the agent was prejudiced against the defendant. The Sixth Circuit concluded that counsel had deprived his client of a "substantial defense" because he had not attacked the government's identification evidence.<sup>147</sup> Without defining a "substantial defense" the court reversed *Beasley*'s conviction, holding that a finding of ineffective representation required automatic reversal.<sup>148</sup>

*DeCoster II* focuses on the attorney's conduct, while *Beasley* concentrates on the reliability of the verdict.<sup>149</sup> *DeCoster II* does not require the defendant to show either that the information overlooked was admissible at trial<sup>150</sup> or that the verdict might, or would, have differed. *Beasley* probably requires proof of both.

*Beasley* leaves two important questions unresolved. First, the court does not explain what it considers a "defense." In *Beasley* the term is apparently not limited to affirmative defenses but includes attacks

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<sup>146</sup> *Id.* at 691. The government's bank robbery case was largely circumstantial. The defendant's palm print appeared on the note given to the bank teller, the defendant had access to the type of lettering device used to stencil the note, and one government witness testified that the defendant resembled the robber. *Id.* at 690.

<sup>147</sup> *Id.* at 696.

<sup>148</sup> *Id.*

<sup>149</sup> This difference between *DeCoster II* and *Beasley* is illustrated by *Woody v. United States*, 369 A.2d 592 (D.C. 1977), where the defense attorney failed to get defendant's bank account record, failed to explain the defendant's possession of money, failed to file certain pretrial motions, failed to object to certain misstatements in the prosecution's summation, failed to request or object to jury instructions and neither adequately consulted with the defendant before trial nor attempted to find a favorable eyewitness. Nonetheless, defense counsel's representation was not ineffective, because the defendant failed to show how any failure had eliminated a substantial defense. See also *Bruce v. United States*, 379 F.2d 112, 116 (D.C. Cir. 1967).

<sup>150</sup> *But see* *McQueen v. Swenson*, 498 F.2d 207, 220 (8th Cir. 1974) (uninvestigated evidence must be admissible at trial).

on crucial elements of the government's case, such as identification. But uninvestigated information that counsel could have used to corroborate other evidence, impeach a government witness, or convince his client to plea bargain, probably would not constitute a "defense." In contrast, proof of these potential uses of evidence should satisfy the defendant's burden in *DeCoster*.

Second, *Beasley* fails to explain when a defense is "substantial." Because the case requires automatic reversal after a finding of ineffective representation based on a failure to present a "substantial defense," a defense might be interpreted as "substantial" only if it would have created a reasonable doubt of the defendant's guilt.<sup>151</sup>

Courts that are ready to reject the "farce" test will probably prefer the analysis in *Beasley* to that in *DeCoster II*.<sup>152</sup> *Beasley*'s definition of the defendant's burden seems more consistent with recent Supreme Court decisions,<sup>153</sup> is less likely to require reversal of the defendant's conviction, and does not impose as much pressure on the trial court to oversee defense counsel's representation.<sup>154</sup>

#### A. *What Is the Constitutional Test of Ineffective Representation?*

The Supreme Court requires a defendant to establish that he was "prejudiced" by the alleged basis of ineffectiveness.<sup>155</sup> *DeCoster* specifically rejects the term "prejudice" to define the defendant's burden.<sup>156</sup> After the defendant shows a "substantial violation" of counsel's duties, the burden shifts to the government to prove the absence of "prejudice" caused by the attorney's failing.<sup>157</sup> Of course, too much can be made of the differences between the terms of art chosen to

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<sup>151</sup> See 491 F.2d at 696. In the *en banc* reconsideration of *DeCoster II*, the government argued that *Beasley* should be interpreted in this way, and that the *en banc* court should adopt the *Beasley* approach.

<sup>152</sup> In contrast to *DeCoster II* and *Beasley*, the Eighth Circuit has a third approach: the circumstances of each case may require a different allocation of the burden. See *Thomas v. Wyrick*, 535 F.2d 407, 414 (8th Cir.) (no explanation of what factors justify a different allocation), *cert. denied*, 429 U.S. 868 (1976).

<sup>153</sup> See Part V(A), *infra*.

<sup>154</sup> See note 176 and accompanying text, *infra*.

<sup>155</sup> See, e.g., *Chambers v. Maroney*, 399 U.S. 42 (1970) (neither last-minute substitution of counsel nor attorney's failure to exclude evidence that was excluded from prior trial prejudiced defendant's case). Cf. *Dukes v. Warden*, 406 U.S. 250 (1972) (apparent conflict in counsel's representation of another person was insufficient to render guilty plea involuntary).

<sup>156</sup> *DeCoster I*, *supra* note 10, 487 F.2d at 1204; *DeCoster II*, *supra* note 10, slip op. at 25.

<sup>157</sup> *Id.* Cf. *Garton v. Swenson*, 417 F. Supp. 697, 704 (W.D. Mo. 1976) (defendant can meet his burden by showing admissible evidence which "could have been presented at the trial and which would have proved 'helpful' to the defendant," thereby shifting the burden to the government to show attorney's omission was harmless beyond a reasonable doubt).

describe the standard.<sup>158</sup>

The Supreme Court has never explained what it means by "prejudice" in an ineffective representation case. The Court will probably define that term as it defined "materiality" in *Agurs v. United States*.<sup>159</sup> In *Agurs*, the defense attorney had not requested,<sup>160</sup> and the government had not disclosed, the victim's record of prior convictions in a murder case where the defense was self-defense. The Court held that the defendant's burden was to prove that the non-disclosed information was "material." "Materiality" was defined in terms of the justice of the verdict.<sup>161</sup> The defendant could not establish materiality simply by claiming that the undisclosed evidence might have helped her to present her case more forcefully,<sup>162</sup> or that it might have influenced the jury to reach a different verdict.<sup>163</sup> *Agurs* thus differs markedly from *DeCoster II*, and joins a number of recent Supreme Court decisions that apparently limit post-conviction relief to defendants who are factually "innocent."<sup>164</sup>

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<sup>158</sup> Cf. *Wainwright v. Sykes*, 97 S. Ct. 2497, 2511 (1977) (Stevens, J., concurring) (noting that the "language of the test the Court purports to apply" may not be important because cases will instead turn on "the competence of counsel, the procedural context in which the asserted waiver occurred, the character of the constitutional right at stake, and the overall fairness of the entire proceedings").

<sup>159</sup> 427 U.S. 97 (1976). Judge MacKinnon apparently thinks that *Agurs* furnishes the correct test. *DeCoster II*, *supra* note 10, slip op. at 40-41 (dissenting opinion). While a member of the U.S. Court of Appeals for the Seventh Circuit, Justice Stevens, who subsequently wrote the Supreme Court's opinion in *Agurs*, defined the defendant's burden in an ineffective representation case in *Agurs*-like terms. See *Matthews v. United States*, 518 F.2d 1245 (7th Cir. 1976). On the other hand, because *Agurs* was decided on fifth amendment due process grounds, it may not furnish the correct definition of the defendant's burden in an ineffective representation case. Most courts now agree that the right to effective representation is protected by the sixth amendment. Consequently, they have held that the defendant's burden is lighter than that imposed by due process principles. See *Scott v. United States*, 427 F.2d 609, 610 (D.C. Cir. 1970). Cf. *Fitzgerald v. Estelle*, 505 F.2d 1334, 1336 (5th Cir. 1975) (where the defendant is represented by appointed counsel, the issue should not be fairness of trial; due process standard is embodied in the "farce" test).

<sup>160</sup> Trial counsel believed the victim's prior record was inadmissible if unknown to the defendant. When counsel learned that inadmissibility did not depend upon the defendant's knowledge, he moved for a new trial based on the government's failure to disclose. 427 U.S. at 102 n.5.

<sup>161</sup> 427 U.S. at 112-13. For a detailed examination of the *Agurs* case, see *Recent Development*, 14 AM. CRIM. L. REV. 319 (1976).

<sup>162</sup> 427 U.S. at 112 n.20.

<sup>163</sup> 427 U.S. at 108-09 & n.15 (this argument was rejected as the "sporting theory of justice;" the jury should not be given another opportunity to "flout" the evidence).

<sup>164</sup> Justice Stevens used the term "innocence" in writing the majority's *Agurs* opinion. *Id.* at 107, 110, 111. The first suggestion that post-conviction relief be conditioned on "innocence" appeared in Justice Black's dissent in *Kaufman v. United States*, 394 U.S. 217, 231 (1969), where the Court refused to limit habeas corpus relief to apparently innocent defendants. *Id.* at 228-30. In recent cases, Justice Black's suggested limitation appears to have gained support. See *Stone v. Powell*, 423 U.S. 465, 490 (1976) ("the ultimate question of guilt or innocence should be the central concern in a criminal proceeding," precluding collateral attack on the



The Supreme Court has never explicitly distinguished between factual and legal "innocence," but *Agurs* could be interpreted as making this distinction. If the distinction is appropriate, limiting relief to the factually innocent differs from *DeCoster's* approach.<sup>165</sup> This limitation begs the crucial question of when a trial is "fair." At trial, the burden of proof is the defendant's ally—it permits acquittal for jury error or uncertainties in the government's case. Defense attorneys are rarely able to convince the jury that the defendant is factually innocent. In fact, many defense attorneys are reluctant to offer evidence because they fear that the jury will decide by comparing the government's evidence against the defendant's, rather than by testing the government's evidence against its burden of proof. *Agurs'* apparent focus on factual innocence rejects what *DeCoster* recognizes: a defendant should be permitted to satisfy his post-conviction burden by showing that he could have better prepared or presented his case—in other words, that the failure to investigate affected the defense strategy.

Two other differences between *Agurs* and *DeCoster II* are significant. First, the Supreme Court refused to apply the harmless error doctrine in deciding whether the defendant had been prejudiced by the failure to disclose.<sup>166</sup> The Court did not distinguish between the existence of a constitutional violation and the influence of that violation on the jury. Unlike *DeCoster II*, the defendant in *Agurs* had to prove

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basis of fourth amendment claims fully litigated in state proceedings). *Cf.* *Hankerson v. North Carolina*, 97 S. Ct. 2339, 2343 (1977) (the purpose of the burden of proof is "to prevent the erroneous conviction of innocent persons"); *Swain v. Pressley*, 97 S. Ct. 1244 (1977) (at oral argument Blackmun, J. asked counsel whether defendant claimed to be innocent) (conversation with Mark Foster, defendant's counsel, Feb. 24, 1977); *Patterson v. New York*, 97 S. Ct. 2319, 2326 (1977) ("Due process does not require that every conceivable step be taken . . . to eliminate the possibility of convicting an innocent person").

*See also* Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 U. VA. L. REV. 927, 961-70 (1973) (arguing that courts should not reverse on collateral review if attorney's conduct did not compromise reliability of the verdict, even if it could have affected the jury's determination of guilt); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160-64 (1970) (ways defendant might meet his burden often mean that he must show factual innocence). *But see* Boyte, *Federal Habeas Corpus after Stone v. Powell: A Remedy Only for the Arguably Innocent?*, 11 U. RICH. L. REV. 291 (1977) (arguing that the Court has not yet limited habeas corpus relief to innocent defendants).

<sup>165</sup> In *DeCoster I*, Chief Judge Bazelon argued that the defendant is not required to prove his innocence. *DeCoster I*, supra note 10, 487 F.2d at 1204.

The apparent requirement of *Agurs* that the defendant establish his innocence presents appellate counsel with a dilemma. If his client admits he is guilty, how should counsel answer the court's question whether the defendant is, in fact, innocent? Does the attorney-client privilege bar counsel from answering? To avoid this dilemma, several appellate attorneys have told the author that they do not ask their clients whether they are innocent.

<sup>166</sup> *United States v. Agurs*, 427 U.S. 97, 112-14 (1976).

both to win reversal.<sup>167</sup>

Second, in a footnote, the *Agurs* Court curtly said that the attorney's failure to request discovery was not ineffective representation.<sup>168</sup> The Court understandably addressed the issue of ineffectiveness, even though that issue had not been presented to it.<sup>169</sup> Without this footnote, the defendant might have tried to appeal again on the basis of ineffective representation. The footnote suggests that the Supreme Court would not agree with *DeCoster II* because the attorney's failure in *Agurs* clearly had the kind of impact on the defendant's case that would meet the defendant's burden in *DeCoster II*.

### B. *Should the Standard Be Defined to Attempt to Improve Representation?*

In *Estelle v. Williams*,<sup>170</sup> the Court indicated that the trial court must superintend its proceedings to ensure that the trial attorney fulfills his responsibility,<sup>171</sup> but has no responsibility to oversee any question that might involve a tactical decision by the defense attorney or even to ascertain that the attorney's decision was a tactical judgment.<sup>172</sup> Although deciding to investigate, to consult with a defendant, or to make some motion is not usually a matter of tactics, *Estelle* is written so broadly that the Supreme Court is unlikely to require trial courts to determine whether the defense attorney has investigated or is prepared.<sup>173</sup>

The Supreme Court, however, has fashioned remedies to prevent certain conduct by trial courts that interferes with the defendant's right to counsel.<sup>174</sup> But in ineffectiveness cases, the culprit is the de-

<sup>167</sup> Compare *id.* at 112-14, with *DeCoster II*, *supra* note 10, slip op. at 23-25.

<sup>168</sup> *Id.* at 102 n. 5.

<sup>169</sup> The district court had denied a motion for new trial on the ground of ineffectiveness. The District of Columbia Circuit found the issue unnecessary to consider on appeal. 510 F.2d 1249 (D.C. Cir. 1975) The defendant decided not to present the issue to the Supreme Court as an alternative ground upon which the Court could affirm.

<sup>170</sup> 425 U.S. 501, 503 (1976).

<sup>171</sup> See also *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (judges should "maintain proper standard of performance by attorneys who are representing defendants in criminal cases in their courts").

<sup>172</sup> 425 U.S. at 512. "Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system." *Id.*

<sup>173</sup> *Estelle* is consistent with recent decisions where the Court has refused to apply prophylactic rules to outlaw governmental misconduct, even if its potential for prejudice is great. See *Manson v. Braithwaite*, 97 S. Ct. 2243 (1977) (eyewitness identification); *Weatherford v. Bursey*, 97 S. Ct. 837 (1977) (undercover agent overheard conversations between defendant and counsel).

<sup>174</sup> See, e.g., *Geders v. United States*, 425 U.S. 80, 91 (1976) (automatic reversal when court forbade defense attorney to speak with defendant during recess in defendant's testimony despite

fense attorney rather than the court.<sup>175</sup> Chief Judge Bazelon intended *DeCoster II*'s definition of the defendant's burden of proof to act as a prophylactic to prevent ineffective representation.<sup>176</sup> Yet this kind of remedy must be narrowly tailored so that it curtails illegitimate behavior while not interfering with proper conduct. For example, an explanation from a defense attorney about his preparation could violate the attorney-client privilege, or the attorney might fear that any information he gave to the judge would affect the judge's later decisions in the case.<sup>177</sup> Even if the standard were sufficiently precise, the problem remains that many courts are unhappy with the prospect of overseeing defense counsel.<sup>178</sup>

### C. Applying DeCoster II

The *DeCoster II* analysis can pressure trial courts and the government to oversee defense attorneys, but no court should fear that the standard will require wholesale reversals. Trial courts that have applied the *DeCoster* standard have reached inconsistent results.<sup>179</sup>

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defendant's failure to show prejudice); *Herring v. New York* 422 U.S. 853 (1975) (automatic reversal when trial court refused to hear defense attorney's final argument). See also *Moore v. United States*, 432 F.2d 730, 734-35 (3d Cir. 1970) (harm presumed from late appointment of counsel to force state courts to appoint counsel early in the proceedings).

<sup>175</sup> Courts might also decide that *DeCoster*'s standard is incorrectly designed because it pressures the trial court rather than the real wrongdoer, the defense attorney. See *Rizzo v. Goode*, 423 U.S. 362, 370, 378 (1976) (vacating a district court injunction prophylactically designed to force city officials to prepare a program to improve handling of citizens' complaints against police when no showing that those officials authorized or encouraged the conduct complained of).

<sup>176</sup> This is clear from the Judge's writings, if not from his opinions in *DeCoster I* and *II*. See *The Realities*, *supra* note 9 at 823-24 (*DeCoster II* enunciated "prophylactic rules of conduct for defense counsel").

<sup>177</sup> Notwithstanding these problems, this article suggests in Part VII that the trial court must interfere with the attorney-client relationship to improve defense representation.

<sup>178</sup> See *Fitzgerald v. Estelle*, 505 F.2d 1334, 1337 (5th Cir. 1974) ("counterproductive" to require trial court to oversee retained counsel); *Mitchell v. United States*, 259 F.2d 787, 792-93 (D.C. Cir.) (requiring judges to intercede would "destroy concept of impartial judges," interfere with attorney-client confidences, and discourage attorneys from accepting appointments in criminal cases), *cert. denied*, 358 U.S. 850 (1958). *But cf.* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE FUNCTION OF THE TRIAL COURT JUDGE, Section 1.1(a) (1972) (trial judge should initiate any matter "which may significantly promote a just determination of the trial").

If the defendant complains to the judge about his attorney's representation, the judge should intervene. By objecting, the defendant should waive the protection of the attorney-client privilege. In *DeCoster*, for example, the judge failed to explore the basis for defendant's complaints about his attorney. *DeCoster II*, *supra* note 10 slip op. at 5.

<sup>179</sup> Following *DeCoster I*, several trial courts in the District of Columbia granted motions for new trials on the ground of ineffective representation. See *United States v. Lucas*, 513 F.2d 509, 512 n.5 (D.C. Cir. 1975) (trial counsel failed to interview eyewitness). See Bazelon, *The Realities*, *supra* note 9, at 829 n.82 (citing cases). *But see* *United States v. Brown*, No. 76-162 (D.D.C. May 31, 1977) (unpublished memorandum order)(no ineffective representation even

*DeCoster II* leaves two unanswered questions whose ultimate resolution could permit any court to deny an ineffectiveness challenge.

First, *DeCoster II* does not explain how the government establishes harmless error.<sup>180</sup> Because the failure to investigate presents the question of harmless error in an unusual way,<sup>181</sup> the definition given this doctrine can greatly affect the government's chance to prevent reversal. In *Chapman v. California*,<sup>182</sup> the Supreme Court held that constitutional errors were harmless only if they were found harmless beyond a reasonable doubt. In applying that formulation of harmless error, the Court focused on the possible impact of a constitutional violation on the jury, regardless of the weight of other evidence supporting the verdict.<sup>183</sup> In *Harrington v. California*,<sup>184</sup> the Court switched its emphasis, and said that a constitutional violation was harmless error when "overwhelming evidence" supported the verdict even after the offending evidence was subtracted.<sup>185</sup> Although the Court has never clearly applied either test of harmless error where the alleged constitutional violation was ineffective representation, it would probably apply the *Harrington* version.<sup>186</sup>

If *Harrington* provides the correct approach, the government can prove harmless error relatively easily.<sup>187</sup> If the omitted evidence

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though counsel had not challenged whether government could use defendant's prior convictions to impeach him (a failure that defendant claimed led him to decide not to testify at trial); counsel had also based defense on misidentification despite defendant's admission to counsel that he was inside bank and despite defendant's desire to argue that he was inside bank innocently).

<sup>180</sup> While *DeCoster II* holds that the government must establish harmless error beyond a reasonable doubt, it fails to explain whether the government must show that the change in the defense tactics, given the omitted information, would not have affected the jury's verdict, or whether the government can show that overwhelming evidence existed to justify the verdict even with the omitted information added.

<sup>181</sup> Rather than subtracting the offending evidence from the record, as is normally done in assessing harmless error, the court must add the omitted evidence to that evidence presented to the jury.

<sup>182</sup> 386 U.S. 18, 24 (1967).

<sup>183</sup> *Id.* at 24-26.

<sup>184</sup> 395 U.S. 250 (1969).

<sup>185</sup> *Id.* at 254. Although the Court claimed to reaffirm *Chapman's* approach, *id.*, its decision seems inconsistent with *Chapman*. See also *Milton v. Wainwright*, 407 U.S. 371 (1972).

<sup>186</sup> See *Chambers v. Maroney*, 399 U.S. 42, 53 (1970) (apparently applying *Harrington* test in holding that late appointment of counsel was harmless error). Cf. *Wainwright v. Sykes*, 97 S. Ct. 2497, 2509 (1977) (by reviewing entire record to determine whether evidence, besides defendant's statement that his attorney had not moved to suppress, justified jury verdict, the Court followed the *Harrington* approach without citing that case). But cf. *Henderson v. Morgan*, 426 U.S. 637 (1976) (where the defendant attacked the voluntariness of his guilty plea and argued that his attorneys had not adequately explained the elements of the crime to which he pleaded, the Court cited neither *Chapman* nor *Harrington*, but indicated that the government had not established harmless error, however it was defined).

<sup>187</sup> *DeCoster* illustrates the difference in result that could follow from applying *Chapman* rather than *Harrington*. Unless *DeCoster* had been arrested on the scene, the evidence against

merely corroborates other defense evidence or bolsters an existing attack on the government's case, then a court could find harmless error.<sup>188</sup> And even if the omitted evidence presents a new defense, such as an alibi,<sup>189</sup> or a different type of attack on the government's case,<sup>190</sup> the error might be harmless.

The second question left unanswered by *DeCoster II* is how the reviewing judge, in deciding the harmless issue, can evaluate the accuracy and impact of the omitted information. Should the judge decide on the basis of his own reaction to the omitted evidence or must he consider how the jury might have assessed that information?<sup>191</sup> There would be more reversals with the latter analysis because the judge could only speculate about the jury's reaction and could not consider any information that had not been presented before the jury.<sup>192</sup> But, in *United States v. Agurs*, the Supreme Court suggested that the judge can evaluate his own reaction to the omitted evidence.<sup>193</sup> This approach may reduce *DeCoster II*'s pressure on trial judges to oversee defense representation by reducing the prospect of reversals.

The prophylactic force of *DeCoster II* also decreases if the judge can consider evidence presented at the post-conviction hearing that was not presented to the jury. *DeCoster*'s letter, with its inconsistent statements, was first revealed at his post-conviction hearing. The letter strengthened the government's case considerably. The government might also have introduced evidence that it had discovered after

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him could not have been more overwhelming. On the *Harrington* test, his conviction would have been affirmed; on the *Chapman* test, his conviction was reversed, because no one knew what evidence further investigation might have developed.

<sup>188</sup> See, e.g., *United States v. Agurs*, 427 U.S. 97, 114 (1976) (because victim's prior convictions were cumulative of other evidence indicating that he was the aggressor and that the defendant had acted in self-defense, the Court found no constitutional violation from the government's failure to disclose).

<sup>189</sup> See, e.g., *United States ex rel. Johnson v. Johnson*, 531 F.2d 169, 177-78 (3d Cir.) (no showing of prejudice from attorney's unsuccessful efforts to locate alibi witnesses, *cert. denied*, 425 U.S. 997 (1976)).

<sup>190</sup> *But see* *Thomas v. Wyrick*, 535 F.2d 407, 415-17 (8th Cir.) (omission not harmless when testimony could have provided defense attorney with information for impeaching and attacking government witness), *cert. denied*, 429 U.S. 868 (1976).

<sup>191</sup> See *Thomas v. State*, 512 S.W.2d 116, 125-26 (Mo. 1974) (Seiler, J., dissenting) (in post-conviction evidentiary hearing, petitioner must show admissible evidence that would have helped his trial presentation; court should not usurp jury role and weigh probative force of the evidence), *petition denied*, *Thomas v. Wyrick*, 417 F.Supp. 508 (E.D. Mo. 1975), *rev'd*, 535 F.2d 407 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976).

<sup>192</sup> For example, the judge could not consider evidence suppressed at a pre-trial motion, or information provided by the attorneys during argument out of the presence of the jury or during casual conversations.

<sup>193</sup> 427 U.S. 97, 113 (1976). In dissent, Justice Marshall argued that the judge would usurp the jury's function if he used this analysis. *Id.* at 117 nn. 5 & 6.

the trial, or evidence that it had decided not to use at trial. If the judge assesses just the impact of the omitted evidence on the jury, he should not measure it against anything but the evidence actually presented to the jury. But if the judge follows *Beasley* or *Agurs*, and decides whether the verdict is reliable, he probably can consider any evidence that is relevant to that inquiry.

#### D. Applying DeCoster II's Presumption

It is important to separate *DeCoster II*'s use of the presumption to satisfy the defendant's burden to show impact based on counsel's failure from the case's definition of the defendant's burden of proof. Courts could adopt *DeCoster II*'s definition of the defendant's burden but still reject its use of a presumption. Like *Beasley*, *DeCoster II* requires the defendant to identify and produce the information his attorney failed to find.<sup>194</sup> *DeCoster* did not do this, yet he still met his burden because the court presumed that his attorney's "total failure" to investigate impaired the defense.

Courts use presumptions in two situations: first, as a prophylactic measure, where the defendant cannot establish the harm that was probably caused by some unconstitutional conduct by the government or the trial court; and, second, where a party cannot produce evidence that is likely to exist and that is probably under the control of the opponent. The facts of *DeCoster II* present neither situation.

1. *The presumption as a prophylactic measure.* *DeCoster II*'s presumption of impact arises under different circumstances than many other presumptions, because the defense attorney, rather than the government or trial court,<sup>195</sup> has committed the constitutional violation. These presumptions are designed to force the government or trial court to police itself, but the *DeCoster* presumption will probably not prod defense attorneys to investigate. In fact, the presumption could invite abuse. The attorney might choose not to investigate, and if the defendant loses at trial, the attorney could claim that his failure to investigate presumptively established prejudice.<sup>196</sup> Although defense attorneys are not likely to do this,<sup>197</sup> courts that sus-

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<sup>194</sup> *DeCoster II*, *supra* note 10, slip op. at 20; *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974).

<sup>195</sup> See note 174, *supra*. See also *Peters v. Kiff*, 407 U.S. 493 (1972) (systematic exclusion of blacks from grand and petit juries held prejudicial although defendant could not show actual harm).

<sup>196</sup> Cf. *Wainwright v. Sykes*, 97 S. Ct. 2497, 2509 (1977) (to permit the defendant to raise an issue for the first time on collateral attack could encourage his attorney not to make the constitutional claim at trial on the hope that, if his client was convicted, he could bring it on collateral attack).

<sup>197</sup> The attorney faces severe disciplinary action if he fabricates a claim. See, e.g., *McQueen v. Swenson*, 498 F.2d 207, 218 n.15 (8th Cir. 1974) (deliberate error may prevent reversal and

pect that attorneys and defendants collaborate in claims of ineffective representation may not accept *DeCoster II*'s use of the presumption.

*DeCoster II* must assume that either the government or trial court can police defense representation. But any such governmental oversight would interfere with the attorney-client relationship and the function of the adversarial process.<sup>198</sup> And, as discussed earlier,<sup>199</sup> the trial court is probably not obligated to oversee the defense. As a result, the assumption upon which *DeCoster II*'s use of the presumption is based is probably wrong.

2. *Does the evidence of impact probably exist and does the defendant have access to it?* Judge MacKinnon's criticism of the presumption on the ground that the defendant should know more than the government about the evidence his attorney failed to investigate is wrong on the facts of *DeCoster*.<sup>200</sup> If the defendant only knows the sources his attorney did not investigate without knowing what might have been discovered, as in *DeCoster*, he is not necessarily in a better position than the government to locate that information.<sup>201</sup> Of course, the defendant's appellate counsel should investigate to determine whether he can find any overlooked information. If he finds any new facts or witnesses he must produce them at the post-conviction hearing and the presumption of impact would not be used. But if appellate counsel cannot find any information, he has established one of the bases to trigger the presumption.

Courts use presumptions only when the "presumed fact" probably exists.<sup>202</sup> The "presumed fact" in *DeCoster II* is the impact caused by the attorney's failure to investigate. The presumption is inextrica-

invites disciplinary action) (dictum). *Cf.* *McAleney v. United States*, 539 F.2d 282 (1st Cir. 1976) (urging investigation of whether trial attorney intentionally misstated to his client the government's representations concerning plea bargaining and sentence; disbarment a possibility).

<sup>198</sup> The government might, however, spur the defense attorney to investigate by asking him to disclose his alibi witnesses under Rule 12.1 of the Federal Rules of Criminal Procedure.

<sup>199</sup> See Part IV(B), *supra*.

<sup>200</sup> See *DeCoster II*, *supra* note 10, slip op. at 34 (MacKinnon, J., dissenting). Judge MacKinnon's criticism is factually, rather than legally, wrong. A state can, for example, constitutionally place the burden of proving an affirmative defense upon the defendant when he has better access to information relevant to that defense. See *Patterson v. New York*, 97 S.Ct. 2319, 2323-24 n.9, 2326-27 n. 11 (1977).

<sup>201</sup> If the attorney does not tell his client what sources he investigated, the defendant has no means of attaining this information. See also Note, *Ineffective Assistance of Counsel and the Harmless Error Rule: The Eighth Circuit Abandons Chapman*, 43 GEO. WASH. L. REV. 1384, 1404-05 & n.129 (1975). An attorney's inadequacy may severely restrict the defendant's ability to explain what information might have existed that timely investigation would have uncovered. See *United States v. Benn*, 476 F.2d 1127, 1135 (D.C. Cir. 1973); *United States ex rel. Mandrier v. Hewitt*, 409 F. Supp. 38, 42 (W.D. Pa. 1976).

<sup>202</sup> See generally MCCORMICK ON EVIDENCE § 346 (2d ed. 1972).

bly linked with *DeCoster II*'s definition of the defendant's burden. Investigation might help the defendant make a better decision about trial tactics or plea bargaining. But the failure to investigate will not frequently deprive the defendant of evidence that would have established a "substantial defense" or his factual innocence. Therefore, if the *DeCoster II* definition of the defendant's burden is wrong, the use of the presumption is also wrong.<sup>203</sup> Certainly any court that adopted the *Beasley* definition of the defendant's burden would not need to use the presumption.

3. *Can the defendant trigger the presumption?* Even if it is not wrong to presume harm in an ineffective representation case, few defendants will be able to establish the "basic facts"<sup>204</sup> necessary to trigger the presumption. According to *DeCoster II*, the defendant must show that his attorney totally failed to conduct a factual investigation and that his appellate counsel could not locate the missing information.<sup>205</sup> The defendant can establish the second "basic fact" easily. But it is not clear what a "total failure" to investigate means. If courts require defendants to show that their trial attorneys conducted absolutely no investigation, few defendants will meet this burden.

*DeCoster II* illustrates this problem of definition. The court's conclusion that trial counsel had totally failed to investigate seems both unfair and wrong. The court unfairly restricted its analysis of what the attorney had done to the evidence developed at the post-conviction hearing. According to his testimony at the hearing, the

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<sup>203</sup> Chief Judge Bazelon argued that the failure to investigate was inherently prejudicial. *DeCoster II*, *supra* note 10, slip op. at 21. But only the violation of those rights that are basic to a fair trial are inherently prejudicial. *Chapman v. California*, 386 U.S. 18, 23 (1966). Although the Supreme Court has found harm inherent in a denial of the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1962), it has refused to place denial of effective counsel in this category. *See Chapman v. California*, 386 U.S. at 23.

*DeCoster II*'s use of the motion for new trial as a procedural device to raise the issue of ineffective representation (*see* notes 210-216 and text, *infra*) is of value in deciding whether prejudice can be presumed. In its recent decisions restricting the availability of federal habeas review, the Supreme Court has noted that the defendant is not entitled to any presumption of prejudice once his conviction becomes final. *See Francis v. Henderson*, 425 U.S. 536, 542 n.6 (1976); *Davis v. United States*, 411 U.S. 233, 244-45 (1973). Because any presumption of prejudice disappears on collateral review, the defendant must establish "actual prejudice" caused by the government's conduct that he challenges. But because the defendant moves for a new trial on the ground of ineffective representation before his conviction becomes final, the defendant should be entitled to any presumption of harm if he can establish the "basic facts" that would trigger the presumption. *DeCoster II*'s motion for a new trial circumvents the higher burden of proof that *Francis* and *Davis* impose upon the habeas petitioner, and that procedural device would thus permit *DeCoster II*'s use of the presumption.

<sup>204</sup> *See generally* MCCORMICK ON EVIDENCE §§ 342-343 (2d ed. 1972).

<sup>205</sup> *DeCoster II*, *supra* note 10, slip op. at 21.



trial attorney did not investigate at the bar or hotel, and spoke to the witness Eley only moments before he testified. The remainder of the record indicated, however, that at the preliminary hearing for all three defendants, DeCoster's trial attorney had also represented the third accomplice and had cross-examined the police officer who had arrested DeCoster. Thus, the attorney knew what the police officer and the two alleged accomplices would say, if called at the trial, and had, in a sense, "investigated." Given the attorney's preparation, even if perhaps inadequate, many courts would find that he had not "totally failed to investigate."

## VI. RAISING THE ISSUE OF INEFFECTIVE REPRESENTATION

### A. *Direct Appeal*

Although a defendant can challenge the effectiveness of his attorney's representation on direct appeal, this is not likely to happen. First, since the trial attorney usually represents the defendant on appeal, he is unlikely to question his own conduct, either because he sees no error in his actions or wishes to conceal any error. Second, the defendant may be unaware of any problem; attorneys are unlikely to share their oversights and mistakes with their clients. Third, even if the defendant does recognize the issue, he may be unable to raise it on direct review. If the issue is not apparent from the record,<sup>206</sup> the appellate court may not accept additional evidence.<sup>207</sup> The defendant might preserve the issue for direct appeal by objecting during the trial to his attorney's representation. This is not likely to occur, because the defendant may be unaware of his attorney's failures or might fear the displeasure of either the judge or his own attorney.<sup>208</sup>

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<sup>206</sup> Failure to investigate will rarely be apparent from the record, unless the defendant objected at trial. See *United States v. Benn*, 476 F.2d 1127, 1135 (D.C. Cir. 1973); *United States v. Brown*, 476 F.2d 933, 934 (D.C. Cir. 1973). Cf. *United States ex rel. Mandrier v. Hewitt*, 409 F. Supp. 38, 42 (W.D. Pa. 1976) (record may lack evidence of trial attorney's inadequacy precisely because attorney was inadequate).

<sup>207</sup> See, e.g., *United States v. Huntley*, 535 F.2d 1400, 1405-06 and n.8 (5th Cir. 1976) (amplification of record only on collateral attack); *United States v. Thompson*, 475 F.2d 931, 932 (D.C. Cir. 1973) (affidavits not considered on direct review); *Brubaker v. Dickson*, 310 F.2d 30, 32 n.3 (9th Cir. 1962) (examination limited to trial record on direct appeal).

<sup>208</sup> But see *United States v. Bridgeman*, 523 F.2d 1099, 1118 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 961 (1976).

An interesting question is whether courts will interpret *Estelle v. Williams*, 425 U.S. 501 (1976), to require the defendant who is aware of his attorney's failure to investigate to object to this failure. In *Estelle*, compelling the defendant to wear jail clothes at trial was not a constitutional violation because the defendant did not make his objection known to the trial judge. But *Estelle* should not be interpreted to require an objection because neither the trial court nor the defendant can order the attorney to act where the controversy involves a question of tactics. See *Taylor v. Alabama*, 291 Ala. 760, 287 So. 2d 901 (1973).

The defendant who recognizes an ineffectiveness issue might immediately institute a collateral attack. Most courts, however, postpone collateral review until they resolve all issues in the direct appeal.<sup>209</sup> This delay, although understandable from the appellate court's viewpoint, can be unfair to the defendant. Not only may his principal attack be the ineffectiveness claim, but he may choose not to litigate the issue if he is released from jail before the resolution of any direct appeal. Even if this collateral attack is successful, the defendant can never be compensated for the time he spent in jail pending a decision on his direct appeal.

To permit the defendant to augment the record and to litigate his claim immediately and to avoid the higher burden on collateral attack, the *DeCoster* court created a new avenue to raise the issue of ineffective representation. The defendant can move in the trial court, before any direct appeal, or during its pendency, for a new trial on the ground of newly discovered evidence under Rule 33 of the Federal Rules of Criminal Procedure.<sup>210</sup> If the trial court sees merit in the motion, it should hold an evidentiary hearing<sup>211</sup> and the appellate court will stay consideration of the direct appeal until the trial court reaches a decision.<sup>212</sup> If the trial court denies the motion, the court of appeals will have a complete record to review the claim. This procedure reinterprets Rule 33.<sup>213</sup> To apply *DeCoster* requires defin-

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<sup>209</sup> See *Womack v. United States*, 395 F.2d 630, 631 (D.C. Cir. 1968) (unless "special circumstances" exist, collateral attack stayed pending resolution of direct appeal). Ineffectiveness of counsel might constitute "special circumstances." *Cf. In re Westmoreland*, 58 Cal. App. 3d 32, 129 Cal. Rptr. 554 (1976) (collateral attack permitted where the prosecutor failed to disclose material evidence at trial).

<sup>210</sup> See *DeCoster I*, *supra* note 10, 487 F.2d at 1204-05. Rule 33 provides in part that "A motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending, the court may grant the motion only on remand of the case." See also *United States v. Tindle*, 522 F.2d 689, 692 n.8 (D.C. Cir. 1975); *United States v. Brown*, 476 F.2d 933, 935 n.11 (D.C. Cir. 1973); *United States v. Benn*, 476 F.2d 1127, 1134-35 (D.C. Cir. 1973); *Bazelon, Defective Assistance*, *supra* note 9 at 39.

<sup>211</sup> To get the hearing, the defendant submits an affidavit detailing the attorney's errors. See generally *United States v. Smith*, 551 F.2d 348, 352 (D.C. Cir. 1976).

<sup>212</sup> See *United States v. Brown*, 476 F.2d 933, 935 n.11 (D.C. Cir. 1973). Trial judges may grant hearings infrequently because they know the evidence presented and probably have a belief about what else the defense attorney could have done. The judge may deny the motion summarily if the defendant never mentioned at trial the existence of witnesses he now claims his attorney did not investigate. See *United States v. Hurt*, 543 F.2d 162 (D.C. Cir. 1976) (Remand Hearing, Findings of Fact and Conclusions of Law, ¶6, May 3, 1974).

<sup>213</sup> The general prerequisites for granting a new trial on the grounds of newly discovered evidence are: 1) the evidence was discovered since trial; 2) the party seeking a new trial must show diligent efforts in seeking the new evidence; 3) the new evidence must not be cumulative or impeaching; 4) it must be material to the issues involved; and 5) it must indicate that a new trial would probably bring an acquittal. See, e.g., *United States v. Johnson*, 327 U.S. 106 (1946); *Woody v. United States*, 369 A.2d 592, 594 (D.C. Cir. 1977). See generally 2 C.

ing "newly discovered evidence" as evidence that did not appear in the record on direct appeal instead of evidence of which the defendant was not aware, because defendants often know the witnesses or sources their attorneys failed to investigate.<sup>214</sup>

Even if *DeCoster's* reinterpretation stretches the rule's meaning, that reinterpretation should protect the interests of both the government and the defendant. It would restrict the application of the *DeCoster* standard to two years from the date of the judgment,<sup>215</sup> thus limiting the time within which the defendant can suddenly "remember" some evidence which his attorney allegedly had failed to investigate. Two years is not too long for the government to guard against losing its witnesses should the conviction be reversed and a retrial become necessary. In most instances, the defendant will move for a new trial simultaneously with, or soon after, the direct appeal is filed.<sup>216</sup> If the defendant institutes his attack more than two years after the judgment, he must appeal collaterally. Unfortunately, the court in *DeCoster* did not adequately explain why it adopted this sensible method to raise the issue of ineffectiveness, and no other court has adopted it.

### B. Collateral Attack

The defendant can still collaterally attack his attorney's representation even if he cannot appeal directly or through an expansion of Rule 33. Collateral attack permits him to augment the record by affidavit or by testimony at a post-conviction hearing.<sup>217</sup> But there are hurdles in this path to relief.<sup>218</sup> If *DeCoster II* is followed, the defen-

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WRIGHT & F. ELLIOT, *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* § 557 (1969). The above requirements indicate that the substantive test in Rule 33 places a burden on the defendant that is much higher than the burden in *DeCoster*.

<sup>214</sup> See, e.g., *United States v. Greer*, 538 F.2d 437, 441 (D.C. Cir. 1976) (trial court held that witness not called at trial was not "newly discovered" because defendant and counsel knew about him before the verdict); *United States v. Smallwood*, 473 F.2d 98 (D.C. Cir. 1972) (the newly discovered evidence was the ground for claim of ineffective representation — the attorney's failure to challenge seizure of items).

<sup>215</sup> Rule 33 requires that the defendant move for a new trial on the ground of "newly discovered evidence" within two years of the judgment. See *United States v. Tindle*, 522 F.2d 689 (D.C. Cir. 1975).

<sup>216</sup> Rule 4(b) of the Federal Rules of Appellate Procedure requires notice of appeal in a criminal case "within 10 days after the entry of the judgment or order appealed from."

<sup>217</sup> See *United States v. Huntley*, 535 F.2d 1400, 1405 (5th Cir. 1976) (referring to proceedings under 28 U.S.C. § 2255), cert. denied, 97 S. Ct. 1548 (1977); *Brubaker v. Dickson*, 310 F.2d 30, 36 (9th Cir. 1962).

<sup>218</sup> See *Stone v. Powell*, 428 U.S. 465 (1976) (barring federal collateral review of fourth amendment claims when state court had provided opportunity for full and fair hearing). Yet *Stone* should not be applied to sixth amendment ineffectiveness claims because ineffective representation goes directly to the accuracy of the guilt determination process, which *Stone* said federal habeas corpus was designed to protect. See *id.* at 493-94.

dant's burden to show ineffectiveness or prejudice on collateral attack is greater than on direct appeal.<sup>219</sup> He may also have difficulty in presenting his claim. He does not automatically receive a free transcript of his trial,<sup>220</sup> appointment of an attorney,<sup>221</sup> or discovery to search for the evidence he claims was omitted and which he must present at the hearing.<sup>222</sup> Nor does he automatically get the evidentiary hearing he needs to explore his attorney's conduct.<sup>223</sup> A court can refuse a hearing if his allegations, even assuming their truth, do not present a colorable claim.<sup>224</sup> Although some courts believe that the defendant is entitled to at least one hearing to air any claim of ineffective representation,<sup>225</sup> that has not proven true when the defendant claims his attorney failed to investigate. A sweeping challenge that the attorney completely failed to investigate is insufficient when it does not allege the identity or expected testimony of the witnesses omitted.<sup>226</sup> And it may not be enough to indicate the expected testi-

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The federal district court need not hold a second evidentiary hearing if the state court conducted a full and fair hearing to review the factual bases for the claim of ineffective representation. See *Franklin v. Wyrick*, 529 F.2d 79, 81 (8th Cir.), cert. denied, 425 U.S. 962 (1976). It is important that the standard be clear so that the state court's hearing is full and fair. See *United States v. Rispo*, 470 F.2d 1099, 1103 (3d Cir. 1973). A second hearing may be necessary if the state court failed to appoint an attorney for an indigent. See generally *United States ex rel. Johnson v. Johnson*, 531 F.2d 169, 177 (3d Cir.), cert. denied, 425 U.S. 997 (1976).

<sup>219</sup> See note 93 and accompanying text, *supra*.

<sup>220</sup> See *United States v. MacCollum*, 426 U.S. 317, 324-26 (1976).

<sup>221</sup> Because a habeas corpus attack is considered civil in nature, an indigent defendant does not have a sixth amendment right to appointed counsel, unless an evidentiary hearing is required. See generally *Hunter, Post-Conviction Remedies*, 50 F.R.D. 153, 175 (1970); RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, 8(c) (West Federal Rules of Civil—Appellate—Criminal Procedure 1977) (hereinafter SECTION 2254 RULES).

<sup>222</sup> In a federal collateral attack on a state conviction, the defendant is only "entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." SECTION 2254 RULES, *supra* note 221 at 6(a). See *Wilson v. Weigel*, 387 F.2d 632 (9th Cir. 1967) (right to discovery in habeas corpus proceeding is no greater than pre-trial right to discovery in criminal case).

<sup>223</sup> Federal judges have discretion to grant a hearing after reviewing the defendant's petition, the government's answer, and the record of the trial. SECTION 2254 RULES, *supra* note 221, at 8(a). See also *Founts v. Pogue*, 532 F.2d 1232 (9th Cir.), cert. denied, 426 U.S. 925 (1976); *United States ex rel. Mandrier v. Hewett*, 409 F. Supp. 38, 44-46 (W.D. Pa. 1976).

<sup>224</sup> See *United States v. Huntley*, 535 F.2d 1400, 1406-07 (5th Cir. 1976) (no hearing when defendant failed to suggest "concrete facts"); *United States ex rel. Curtis v. Illinois*, 521 F.2d 717, 719 (7th Cir. 1975). Cf. *Mitchell v. United States*, 259 F.2d 787, 794 (D.C. Cir.) (no hearing if allegations pertain only to matters normally within counsel's judgment), cert. denied, 358 U.S. 850 (1958).

<sup>225</sup> See, e.g., *Garton v. Swenson*, 417 F.Supp. 697, 713 n.7 (W.D. Mo. 1976).

<sup>226</sup> See *Harshaw v. United States*, 542 F.2d 455, 457 (8th Cir. 1976) (no hearing when record failed to indicate what evidence could have been discovered through investigation); *Matthews v. United States*, 518 F.2d 1245, 1246 (7th Cir. 1975) (no hearing required when defendant did not indicate what evidence investigation might have uncovered); *Jackson v. Cox*, 435 F.2d 1089, 1093 (4th Cir. 1970) (not enough to name a witness without explaining expected testimony).

mony of an overlooked witness, if the court, as a condition to granting the hearing, can evaluate whether that evidence would have helped the defendant.<sup>227</sup> Thus, even if *DeCoster II*'s standards are generally accepted, some courts could deny the defendant the opportunity to develop a record of his attorney's conduct because he could not show the necessary foundation.

### C. *Post-Conviction Hearing: Problems in Proving Ineffective Representation*

The defendant's problems do not end once he gets a hearing. He still faces formidable difficulties in gathering the evidence, deciding how to present it, and convincing the court to review his trial attorney's performance fairly. Usually, appellate counsel is reluctant to attack a colleague, the trial attorney is antagonistic towards his former client, and the judge is displeased with the challenge. These considerations suggest that some approach other than post-conviction review is necessary to assure effective representation. The hearing exacts too great a toll on those involved and too few deserving defendants receive relief.

1. *How does the defendant meet his burden?* The defendant cannot easily satisfy his burden of showing what his attorney failed to do and how that failure affected or prejudiced his defense. His initial decision of whether to testify at the hearing involves tactical considerations similar to his decision to testify at the trial itself. He may be forced to testify in a number of situations:<sup>228</sup> if he must assert his innocence as part of his burden; if he believes that only candor and openness will sway a hesitant judge and he is willing to risk testifying

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<sup>227</sup> *Jones v. Taylor*, 547 F.2d 808 (4th Cir. 1977) (hearing unnecessary if expected testimony of overlooked alibi witness would not have provided the defense asserted by the defendant); *See also United States v. Sellers*, 520 F.2d 1281 (4th Cir. 1975) (judge refused to subpoena three out-of-state prisoners because he discredited their affidavits), *modified on other grounds*, 574 F.2d 785 (1976), *cert. denied*, 97 S.Ct. 815 (1977); *Moran v. Hogan*, 494 F.2d 1220, 1222-23 (1st Cir. 1974) (no hearing when magistrate discredited partial alibi provided in defendant's ex-wife's affidavit).

<sup>228</sup> A problem that apparently has not arisen is whether the government could call the defendant as its own witness, because the habeas proceeding is considered civil in nature. *Cf. Harris v. Nelson*, 394 U.S. 286, 293-94 (1969) (habeas corpus proceedings generally characterized as civil but actually "unique"). The government might want to call the defendant in two instances: first, to ask him if he is innocent, if he did not testify at the trial; second, to establish bases for impeachment if it intended to call the trial attorney to ask whether the defendant had admitted anything inconsistent with his testimony at the hearing. Even if the government can call the defendant, he should still be able to invoke the fifth amendment in regard to particular questions. Of course, the government could call the defendant to cross-examine him if the court accepted the defendant's affidavit in place of direct examination. *See United States v. Hurt*, 543 F.2d 162 (D.C. Cir. 1976), record of hearing at 70 (May 1, 1974).

about his involvement in the crime charged;<sup>229</sup> if he is the only person who can establish the factual basis of his claim;<sup>230</sup> or if he is uncertain whether to call his trial attorney when the attorney's position is unclear and the jurisdiction's evidentiary rules prevent him from leading or impeaching any witness he calls.<sup>231</sup>

The defendant may choose not to testify, even if that decision makes it difficult for him to establish his burden. The defendant may fear that the trial judge will assess his credibility unfavorably and deny his motion, despite its merits. He may fear a perjury charge,<sup>232</sup> especially if he must testify about his participation in the crime. The risk of perjury exists even if prosecutors do not usually bring the charge, if only because they cynically expect him to perjure himself, or because they do not believe that the mere threat of a perjury charge will deter an already convicted defendant from lying.<sup>233</sup> The defendant could reduce the risk of perjury by restricting the scope of his testimony or by invoking the fifth amendment.<sup>234</sup>

A defendant may also be reluctant to testify if the government can use his testimony at a retrial. In many jurisdictions, the government could use his testimony for subsequent impeachment purposes.<sup>235</sup>

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<sup>229</sup> Most judges probably believe that a defendant's failure to give "forthright and credible testimony [at a hearing on a post-conviction motion] . . . virtually dooms his cause." See *Bruce v. United States*, 379 F.2d 113, 120 (D.C. Cir. 1967) (defendant did not testify at post-conviction hearing; no ineffective representation).

<sup>230</sup> This most commonly occurs when the defendant claims that he gave his attorney the name of a witness or that his attorney erroneously advised him concerning the plea negotiations or his decision to testify.

<sup>231</sup> Rule 607 of the Federal Rules of Evidence rejects this "voucher" rule and permits the proponent to lead or impeach his own witnesses.

<sup>232</sup> See *People v. Morris*, 20 Cal. App.3d 659, 97 Cal. Rptr. 817 (1971) (consecutive sentences imposed in perjury conviction to deter defendant and others from making perjurious claims of ineffective representation). Cf. *Tasby v. United States*, 504 F.2d 332 (8th Cir. 1974), cert. denied, 419 U.S. 1125 (1975) (suggesting that defendant be prosecuted for perjury based on his charge against his attorney).

<sup>233</sup> Compare *Brubaker v. Dickson*, 310 F.2d 30, 39 (9th Cir. 1962) (threat of perjury ineffective deterrent to prisoners) and *Diggs v. Welch*, 148 F.2d 667, 670 (D.C. Cir. 1945) (convicts not subject to prosecution for perjury), cert. denied, 325 U.S. 889 (1945), with *Jones v. Huff*, 152 F.2d 14, 16 (D.C. Cir. 1945) (defendant can be punished for perjury by courts or by parole board).

<sup>234</sup> By testifying only about the factual basis of the charge, the defendant might block the government from asking about his participation in the crime, as long as the jurisdiction limited cross-examination to the scope of the direct examination. This would not work, however, if the defendant must testify that he was innocent, or must testify about how his attorney's failure affected the defense case. And, some courts might circumvent an evidentiary restriction on cross-examination by holding that the defendant's culpability is relevant in assessing his credibility.

The defendant could invoke the fifth amendment to refuse to answer any question that he considered was beyond the scope of his direct examination. Of course, by refusing to answer, the defendant would undercut his credibility and probably damn his motion.

<sup>235</sup> Compare *Harris v. New York*, 401 U.S. 222 (1971) (pre-trial statements inadmissible

Usually the defendant will run this risk, since he has already been convicted. His decision to testify is more difficult, however, if his testimony is not crucial and the area about which he would testify would be revealed for the first time at the post-conviction hearing. For example, could the government, at retrial, use the letter DeCoster sent his attorney? Since the letter was revealed through the trial attorney's testimony at the evidentiary hearing, the government might not be able to use it at retrial unless the defendant had also testified about it. By analogy to fourth amendment cases, the government would have the difficult burden of showing that it would have discovered the letter independently of the sixth amendment violation.<sup>236</sup>

Even if the defendant decides to testify, he may not be able to show the effect of his attorney's failure.<sup>237</sup> If he cannot decide questions of trial tactics,<sup>238</sup> for example, his opinion of how the attorney's failures affected or prejudiced the defense may be irrelevant. If he can present the omitted witnesses, he still may not win.<sup>239</sup> This is particularly true if he must establish that these witnesses would have helped him prove his innocence. The witnesses may not be credible or persuasive if they crumble under cross-examination or forget what had occurred.<sup>240</sup>

## 2. *The trial attorney as witness: friend or enemy?* The trial attor-

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under *Miranda* for prosecution's case-in-chief held admissible for impeachment purposes) with *People v. Disbrow*, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) (under California constitution statements obtained during custodial interrogation in violation of defendant's right to remain silent inadmissible for impeachment purposes).

<sup>236</sup> The argument would be that the fruit of the poisonous tree doctrine should prevent the government's use of the letter. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

<sup>237</sup> Defendants have lost where they failed to show how their attorney's failure prejudiced the defense. See, e.g., *Tollette v. Henderson*, 411 U.S. 258 (1973) (defendant did not show how attorney's failure to challenge composition or selection of grand jury made his guilty plea involuntary or unintelligent); *Chambers v. Maroney*, 399 U.S. 42 (1970) (defendant failed to show what his attorney would have done differently with more time to prepare); *Angarano v. United States*, 312 A.2d 295 (D.C. 1973) (allegation of conflict of interest by counsel on motion to withdraw insufficient; conflict must be explained). It is not clear in these cases whether the defendant did not establish prejudice because he had no evidence of it, or because he did not understand his burden. See *United States ex rel. Rundle v. Green*, 434 F.2d 1112, 1113 (3d Cir. 1970).

For an excellent example of the record a defendant can make, see *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962) (evidence introduced of psychiatric defense that trial attorney failed to present at trial).

<sup>238</sup> Cf. *Wainwright v. Sykes*, 97 S. Ct. 2497, 2510 (1977) (Burger, C.J., concurring). The defendant's opinion would be relevant where the attorney's failure affected the defendant's decision to plea bargain, testify or waive a jury trial.

<sup>239</sup> See notes 224-231 and accompanying text, *supra*.

<sup>240</sup> Cf. *United States ex rel. Mandrier v. Hewitt*, 409 F. Supp. 38, 42 (W.D. Pa. 1976) (noting difficulty of investigating adequacy of pre-trial preparation several years after the fact).

ney usually testifies at the post-conviction hearing. Generally, he is called as a government witness.<sup>241</sup> His testimony may prove to be the most difficult hurdle that the defendant will encounter. Recognition and evaluation of the attorney's probable bias is essential to a judicial determination of the trustworthiness of that testimony. On the other hand, the defendant could call his trial attorney and ask whether, in retrospect, he would have changed his tactics or recommendations in any way, since he now knows exactly what he overlooked through his failure to investigate. This question is relevant to establish impact under *DeCoster*, and seems consistent with the universal desire not to second-guess the attorney.

Courts fear that this kind of questioning invites collusion between counsel and the defendant to fabricate a charge of ineffective representation.<sup>242</sup> Rather, it is more likely that the attorney will be hostile to his former client and attempt to defeat the charge through his testimony.<sup>243</sup> Obviously, the attorney would risk a great deal by admitting anything that might constitute ineffective representation. His client might sue him for malpractice;<sup>244</sup> the bar might institute disciplinary proceedings against him;<sup>245</sup> his insurance company might increase his malpractice insurance; judges might not appoint him to represent indigents in the future; and prospective clients might choose not to retain him. Thus, he has a powerful incentive to forget damaging information, to shade his testimony, or even to lie. Many attorneys in this situation would recognize that the safest answer, whether truthful or not, is to deny remembering anything about the alleged basis of ineffectiveness.<sup>246</sup> But they need not go so far; these attorneys

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<sup>241</sup> The government called the trial attorney in *DeCoster*. See also *United States v. Hurt*, 543 F.2d 162 (D.C. Cir. 1976); *Thomas v. Wyrick*, 535 F.2d 407 (8th Cir.) cert. denied, 429 U.S. 868 (1976); *United States v. Moore*, 529 F.2d 355 (D.C. Cir. 1976); *United States ex rel. Green v. Rundle*, 434 F.2d 1112 (3d Cir. 1970).

<sup>242</sup> See note 196, *supra*.

<sup>243</sup> The one exception might be where the claim is based upon a belated appointment because there the attorney's ability is not directly challenged. The attorney may be unable to establish impact in such a case because he may not know what he could have discovered if he had more time to prepare. Cf., *United States ex rel. Mathis v. Rundle*, 394 F.2d 748, 753 (3d Cir. 1968) (attorney could not say he had been insufficiently prepared to go to trial).

<sup>244</sup> See *Zelle & Stanhope, Lawyer Malpractice: The Boomerang Principle*, Trial, June 1977, at 16; Scott, *Lawyers Who Sue Lawyers*, New York Times Magazine, June 27, 1977, at 74. But see *Minns v. Paul*, 542 F.2d 899 (4th Cir. 1976) (appointed attorney has immunity against suits brought under 28 U.S.C. § 1983); Case Comment, *Standard for Effective Assistance of Counsel*, *BAXTER v. ROSE*, 523 S.W.2d 930 (Tenn. 1975), 1976 WASH. U. L.Q. 503, 508 n.23 (1977).

<sup>245</sup> See *McAleney v. United States*, 539 F.2d 282 (1st Cir. 1976) (suggesting disciplinary proceedings if attorney intentionally misrepresented information to client); *Holt v. State Bar Grievance Bd.*, 388 Mich. 50, 199 N.W.2d 195 (1972) (ordering rehearing by grievance committee of claim that counsel not competent).

<sup>246</sup> Whether truthful or not, many attorneys at evidentiary hearings have not remembered



could explain that they proceeded as they did for tactical reasons or that the omitted evidence would not have proven helpful.<sup>247</sup>

In *United States ex rel. Johnson v. Johnson*,<sup>248</sup> the attorney initially explained that his client failed to testify at trial because the attorney had erroneously believed the government would impeach the client with his prior convictions. The attorney later contended somewhat questionably that he feared his client would place his character in evidence and expose himself to cross-examination about those prior convictions if he had testified.<sup>249</sup> The district court considered this explanation insufficient and found that the attorney's failure to have his client testify, coupled with other omissions, constituted ineffective representation. The Third Circuit reversed, however, because it found that the attorney's tactics were within the range of competence expected of criminal attorneys.

In *Thomas v. Wyrick*,<sup>250</sup> Frederick Brown confessed to murdering a cab driver and named the defendant Thomas as his accomplice. Thomas' defense attorney did not interview Brown and Brown did not testify at Thomas' trial.<sup>251</sup> Two years after Thomas' conviction, Brown recanted his implication of Thomas, claiming he had lied to protect the actual accomplices. After Brown testified at the evidentiary hearing, the government called Thomas' trial attorney and asked whether he would have called Brown as witness if he had learned that Brown would repudiate his implication of Thomas. The attorney testified that he would not have called Brown because Brown's testimony would have shown that Thomas had been in the cab. The government had only shown this point by circumstantial evidence. The Missouri Supreme Court denied the claim of ineffec-

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much about the defendant's case. This was true in *DeCoster*. See also *United States ex rel. Mandrier v. Hewitt*, 409 F.Supp. 38, 44 (W.D. Pa. 1976) (attorney testified about his usual procedures but did not specifically remember defendant's case). Cf. *United States v. Simpson*, 475 F.2d 934, 935 (D.C. Cir. 1973) (attorney had "at best an uncertain recollection [of] this case").

<sup>247</sup> See *Franklin v. Wyrick*, 529 F.2d 79, 82 (8th Cir. 1976), cert. denied, 425 U.S. 962 (1977) (attorney testified at post-conviction hearing that he decided, for tactical reasons, to point out differences between coroner's testimony and government's opening statement in summation rather than in cross-examination of coroner). The evidentiary hearing court should not presume the attorney acted for tactical reasons if he does not testify that he did. See, e.g., *United States v. Moore*, 529 F.2d 355, 358 n.7 (D.C. Cir. 1976).

<sup>248</sup> 531 F.2d 169 (3d Cir. 1976), cert. denied, 425 U.S. 977 (1977).

<sup>249</sup> *Id.* at 175-76 & n. 17. The defendant had been convicted of two misdemeanors and one felony and the attorney had not asked the court to rule on their use by the government.

<sup>250</sup> 535 F.2d 407 (8th Cir.), cert. denied, 429 U.S. 868 (1976).

<sup>251</sup> The defendant also charged that his trial attorney had not interviewed other witnesses who could have provided an alibi. Because those witnesses did not testify at the post-conviction hearing, the Eighth Circuit focused on the attorney's failure to interview Brown. 535 F.2d at 410, n.4.

tive representation because it thought the attorney's explanation indicated a sound tactical decision,<sup>252</sup> but the Eighth Circuit decided that the attorney had been ineffective.<sup>253</sup>

*Johnson* and *Thomas* illustrate that the attorney's testimony may be the biggest problem the defendant has in proving his claim. The defendant cannot prevent his attorney from testifying by invoking the attorney-client privilege. By challenging his attorney, he waives the protection of that privilege.<sup>254</sup>

But the scope of the defendant's waiver is not clear. Although the attorney can testify about whatever is relevant or necessary to the charge,<sup>255</sup> courts should not interpret relevancy expansively. If the defendant testifies that he received certain erroneous advice, the attorney can repeat what he actually said. If the defendant claims to have given his attorney the names of witnesses, the attorney can testify that the defendant did not do this. The attorney can also explain why he made any tactical judgments. He could, for example, testify that he urged his client to plead guilty because the defendant had admitted guilt or that he did not investigate some source or present some evidence in order to avoid exposing other criminal conduct by his client.<sup>256</sup>

The government might try to reveal the defendant's admissions to his attorney in order to prove harmless error or to rebut the defendant's claim that he could have proven his innocence. Could the government ask the attorney whether the defendant had ever admitted either guilt or anything inconsistent with his testimony at the trial or hearing? Or, could the government ask the attorney's opinion about his client's guilt or the harm caused by the failure to investigate?<sup>257</sup> The attorney should be free to reveal his client's com-

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<sup>252</sup> *Thomas v. State*, 512 S.W.2d 116, 122 (1974).

<sup>253</sup> The Eighth Circuit refused to accept the attorney's testimony that Brown would not have helped as a witness. It disagreed with the district court's refusal to credit Brown's recantation, and thought that the jury might have been affected had Brown testified.

<sup>254</sup> See, e.g., *State v. Tucker*, 97 Idaho 4, 12, 539 P.2d 556, 564 (1975); *Morse v. Colorado*, 180 Colo. 49, 55-56, 501 P.2d 1328, 1331 (1972); KAN. CIV. PRO. STAT. ANN. § 60-426(b)(3) (Vernon 1965); ABA STANDARDS, THE DEFENSE FUNCTION, *supra* note 103 at § 8.6(c); FED. R. EVID. (proposed) 503(d)(3). If the defendant invokes the privilege, the attorney may not testify, but the motion will be denied. See *United States v. McCambridge*, 551 F.2d 865, 873 (1st Cir. 1977).

<sup>255</sup> The terms are used interchangeably, but if the test is "relevancy" rather than "necessity," the attorney should be permitted to testify to much more. Compare *J. WEINSTEIN & M. BERGER*, 2 WEINSTEIN'S EVIDENCE, ¶ 503(d)(3)[01] (1975) (necessity) with *Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1974) (relevancy).

<sup>256</sup> See *United States v. Stern*, 519 F.2d 521, 524 (9th Cir. 1975) (attorney exposed client's psychiatric problems to show he had researched insanity defense but chose to present different defense for tactical reasons).

<sup>257</sup> In *United States v. Hurt*, 543 F.2d 162 (D.C. Cir. 1976), the government asked the trial

munications only insofar as they explain what the attorney did and why he acted as he did.<sup>258</sup> But once that evidence is known, the attorney should not be permitted to comment on the strength of the government's or the defendant's case.<sup>259</sup>

3. *Can the attorney's testimony be checked for accuracy?* Obviously, the trial attorney may testify honestly and fairly. There may be no way, however, to ensure that he does. Neither artful defense tactics nor an inspection of his file is likely to provide the necessary review.

(i) *Tactics.* The defendant's tactical problem is best illustrated when he seeks habeas corpus review of a constitutional challenge other than a claim of ineffective representation. The defendant might have no tactical problem if he could satisfy his burden by showing that his attorney was unaware of a motion, that he thought it futile to bring that motion, or that he was unaware that a procedural rule barred making that motion later in the proceedings. But the defendant probably must characterize those admissions by the attorney as ineffective representation.<sup>260</sup> By joining a claim of ineffective representation to the other constitutional claim, the defendant might transform the attorney from a friendly witness to an adverse one. The attorney could simply tailor his testimony to defeat both claims; for example, he could easily say that he had considered the motion but thought it futile or tactically inadvisable.<sup>261</sup>

To protect himself, the defendant might try to depose the attorney before the hearing in order to lock him into a position, but in obtaining the court's permission to take the attorney's deposition, the defendant probably must explain his purpose. In so doing, he alerts the trial attorney. Alternatively, the defendant might add a claim of

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attorney how strong he thought the government's case was. Record of hearing at 28 (May 1, 1974).

<sup>258</sup> For example, DeCoster's trial attorney should not have been permitted to reveal his client's letter because the letter did not explain why he had not investigated at the hotel or bar at some point before he received it immediately before trial.

<sup>259</sup> Even so, it will be difficult to prevent the attorney from indirectly commenting on his client's guilt. In *DeCoster*, for example, during his testimony the attorney gratuitously mentioned that the trial judge had thought Eley's testimony had undercut the defense. Record, *supra* note 50, at 55.

The prosecutor should not be allowed to comment because he has a conflict of interest in wanting to protect the conviction. *But cf.* *Williams v. Beto*, 364 F. Supp. 335, 338-39 (S.D. Tex. 1973) (prosecutor testified at evidentiary hearing that he would not have had defendant testify).

<sup>260</sup> The defendant may be required to argue ineffectiveness to avoid the procedural bars to habeas corpus review. See notes 105-115 and accompanying text, *supra*.

<sup>261</sup> See *United States v. Smith*, 551 F.2d 348, 353 & n.7 (D.C. Cir. 1976) (trial attorney's testimony that he thought it futile to bring motion barred later review of issue on appeal).

ineffective representation if the attorney's testimony at the hearing reveals a basis for the claim. If his original hearing is in state court, the defendant probably cannot add such a claim in federal habeas corpus because he may have failed to exhaust state remedies. And some appellate counsel will reject this strategy as unfair, especially if the trial attorney had cooperated with appellate counsel.

(ii) *Record keeping.* The attorney might justify his failure to investigate, for example, by testifying that the defendant never gave him the names of witnesses although the defendant claims he gave this information. The court faces the problem of assessing the credibility of the defendant and the attorney. This problem will arise most frequently when there is no record of the disputed information. The attorney may testify that his usual practice was to keep records of this information and argue that the absence of a record indicates that he never got certain information.<sup>262</sup> Courts usually treat the absence of a record of information normally recorded as a hearsay exception, probative of the fact that the event to be recorded did not occur. Excluding this testimony is unfair to the attorney, but admitting it may be unfair to the defendant since the attorney's self-serving testimony cannot be verified.

The attorney may no longer have his file of the defendant's case, if he ever kept one.<sup>263</sup> A careful attorney will document every conversation he has with his client,<sup>264</sup> but if he fears he might be challenged

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<sup>262</sup> See, e.g., *Mason v. Balcom*, 531 F.2d 717, 722 n.9 (5th Cir. 1976) (attorney did not remember specific case and testified about usual practice); *Shuman v. Peyton*, 361 F.2d 646, 648 (4th Cir. 1966) (attorney explained usual investigative practice); *United States ex rel. Mandrier v. Hewitt*, 409 F. Supp. 38, 45 (W.D. Pa. 1976) (attorney usually asked for continuance if he needed time to prepare).

<sup>263</sup> Appellate counsel may also be forced to subpoena that file, if trial counsel claims that the attorney-client privilege bars him from releasing it. *DeCoster's* trial counsel, for example, claimed that that privilege barred him from releasing the defendant's letter to appellate counsel. Record, *supra* note 50, at 3. Because the privilege protects the defendant rather than the attorney, if the defendant waives the privilege, the trial counsel should comply with the request.

An unexplored question is the effect of the work product doctrine. The defendant should not be able to invoke that doctrine to prevent trial counsel from using relevant information to protect himself. Cf. *Duplan Corp. v. Moulinageet Ratorderie De Citavanoz*, 487 F.2d 480, 483-84 (4th Cir. 1973) (work product privilege designed to protect attorney). The attorney probably cannot invoke the doctrine to bar the defendant's attempt to discover whether the attorney has information, such as a list of witnesses defendant claims to have given him. Nor should the defendant be able to invoke the doctrine to prevent the government from discovering the file, at least whenever the attorney also wants to use that information sought to protect himself.

<sup>264</sup> Or, he might file an explanation with the court of why he did or did not do something. See *United States v. Clayborne*, 509 F.2d 473, 481-82 (D.C. Cir. 1974) (attorney filed unsworn statement explaining why he did not cross-examine a key witness); *Taylor v. Alabama*, 291 Ala. 760, 287 So. 2d 901 (1973) (trial court urged attorney to record reasons why he followed defendant's desire in conflict concerning defense trial tactics; defendant filed motion for new trial on ground that attorney should have overridden defendant's desire).

at some future point, he might choose not to keep notes of conversations with his clients or other witnesses. He might routinely destroy his files once his representation is over, or dispose of his notes if his client claims ineffective representation.<sup>265</sup>

4. *The attitude of the judiciary.* Many judges do not view claims of ineffective representation with favor and are reluctant to brand any attorney as ineffective.<sup>266</sup> Judges may suspect that every disgruntled defendant will challenge his attorney,<sup>267</sup> that appellate counsel fail to understand the nature of trial practice and irresponsibly accept the defendant's charge,<sup>268</sup> or that ineffectiveness claims implicitly accuse the trial judge with failing to oversee the trial.

This attitude is reflected in the way in which some judges treat trial counsel at the evidentiary hearing and evaluate the evidence counsel submits.<sup>269</sup> Judges will allow counsel to remain in the courtroom while other witnesses testify, and have accepted affidavits without requiring the attorney affiant to testify.<sup>270</sup> No court has decided recently whether the defendant's sixth amendment right of confrontation ap-

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On the other hand, one trial attorney testified that he kept no notes of any conversation he had with witnesses to prevent the notes from "fall[ing] into the wrong hands." *United States v. Hurt*, 543 F.2d 162 (D.C. Cir. 1976), record of hearing at 49-50 (May 1, 1974).

<sup>265</sup> The voucher prepared by an appointed attorney to receive compensation would not provide an effective way to review the accuracy of his testimony at the hearing. Because the attorney would not indicate in the voucher why he did not do something or what his client had not told him, he could explain at the hearing why he did not make some motion or deny that his client had mentioned a witness. Some appointed attorneys do not even prepare vouchers because they waive payment. See Austern-Reznick Report, *supra* n.121 at 18.

<sup>266</sup> See *United States v. Heard*, 419 F.2d 682, 684 (D.C. Cir. 1969). See also Bazelon, *The Realities*, *supra*, note 9, at 822 (criticizing judges' reluctance "to soil the reputation" of attorneys by finding them ineffective).

<sup>267</sup> See *United States v. Joyce*, 542 F.2d 158, 160 (2d Cir. 1976) ("A convicted defendant is a dissatisfied client, and the very fact of his conviction will seem to him proof positive of his counsel's ineffectiveness), quoting *United States v. Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963). See also *Brubaker v. Dickson*, 310 F.2d 30, 39 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963); *Mitchell v. United States*, 259 F.2d 787, 792 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); *Garton v. Swenson*, 417 F. Supp. 697, 708 app. (W.D. Mo. 1976).

<sup>268</sup> For example, at the evidentiary hearing in *United States v. Hurt*, 543 F.2d 162 (D.C. Cir. 1976), the hearing judge, characterizing the question as "impertinent," asked appellate counsel how many criminal trials he had tried. His answer was none. Transcript of hearing at 82 (May 1, 1974). See also *United States v. Clayborne*, 509 F.2d 473, 479 (D.C. Cir. 1974) (appellate counsel is "insulate[d] . . . from responsibility for the decisions of trial counsel"); *Weatherall v. State of Wisconsin*, 73 Wis.2d 22, 25, 242 N.W.2d 220, 222 (1976) (appellate counsel always tempted to substitute his judgment for that of trial counsel).

<sup>269</sup> See, e.g., *United States v. Matthews*, 518 F.2d 1245, 1246 (7th Cir. 1975) (court presumed attorney was aware of his duties and that he sought conscientiously to discharge them), *cert. denied*, 429 U.S. 868 (1976).

<sup>270</sup> See *Tollett v. Henderson*, 411 U.S. 258, 273 (1973) (Marshall, J., dissenting); *Brubaker v. Dickson*, 310 F.2d 30, 35 n.24 (9th Cir. 1962); SECTION 2254 RULES, *supra* note 221 at 7(b) & (c).

plies at the post-conviction hearing.<sup>271</sup> Since habeas proceedings are considered a hybrid of criminal and civil proceedings,<sup>272</sup> that right may not apply. But courts should rarely accept affidavits in place of live testimony if a hearing is held.<sup>273</sup> In an affidavit, the attorney could rationalize his conduct or omit damaging information too easily.<sup>274</sup> He should be required to testify because his credibility is frequently the crucial issue.<sup>275</sup>

Courts have also relaxed other evidentiary requirements. They have, for example, used character evidence to infer how the attorney usually represents his clients.<sup>276</sup> But the attorney's character is not in issue and evidence of those factors should be irrelevant; the question is not how the attorney usually acts, but whether he effectively represented the particular defendant who challenges him.

## VII. WHAT CAN COURTS DO?

If courts decide to oversee defense representation, they could begin by explaining the attorney's obligations to counsel and to the defendant early in the proceedings.<sup>277</sup> Then, at another point before trial,<sup>278</sup>

<sup>271</sup> See *Irvin v. Zerbst*, 97 F.2d 257 (5th Cir. 1938) (admitting affidavits and holding confrontation clause inapplicable because habeas corpus proceedings not a criminal trial). The confrontation clause might apply if the defendant were to challenge his attorney's representation through Rule 33 of the Federal Rules of Criminal Procedure because that motion might be considered part of the criminal proceeding.

<sup>272</sup> See *Harris v. Nelson*, 394 U.S. 286 (1969).

<sup>273</sup> See *McAleney v. United States*, 539 F.2d 282 (1st Cir. 1976).

<sup>274</sup> See *United States v. Clayborne*, 509 F.2d 473 (D.C. Cir. 1974) (attorney filed unsworn statement with trial court following guilty verdict in apparent attempt to explain decision not to interview or cross-examine key government witness. In dissent, Bazelon, C.J., thought attorney's decision was uninformed because the witness had not been interviewed).

<sup>275</sup> See, e.g., *United States v. Cooper*, No. 74-531 (D.D.C. May 4, 1976), *appeal dismissed*, No. 76-1498 (D.C. Cir. July 26, 1976), (jail records indicated counsel had not interviewed client as frequently as he claimed; district court reversed conviction even though defendant failed to show prejudice from failure to interview). *Cooper* suggests that courts may reverse to uphold the appearance of justice where the attorney has apparently lied or shaded his testimony.

<sup>276</sup> See FED. R. EVID. 404. Courts have bolstered the credibility of the trial attorney by considering his past reputation, *Baxter v. Rose*, 523 S.W.2d 930, 939 (Tenn. 1975) (two attorneys enjoyed "exemplary professional reputation and normally practice[d] before the trial judge who most assuredly knows their reputation . . ."), his listing in *MARTINDALE-HUBBELL*, *United States v. Stern*, 519 F.2d 521, 524 n. 2 (9th Cir.), *cert. denied*, 423 U.S. 1033 (1975), his extensive trial experience, *Chambers v. Maroney*, 408 F.2d 1186, 1191 (3d Cir. 1969) (trial attorney described as "an attorney of great experience in the trial of criminal cases."), *aff'd*, 399 U.S. 42 (1970), and the extent of his practice, see *United States v. Matthews*, 518 F.2d 1245, 1246 (7th Cir. 1975) (attorneys "who are the busiest and under greatest pressure often perform with greatest skill, diligence and effectiveness").

<sup>277</sup> This assumes that the court adopts and interprets guidelines like the ABA standards to define the defense attorney's role. Cf. *Washington v. United States*, 390 F.2d 444, 457-58 (D.C. Cir. 1967) (court instructs psychiatrist about role as a witness when defense is insanity). Most judges and attorneys would not be pleased to educate the defendant, because he might then object to counsel's decisions. If he objects, the court must decide the fundamental issue of whether he, or his attorney, controls trial tactics.

<sup>278</sup> If the defendant pleads guilty, the court should also require counsel to explain his prepara-

a judge could ask the attorney to explain his preparation, and ask the defendant whether he was satisfied with his attorney's representation.<sup>279</sup> The attorney could reply in either a conference with the judge or by completing a checklist.

This simple approach has several benefits. It applies to retained and appointed counsel.<sup>280</sup> It provides a record of what the attorney did and why he did not do something.<sup>281</sup> And, it avoids the problem of whether the power to appoint and discipline attorneys should be transferred from the judiciary to some independent entity.<sup>282</sup>

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tion and his decision not to make some motion or not to proceed to trial. This requirement could be part of the judge's inquiry under Rule 11 of the Federal Rules of Criminal Procedure. If the judge does not demand that explanation, the guilty plea will almost surely bar the defendant from any later attack on his attorney's failure to make some motion, like a motion to suppress, even if the attorney's decision was clearly wrong. See *McMann v. Richardson*, 397 U.S. 759 (1970).

<sup>279</sup> See Bazelon, *The Realities*, *supra* note 9 at 831 and *Defective Assistance*, *supra* note 9 at 40 (similar suggestion but not explaining its implementation); Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1248 (1970) (suggesting that attorney need not testify at the post-conviction hearing if he completed a checklist). See also *United States v. Greer*, 538 F.2d 437, 442 (D.C. Cir. 1976) (in dictum, Bazelon, C.J., suggested that counsel should explain his preparation to the judge); *United States v. Simpson*, 475 F.2d 934, 939-42 (D.C. Cir.) (*per curiam*) (Bazelon, C.J., in dissent, set out a form that the attorney could complete to indicate his preparation whenever the defendant pleaded guilty), *cert. denied*, 414 U.S. 873 (1973).

<sup>280</sup> This approach may provide the only possible form of oversight over retained counsel, whom the defendant has a right to choose, even if the court thinks that counsel is inept or inexperienced. See *Smith v. Superior Court*, 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968).

<sup>281</sup> A requirement that the attorney explain why he did not do something would eliminate the difficult problem for the post-conviction court of assessing a conflict between counsel and defendant over what counsel had told his client. Because that requirement might also force the attorney to consider what he should do, it may be the only effective way to improve defense representation.

<sup>282</sup> More extensive reform is possible, at least with appointed counsel. Courts could establish qualification tests for attorneys who sought appointments. They might refuse to appoint those attorneys who frequently performed questionably. And they might relinquish the power to qualify, select and discipline attorneys to an independent authority. Each of these reforms will generally improve defense representation, but none will guarantee that an individual defendant is represented effectively, as the proposal suggested here is designed to do. Of these three reforms, the first is the most likely to be adopted. A federal task force is currently examining whether the federal courts should establish standards that an attorney must meet to qualify to receive appointments. See note 13, *supra*.

The second and third reforms are not likely to be adopted. Judges are reluctant to remove an appointed attorney from a case, or to bar him from receiving other appointments, without clear standards governing how attorneys should represent their clients. Many judges will also refuse to deprive an attorney of appointments, no matter how inept he is, if appointments are an important source of income for him. (Chief Judge Harold Greene of the District of Columbia Superior Court made this argument while commenting on proposed changes in the appointment process. Letter to Bernice Just, Feb. 17, 1977, at 3; copy available from author.) As long as judges control appointments, the process of disciplining or removing an attorney from a case will be chaotic. In one recent case, for example, a judge in the District of Columbia removed two appointed attorneys for incompetency, and granted a new trial as a result. The second

The checklist probably involves fewer problems than the conference. A conference between judge, attorney and defendant might intrude on the attorney-client relationship and consume too much time and money. For example, courts might balk at scheduling a calendar date for a conference, or at compensating an appointed attorney for attending that conference. They may also be wary of inviting the defendant into chambers.<sup>283</sup>

Many attorneys would consider the conference demeaning and would justifiably fear giving information to the judge because it might affect that judge's rulings at trial and his evaluation of the testimony or the defendant's guilt. And, the defendant would probably have to waive the attorney-client privilege. An attorney could find himself in

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judge, to whom the case was reassigned, reappointed the attorneys. THE WASHINGTON STAR, May 1, 1977, at F-5, col. 2.

Few judges are ready to transfer their power over appointments. In 1975, a report prepared by a committee established by the Judicial Conference of the District of Columbia Court of Appeals and a local bar association recommended the creation of an umbrella organization to control the appointment process. *Austern-Reznick Report*, *supra* note 121. Although most sections of the bar endorsed that recommendation, the Superior Court refused to adopt it and created a "cadre" system of several lawyers, chosen by the judges, who would represent up to eight new defendants each day from their initial appearance through indictment. The court adopted the "cadre" system without holding hearings, and in the face of almost unanimous opposition from the bar. It is too early to assess whether the "cadre" system will improve defense representation. Compare the initial report prepared by the Criminal Justice Act Committee, Aug. 18, 1977 (in favor of the "cadre" system) with the "Report of the Ad Hoc Committee to Evaluate the Cadre System of Division V of the D.C. Bar," October, 1977 (generally criticizing the system) (copies of both reports available from the author).

The "cadre" system represents the worst approach to the problem of improving defense representation, because a new attorney is appointed to replace the "cadre" attorney after indictment. This system divides the responsibility between attorneys and increases judicial control. The crucial time to consult and investigate is usually immediately after the defendant's arrest. Because the "cadre" attorney will not represent the defendant after the indictment, he may have little incentive to begin immediate preparation of the defense. See also Just, "The Accused Shall Enjoy . . . Assistance of Counsel?" 1 *District Lawyer*, No. 4, p. 48 (Summer, 1977). Compare Temple, "The Cadre Plan: No Help to the Accused," *id.* at 51, with Murray, "A Re-Examination of the Cadre Plan," *ibid.*, Vol. 2, No. 1, p. 48 (Fall, 1977).

The threat of discipline for ineffective representation may goad attorneys in general to improve their counseling, but it may not help an individual defendant who is upset by counsel's performance. In the District of Columbia, for example, a defendant may be reluctant to complain because he must address his complaint to the judge assigned his case. If the judge cannot resolve the dispute, he can refer it to a disciplinary board. That board, however, refuses to review the matter because of the attorney-client privilege until the attorney either withdraws or is removed. That seems to be an inadequate reason for non-intervention because a defendant who complains would undoubtedly be willing to waive the protection of the privilege. If the defendant appeals his conviction on the ground of ineffective representation, the board also delays review until the appellate court decides the issue. See Gribbon, "Disciplinary Board on Complaints Against CJA Attorneys," 2 *District Lawyer* No. 1, p. 47 (Fall 1977). As a result, the grievance process is not likely to help the individual defendant receive better representation.

<sup>283</sup> A practical reason to hold the conference in chambers is the impracticality of clearing the courtroom of everyone but the defendant and the attorney in any jurisdiction where the volume of cases is high, and a number of conferences are scheduled for the same time.



the dilemma of being forced to answer the court's questions when he thinks that it is better that his client not waive the privilege.<sup>284</sup> That fear might also lead an attorney never to ask for a bench trial before the judge who presided at the hearing.

To avoid influencing the trial judge, a different judge could speak with the attorney at the conference. But that solution would be cumbersome in jurisdictions where the dockets are already overcrowded. And, a specially-assigned judge might not easily provide the necessary review if he knew little about the case.

Courts could use a checklist to provide the same protection for a defendant. The attorney could complete a form in which he indicated what he had and had not done, and what he expected to do.<sup>285</sup> The defendant would review the form; if he disagreed, he could object to the judge. By objecting, he would waive the attorney-client privilege. If he did not object, the attorney-client privilege problem would disappear, because neither the judge nor prosecutor would see the form. The form could be reviewed only by a post-conviction court if the defendant appealed on the ground of ineffective representation.

Whether the checklist or conference is adopted, one point is clear—review must precede the trial. Only pretrial review will force the attorney to prepare and will deny him the opportunity to rationalize why he failed to do something. Perhaps the attorney should also complete a second form or have a second conference with a judge

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<sup>284</sup> The defendant could abort the conference by refusing to waive the attorney-client privilege. The court might have trouble protecting the defendant against the attorney's advice not to waive the privilege when the attorney was actually trying to protect himself against exposing what little he had done.

It may be difficult to decide whether certain information is covered by the privilege. Witnesses whom the attorney learned of through discovery from the government would not be covered. But witnesses whom the defendant named, or whom the attorney found based on information from the defendant, might be covered.

<sup>285</sup> The checklist would follow the ABA guidelines and could include the following questions:

1. *Investigation.*

- a. Have you obtained discovery from the government? If not, why not? What have you received through discovery?
- b. Have you investigated at the scene of the alleged crime? If not, why not?
- c. What witnesses have you spoken to? What witnesses do you intend to speak to? If there are potential witnesses whom you have decided not to speak to, why did you make that decision?

2. *Motions.*

- a. What motions have you made?
- b. Have you made all motions you consider relevant and helpful?
- c. Did you consider, but decide not to make, some motion? If so, what was that motion(s) and what prompted your decision?

3. *Consultation.*

How many times have you spoken to your client? Are you satisfied that these consultations have provided you with sufficient information to represent him properly?

immediately before the trial begins, or before both sides rest their cases. The second review would require the attorney to document his recognition and treatment of any further problems.

There are problems with either method of monitoring attorneys. Some attorneys might refuse criminal cases because they found this intrusion into their practices unjustified. The judge must decide what he can do if the defendant and attorney disagree about some aspect of the attorney's representation. The judge probably is powerless, for example, to order the attorney to investigate; that is a decision within the attorney's discretion. On the other hand, the judge might replace an appointed attorney who refused to perform some duty provided by the guidelines. But, in resolving any dispute between attorney and defendant, the judge will probably learn the very information that the use of a checklist is designed to avoid. To prevent that, and thereby to provide complete protection for the defendant, an independent committee could review the dispute or even conduct the initial conference with the defense.<sup>286</sup>

### VIII. CONCLUSION

The post-conviction process is not designed to improve defense representation. The standard of review is not settled, the problem of raising the issue is too great, the record of what the attorney did is frequently incomplete, and the remedy of reversal is not directed at the defense attorney.

*DeCoster* is the best judicial attempt to improve defense representation through the post-conviction process. But that decision moves against the force of recent Supreme Court cases, and is not likely to survive *en banc* review.<sup>287</sup> Even if adopted, *DeCoster's* standard will improve defense representation only if trial courts try to police the defense attorney. They can do that by adopting the ABA guidelines and by asking the attorney what he did to prepare. Unless courts are willing to police the attorney, they should candidly admit that the call for "effective representation" is simply rhetoric.

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<sup>286</sup> But the problems of staffing that body and of deciding its power and accountability make its creation and operation impractical. The fact that the proposal suggested in this article for pretrial judicial review of the attorney's representation by conference or checklist is not perfect should not undercut its value.

<sup>287</sup> If the *en banc* court decides to reverse, hopefully it will do so on the narrow ground that there was no factual basis to trigger the use of the presumption, or that the trial attorney's failures were harmless error. On either ground, the three-part standard establishing the burden of proof on the defendant and government on the issue of ineffectiveness will survive.



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