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Criminal Law - Ineffective Assistance of Counsel - Burden on Defendant to Demonstrate That Serious Incompetency, Falling Measurably below the Performance Ordinarily Expected of Fallible Lawyers, Was Likely to Have Affected the Outcome of Trial

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CRIMINAL LAW—INEFFECTIVE ASSISTANCE OF COUNSEL—BURDEN ON DEFENDANT TO DEMONSTRATE THAT SERIOUS INCOMPETENCY, FALLING MEASURABLY BELOW THE PERFORMANCE ORDINARILY EXPECTED OF FALLIBLE LAWYERS, WAS LIKELY TO HAVE AFFECTED THE OUTCOME OF TRIAL.

*United States v. Decoster (D.C. Cir. 1979)*

After defendant was convicted of numerous criminal offenses,¹ he appealed to the United States Court of Appeals for the District of Columbia Circuit, claiming that his sixth amendment right to counsel was violated because of the ineffectiveness of his trial lawyer.² In a panel decision, hereinafter referred to as *Decoster I*,³ the court established a "reasonable competence" standard for evaluating a criminal defendant’s right to effective counsel,⁴ and remanded the case *sua sponte* to determine whether, under this standard, defendant had been deprived of his sixth amendment right.⁵ On remand, the District Court for the District of Columbia found no violation of the defendant’s sixth amendment right,⁶ a determination later overturned by the same panel of the court of appeals.⁷

¹ Editor’s Note: As this Note went to print, the principal case under discussion had not yet been submitted for publication in the West Reporter System. The current official citation is United States v. Decoster, No. 72-1283 (D.C. Cir. July 10, 1979) (en banc) [hereinafter cited as *Decoster II*].

² United States v. Decoster, 487 F.2d 1197, 1199 (D.C. Cir. 1973) (three-judge panel), rev’d, *Decoster II*, supra note *, cert. denied, 100 S. Ct. 302 (1980). In an unreported trial court decision, the District Court for the District of Columbia found defendant guilty of assault with a dangerous weapon, and of aiding and abetting an armed robbery, imposing a sentence of two to eight years. *See* 487 F.2d at 1199.

³ 487 F.2d at 1199. For the relevant portion of the sixth amendment, *see* text accompanying note 10 infra.

⁴ 487 F.2d at 1199. Judge Bazelon, who was chief judge at the time, wrote the majority opinion for a panel which included Circuit Judge MacKinnon and then Circuit Judge Wright. Judge MacKinnon filed a separate opinion in which he concurred in part and dissented in part. *Id.* at 1205.

⁵ 487 F.2d at 1202. The standard which the panel adopted provided that "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate." *Id.* (emphasis in original). For an analysis of *Decoster I*, *see* notes 38-43 and accompanying text infra.

⁶ 487 F.2d at 1201. For a discussion of the manner in which this constitutional guarantee has been interpreted and applied, *see* notes 11-43 and accompanying text infra. *See also* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289, 293-94 (1964).

⁷ United States v. DeCoster, 72-1283 (D.C. Cir. Oct. 19, 1976) (three-judge panel) (unreported), vacated, United States v. Decoster, No. 72-1283 (D.C. Cir. Mar. 17, 1977) (three-judge panel). As evidence of trial counsel’s ineffectiveness, the defendant pressed most vigorously on appeal that counsel had failed to interview potential witnesses prior to trial. *Decoster II*, supra note *, at 28-32 (plurality opinion). It was also contended that counsel’s representation was ineffective because: 1) he had been tardy in obtaining defendant’s pretrial release; 2) he had failed to obtain a copy of the transcript of the preliminary hearing; 3) he had unwisely offered to waive a jury trial; 4) he had waived his opening statement; and 5) he had allegedly failed to see that defendant’s sentence was properly executed. *Id.* at 32-34 (plurality opinion).
Granting the government's motion for rehearing en banc, the court of appeals, in Decoster II, vacated the second panel decision and affirmed the defendant's conviction. The court also reversed DeCoster I, holding that defense counsel's performance is constitutionally infirm if counsel's competency falls measurably below the standard ordinarily expected of fallible lawyers. United States v. Decoster, No. 72-1283 (D.C. Cir. July 10, 1979) (en banc), cert. denied, 100 S. Ct. 302 (1980).

The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." In considering the scope of this guarantee, the Supreme Court has set forth requirements concerning when and where an individual's right to counsel attaches. The Court has not, however, addressed the problem of determining when counsel's performance is so inadequate that it does not satisfy the sixth amendment guarantee of "Assistance of Counsel." As a result, lower courts have formulated different standards for determining when representation fails to satisfy the minimum constitutional requirements. There is also division among the courts regarding whether the failure to satisfy the constitutional standard, once established, must be shown to have prejudiced defendant's trial in order to justify a reversal of the conviction and, if so, on whom the burden of establishing such prejudice should fall.

8. Decoster II, supra note *, at 5, 42 (plurality opinion). Judge Leventhal, writing for a plurality of the court, was joined by Judges McGowan, Tamm, and Wilkey. Id. at 2 (plurality opinion). Judge MacKinnon, joined by Judges Tamm and Bobb, filed a separate opinion concurring in the result of Judge Leventhal's opinion. Id. at 1-61 (MacKinnon, J., concurring in the result). See notes 78-81 and accompanying text infra. Judge Robinson filed a separate opinion concurring in the result. Decoster II, supra, at 1-42 (Robinson, J., concurring in the result). See notes 82-85 and accompanying text infra. Judge Bazelon, joined by Chief Judge Wright, dissented. Decoster II, supra, at 1-81 (Bazelon, J., dissenting). See notes 86-89 and accompanying text infra. A summarizing statement of the disposition of the case was also filed by Chief Judge Wright, in which Judges Bazelon and Robinson joined. Decoster II, supra, at 1 (opinion of Wright, C.J.).

It should be noted that this court corrected the spelling of the defendant's name to Decoster, rather than DeCoster as was used by the DeCoster I court. See id. at 7 n.16 (Bazelon, J., dissenting).

9. Decoster II, supra note *, at 21 (plurality opinion).

10. U.S. CONST. amend. VI.

11. See, e.g., Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (no indigent criminal defendant may be imprisoned unless state affords him right to assistance of appointed counsel for his defense); United States v. Wade, 388 U.S. 218, 223-27 (1966) (accused is guaranteed right to counsel not only at trial but at any critical stage of proceedings wherein results might determine fate and absence of counsel might detract from right to fair trial).

12. See Bazelon, The Defective Assistance of Counsel, 42 U. CIN. L. REV. 1, 21 (1973). Judge Bazelon suggests that the Supreme Court has never confronted the ineffectiveness of counsel issue because of its focus on defining the threshold questions of when and where the right to counsel exists. Id.

The Court was presented with an opportunity to confront the ineffectiveness of counsel issue directly in Chambers v. Maroney, 399 U.S. 42 (1970). Although counsel's briefs and oral arguments centered on this issue, the Court rested its decision on fourth amendment grounds, giving the ineffectiveness question only cursory treatment. Id. at 55-60 (Harlan, J., dissenting). See also Maryland v. Marzullo, 435 U.S. 1011, 1011-13 (1978) (White and Rehnquist, JJ., dissenting from denial of certiorari); Bazelon, supra, at 21; text accompanying note 129 infra.

13. For a discussion of these standards, see notes 15-43 and accompanying text infra.

14. See notes 44-56 and accompanying text infra.
In the 1945 case of *Diggs v. Welch*, the District of Columbia Circuit was first to articulate a standard by which claims of ineffective assistance of counsel could be evaluated. Relying upon the due process clause of the fifth amendment, the court held that ineffectiveness of counsel is simply a factor to consider in determining whether the proceedings have been rendered "a farce and a mockery of justice." Although generally discredited, a form of the "farce and mockery" standard is still followed in a number of circuits.

The Fifth Circuit, however, in *MacKenna v. Ellis*, determined that the right to effective counsel requires "counsel reasonably likely to render and rendering reasonably effective assistance." This standard, which is far more favorable to defendants than the "farce and mockery" approach, is

15. 148 F.2d 667 (D.C. Cir.), cert. denied, 325 U.S. 883 (1945). After pleading guilty to charges of grand larceny, the defendant in *Diggs* sought habeas corpus relief, contending that counsel's bad advice concerning the entering of the plea constituted ineffectiveness of counsel. 148 F.2d at 668.


17. 148 F.2d at 669. The pertinent text of the fifth amendment states that "[n]o person shall ... deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

18. 148 F.2d at 669. Emphasizing that the injustice to the defendant must be extreme, the court viewed the ineffectiveness of counsel issue as one factor used to determine whether the accused had received a fair trial. *Id.* Only if the effectiveness of counsel factor, coupled with other factors in a particular trial, revealed the absence of fifth amendment due process would the court vacate a defendant's conviction. *Id.*

19. See, e.g., Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978) (en banc) ("farce and mockery" standard ruled to be outmoded); Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970) (en banc) (increased recognition of constitutional right to assistance of counsel requires sixth amendment, normal competency analysis); Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970) ("farce and mockery" standard exists only as a metaphor to show that defendant has a heavy burden in proving the requisite unfairness). See also Bazelon, *supra* note 12, at 28-29; Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1078 (1973); *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J.L. & SOC. PROB. 1, 32-37 (1977) [hereinafter cited as *Ineffective Representation*]. It has been suggested that the *Diggs* court's failure to base its decision directly on the sixth amendment, together with its imposition of a severe burden on defendants to show ineffectiveness of counsel, indicated the court's reluctance to delve into the issue of counsel's inadequate performance. See also *Decoster II*, *supra* note *, at 11-12 (plurality opinion).

20. See Gillihan v. Rodriguez, 551 F.2d 1182, 1188 (10th Cir.), cert. denied, 434 U.S. 845 (1977) (requiring farce or mockery of justice which would shock the conscience of the court); Rickenbacker v. Warden, 550 F.2d 62, 65-66 (2d Cir. 1976), cert. denied, 434 U.S. 826 (1977) (upon concluding that counsel's performance satisfied all standards, court maintained "farce and mockery" criterion for time being); United States v. Madrid Ramirez, 535 F.2d 125, 129-30 (1st Cir. 1976) (court considered adoption of "reasonable competence" standard but kept "farce and mockery standard" upon finding that counsel violated neither).

21. 280 F.2d 592 (5th Cir. 1960). Based upon evidence that defendant's lawyers were inexperienced, had a conflict of interests, and were retained on such short notice that witnesses could not be obtained, the *MacKenna* court held that the defendant had been deprived of his right to effective representation. *Id.* at 603-04.

22. *Id.* at 599 (emphasis in original). An examination of the *MacKenna* standard indicates that the court probably never intended this language to be a new standard against which claims of ineffective representation should be measured. See *Ineffective Representation*, *supra* note 19, at 39.

23. See *Ineffective Representation*, *supra* note 19, at 40.
significant in that it shifts the focus of the ineffectiveness issue from notions of fifth amendment due process to the guarantees of the sixth amendment. Variations of MacKenna's "reasonable competence" standard have been adopted in several circuits and states.

Recognizing a need for greater judicial scrutiny than that afforded by the Diggs "farce and mockery" standard, the District of Columbia Circuit, in Bruce v. United States, fashioned a "gross incompetence" standard. Implicitly relying upon the sixth amendment, the court distinguished Diggs by stating that the "farce and mockery" language was not to be taken literally, but rather as descriptive of the defendant's burden of showing the "requisite unfairness" caused by counsel's performance.

Seizing upon Supreme Court dictum which admonished trial judges to insure that defense counseling is "within the range of competence de-

24. See 280 F.2d at 599. The MacKenna court's language immediately preceding the "reasonable competence" language evidences the court's focus on the sixth amendment: "We interpret the right to counsel as the right to effective counsel." Id. Consequently, in resolving the ineffectiveness issue, the court analyzed the reasonableness of all phases of the attorney's representation, rather than considering the overall character of the trial as is done under a due process analysis. See Ineffective Representation, supra note 19, at 40. Note, The Right to Counsel and the Neophyte Attorney, 24 Rutgers L. Rev. 378, 384 (1970).


26. See Bruce v. United States, 379 F.2d 113, 116-17 (D.C. Cir. 1967); Decoster II, supra note *, at 12 (plurality opinion). In Decoster II, Judge Leventhal pointed out the significance of the Bruce opinion which he had authored 12 years earlier. Id.

27. For a discussion of the Diggs standard, see notes 15-20 and accompanying text supra.

28. 379 F.2d 113. Following his conviction on charges of robbery, the defendant in Bruce filed a motion to stay the judgment, contending that his counsel was inexperienced and had given him poor advice concerning his guilty plea, thereby entitling him to habeas corpus relief. Id. at 115.

29. Id. at 116-17. Although the "gross incompetence" standard is conceptually distinguishable from the variations of the "reasonable competence" standards discussed in note 25 and accompanying text supra, there has been little difference in its application. See Decoster II, supra note *, at 17 (plurality opinion).

30. 379 F.2d at 116-17. See Decoster II, supra note *, at 12 n.42 (plurality opinion) (Judge Leventhal stating that his opinion in Bruce was based upon sixth amendment principles).

31. 379 F.2d at 116. For a discussion of the impropriety of requiring a defendant to establish that his lawyer's performance prejudiced his defense before that lawyer may be deemed to have violated the appropriate constitutional standard, see notes 112-19 and accompanying text infra.

32. See McMann v. Richardson, 397 U.S. 759, 771 (1970). The McMann court's discussion of the alleged ineffectiveness of counsel was collateral to its holding that a defendant who claims he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus. Id.
manded of attorneys in criminal cases, the Third Circuit, in Moore v. United States, formulated a standard for resolving incompetency of counsel claims which is based on negligence principles. Rejecting the "farce and mockery" standard, the court held that an accused is entitled to "the exercise of the customary skill and knowledge which normally prevails at the time and place."

In an attempt to provide substantive content to these somewhat vague standards, some courts have specified minimum requirements of competency, the violation of which amounts to ineffective assistance of counsel. Judge Bazelon, writing for the District of Columbia Circuit in DeCoster I, has been the foremost advocate of this approach, deriving a list of duties owed by counsel to his client from American Bar Association guidelines. Representing what Judge Bazelon considered to be a major advance in assur-

33. Id.
34. 432 F.2d 730 (3d Cir. 1970) (en banc). Following his conviction on federal bankruptcy charges, the defendant in Moore appealed, alleging that counsel's failure to aid him in obtaining an appeal and failure to challenge the method of jury selection constituted ineffective assistance of counsel. Id. at 732.
35. Id. at 736. Relying upon § 299A of the Restatement (Second) of Torts, the court took the position that the standard of adequacy for legal services should be comparable to that for other professions. Id. & n.24. Section 299A provides: "Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." Restatement (Second) of Torts § 299A (1965).
36. See 432 F.2d at 737; notes 15-20 and accompanying text supra. The Moore court found that the "normal competency" approach was preferable because of its sixth amendment focus and because it clearly separates the issue of counsel's ineffectiveness from that of prejudice to the defendant. 432 F.2d at 737.
37. 432 F.2d at 736. This standard has been viewed favorably by at least one commentator. See Bines, Remedying Ineffective Representation In Criminal Cases: Departures From Habeas Corpus, 59 Va. L. Rev. 927, 936-39 (1973).
38. See United States v. DeCoster, 487 F.2d at 1203; Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968). In Coles, the first case to apply the minimum requirements approach, the court identified prompt appointment of counsel, the opportunity to prepare a defense, prompt and timely conferences between counsel and client, as well as appropriate factual and legal investigations to be requirements for effective representation. 389 F.2d at 226. The Fourth Circuit has continued to apply this approach, giving substantive content to a "normal competency" standard. See Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978).
39. 487 F.2d at 1203-04. The court stated that counsel should be guided generally by the American Bar Association Standards for the Defense Function. Id. at 1203. See note 40 infra. Specifically, counsel should confer with his client without delay and as often as is necessary to elicit matters of defense, to ascertain whether potential defenses are unavailable, and to fully discuss potential strategies and tactical choices. 487 F.2d at 1203. Moreover, counsel should promptly advise the client of his rights and take all actions necessary to preserve them. Id. In addition, counsel should exhibit concern for obtaining pretrial release, should make appropriate pretrial motions, and should conduct appropriate factual and legal investigations. Id. at 1203-04.
40. 487 F.2d at 1203, citing inter alia ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (App. Draft 1971) [hereinafter cited as ABA STANDARDS]. The second edition of these standards has recently been adopted with only minor changes. See ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION (2d ed. 1979).
ing defendants effective assistance of counsel,41 DeCoster I was the culmination of a shift in judicial attitude from the Diggs notion of near abstention42 to a position of substantial judicial intervention.43

The other major issues raised by claims of ineffective assistance of counsel over which the lower courts have divided are whether violation of the constitutional standard must be shown to have prejudiced defendant's trial in order to justify a reversal44 and, if so, on whom the burden of establishing such prejudice should fall.45 The most common approach is illustrated by the Bruce decision,46 where the burden was placed on the defendant to show that his lawyer's ineffectiveness had an actual effect on the outcome of his trial.47 A derivative of this approach was formulated by the Supreme Judicial Court of Massachusetts in Commonwealth v. Saferian,48 where the court held that a defendant must show that counsel's ineffectiveness "likely deprived [him] of an otherwise available, substantial ground of defence [sic]."

At the opposite end of the spectrum50 are those cases which hold that no showing of prejudice is required—i.e., when a defendant proves that he was given less than effective representation he is automatically entitled to relief.51 Based upon language used by the Supreme Court in Glasser v.

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41. See Decoster II, supra note *, at 8 (Bazelon, J., dissenting). For a discussion of the pros and cons of this method of evaluation, see Bazelon, The Realities of Gideon and Argersinger, 64 GEO. L.J. 811, 823-29 (1976); Bazelon, supra note 12, at 51-53; notes 84, 95 & 97 and accompanying text infra.

42. For a discussion of the Diggs standard, see notes 15-20 and accompanying text supra.

43. For a discussion of the controversy surrounding the role of the court in these matters, see notes 63-65 & 98-102 and accompanying text infra.

44. See notes 46-56 and accompanying text infra. The burden of proving a violation of the constitutional standard for effective representation which is in force in a particular jurisdiction always rests on the defendant, and the prejudice issues discussed herein do not properly arise unless such a violation has been shown. See Ineffective Representation, supra note 19, at 72. The issue of prejudice differs conceptually from the issue of whether appellant's sixth amendment rights have been violated and the two should not be confused. See Bazelon, The Realities of Gideon and Argersinger, supra note 41, at 823 n.65; notes 112-13 and accompanying text infra.

45. See United States v. DeCoster, 487 F.2d at 1204. For a discussion of the need to establish prejudice, see notes 112-13 and accompanying text infra.

46. 379 F.2d 113. See notes 26-31 and accompanying text supra.

47. 379 F.2d at 116-17. The court stated that defendant would be granted relief if, in addition to showing that there had been gross incompetence of counsel, defendant could show that counsel's failure had "in effect blotted out the essence of a substantial defense either in the District Court or on appeal." Id. (footnotes omitted). Accord, McQueen v. Swenson, 498 F.2d 207, 216-18 (8th Cir. 1974) (harm to defendant's case must be shown); United States ex rel. Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970) (burden on defendant to show that alleged missing evidence would have been helpful).


49. Id. at 96, 315 N.E.2d at 883. See notes 76-77 and accompanying text infra.

50. For an explanation of why there is no uniformity over whether defendants must show prejudice, see Ineffective Representation, supra note 19, at 71 ("there are many types of ineffectiveness with differing amenability to proof of consequences"). See also notes 112-13 and accompanying text infra.

this per se rule of reversal is enforced only in the Sixth Circuit. 53

Finally, an intermediate position which follows the "harmless error" rule of Chapman v. California 54 was reflected by the DeCoster I opinion. 55 Under this approach, the burden of proving an absence of prejudice is shifted to the government once the defendant establishes that his counsel's representation failed to meet the appropriate constitutional standard. 56

It was against this background that Judge Leventhal began his analysis in Decoster II by recognizing the varying nature of sixth amendment cases 57 and the differing approaches that the Supreme Court has taken with respect

52. 315 U.S 60 (1942). Noting the importance of providing defendants with the un divided assistance of counsel in conspiracy cases—where liberal rules of evidence and the wide latitude afforded to prosecutors may occasionally operate unfairly against an individual defendant—the Glasser Court held that the defendant in that case had been denied effective representation because the trial court had appointed counsel to represent both co-conspirators, despite having been informed of a potential conflict of interest. Id. at 75-76. Addressing the specific facts at bar, the Glasser Court found that automatic reversal was required, stating: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Id. at 76 (citations omitted).

53. See, e.g., United States v. Goodwin, 531 F.2d 347, 352 (6th Cir. 1976); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974). Under the per se approach, a defendant's conviction will be automatically reversed if he has been deprived of a "substantial" constitutional right. See Chapman v. California, 386 U.S. 18, 23 (1967); note 54 infra. Thus, application of the rule to claims of ineffective assistance requires the court to first characterize counsel's effectiveness as a "substantial" right. See 386 U.S. at 23. Judge Celebrezze, writing for the court in Beasley, made such a characterization by equating the right to effective assistance of counsel with the right to counsel itself. 491 F.2d at 696. Few judges and commentators have been willing to go so far, most preferring to draw some distinction between the varying classes of sixth amendment cases. See note 50 supra. Judge Celebrezze has, however, received some support for his view. See Note, Ineffective Assistance of Counsel and the Harmless Error Rule: The Eighth Circuit Abandons Chapman, 43 GEO. WASH. L. REV. 1384, 1398 (1975).

54. 386 U.S. 18 (1967). According to Chapman, a conviction resulting from a trial in which an error was committed will be reversed unless the government carries its burden of proving beyond a reasonable doubt that the error was insignificant and, therefore, harmless to the defendant. Id. at 24. Denying defendant any representation by counsel was considered by the Chapman Court to be a deprivation of a substantial constitutional right for which automatic reversal is required. Id. at 23. See note 53 supra. Hence, in such circumstances, the per se approach, and not the harmless error rule, would be applied. 386 U.S. at 24.

55. See 487 F.2d at 1204; notes 38-43 and accompanying text supra.

56. 487 F.2d at 1204. The court justified this position by noting that the burden, in our constitutionally prescribed adversary system, is on the government to prove guilt. Id. Because the effect of inadequate representation is as though the defendant has not yet been proven guilty, the court found that requiring the defendant to show prejudice would place the burden on him to establish the likelihood of his innocence. Id. The court further noted that proof of prejudice may well be absent from the record precisely because counsel has been ineffective, as in a case where counsel fails to conduct an examination and the record does not indicate which witnesses might have been called or which defenses raised. Id.

57. Decoster II, supra note 4, at 5 (plurality opinion). Judge Leventhal viewed the sixth amendment cases as presenting a continuum, ranging from those cases where structural or procedural impediments erected by the state prevent the accused from receiving the benefits of the constitutional guarantee, to those in which the issue is counsel's performance when he is unimpaired by state action. Id. at 5-9 (plurality opinion). For a discussion of the differing approaches that courts have taken with respect to the various claims, see notes 60-62 and accompanying text infra.
to each type of case. Writing for a plurality of the court, Judge Leventhal recognized that a defendant's conviction absolutely could not stand where the accused's sixth amendment right to assistance of counsel was completely blocked by the state's structural or procedural barriers. Judge Leventhal found, however, that a more flexible approach was required where the sixth amendment claim stemmed from counsel's alleged inadequate performance. Noting that the Supreme Court has never defined the proper standard for evaluating such claims, Judge Leventhal interpreted analogous Supreme Court opinions as precluding the use of categorical approaches in this context.

Moreover, Judge Leventhal found that Decoster I's categorical approach failed to provide the required flexibility, implying that evaluating counsel's performance by categorical standards interfered with counsel's freedom to make quick decisions in response to the variety of situations which call for the exercise of professional judgment. Judge Leventhal cautioned that courts considering a categorical approach must be wary, lest the approaches' wide-ranging inquiries and standards undercut the attorney-client relationship and cause the adversary system to be more inquisitional in nature. In addition, Judge Leventhal contended that the

58. Decoster II, supra note *, at 5-9 (plurality opinion). Judge Leventhal stated that "[t]he differences stem from the courts' perceptions of the exactness with which a denial [of effective representation] can be identified and remedied, as well as their views of the need for a showing of prejudice." Id. at 5 (plurality opinion). For a discussion of these approaches, see notes 59-62 and accompanying text infra.

59. See note 8 supra.

60. Decoster II, supra note *, at 6-7. See, e.g., Herring v. New York, 422 U.S. 853, 864-65 (1975) (state statute providing judge with power to deny defense counsel his closing argument in a nonjury trial held unconstitutional); Argerisger v. Hamlin, 407 U.S. 25, 37 (1972) (refusal to appoint counsel in misdemeanor prosecution that could result in imprisonment ruled unconstitutional). Judge Leventhal felt that these barriers violated the sixth amendment by disabling counsel from fully assisting and representing his client. Decoster II, supra, at 7. Because these impediments interfere with the exercise of a fundamental right and are susceptible to easy correction by prophylactic rules, Judge Leventhal maintained that a categorical approach was appropriate in such cases. Id.


62. Id. Judge Leventhal noted that the Supreme Court utilized the flexible "reasonable competency" standard in two recent cases involving the validity of guilty pleas given in reliance upon erroneous advice from counsel. Id. at 9, citing Tollett v. Henderson, 411 U.S. 258, 264 (1973); McMann v. Richardson, 397 U.S. 759, 774 (1970). Judge Leventhal also cited a 1976 decision in which the Supreme Court ruled that defense counsel's failure to request the criminal record of a murder victim did not demonstrate ineffective assistance. Decoster II, supra note *, at 9-10, citing United States v. Agurs, 427 U.S. 97, 102 n.5 (1976). Although the Supreme Court provided no rationale for its failure to adopt a categorical approach in Agurs, Judge Leventhal pointed to the judgment calls that must be made in this "fact-laden atmosphere" in declaring that categorical rules are not appropriate. Decoster II, supra note *, at 9-10. The Supreme Court has twice declined the opportunity to address the issue of the proper constitutional standard for evaluating claims that counsel has rendered ineffective representation. See note 12 supra.

63. Decoster II, supra note *, at 22. For a discussion of DeCoster I's categorical approach, see notes 38-43 and accompanying text supra.

64. Decoster II, supra note *, at 22. For a summary of the manner in which this "sensitive" relationship was perceived to be harmed, see text accompanying note 62 supra.

65. Decoster II, supra note *, at 22-23. Judge Leventhal predicted problems at both the trial and pretrial stages of the proceedings. Id. For example, he believed that a categorical or checklist of duties approach would require supervision of defense counsel's development of the
ABA standards utilized by Decoster I's categorical approach are "a mixture of the aspirational and the obligatory" and "were not put forward by the ABA as either exclusively 'minimum' standards or as a set of per se rules applicable to post-conviction procedures." 66

Seeking to delineate a flexible standard by which claims of ineffective assistance of counsel can be evaluated, Judge Leventhal examined those standards presently in use. 67 The "farce and mockery" approach 68 was rejected as not permitting sufficient judicial oversight of counsel's performance. 69 The "negligence" 70 and "reasonable competence" 71 standards were also criticized for leaving open the question of what departures from a potential "norm" are so egregious as to call for judicial intervention. 72 Concluding that these generalized standards may be little more than a "semantic merry-go-round," 73 Judge Leventhal relied upon Saferian 74 in adopting a

case before trial. Id. In addition to the impropriety of this intervention, Judge Leventhal questioned the court's authority to engage in such investigations. Id. With respect to the trial stage, the thought of judicial inquiry into the reasoning behind counsel's tactical decisions, often based upon information confidentially obtained from the defendant, was particularly distasteful to Judge Leventhal. Id. at 22. He further predicted that the adversary system would be upset by the prosecution's requests to oversee defense counsel's conduct in order to ensure against reversal. Id.

66. Id., at 15, quoting ABA STANDARDS, supra note 40, at 11. Judge Leventhal observed that, although the guidelines were originally titled "Minimum Standards," the ABA House of Delegates voted to drop such a designation, noting that the guidelines constituted a "blend of description of function, functional guidelines, ethical guidelines and recommended techniques." Decoster II, supra note *, at 15 n.52. See ABA STANDARDS, supra note 40, at 11. Judge Leventhal buttressed his characterization of the ABA STANDARDS by pointing out that those courts relying upon them have shown restraint in applying the categorical approach. Decoster II, supra, at 15-16. Judge Leventhal noted that in Coles v. Peyton, 389 F.2d 224 (4th Cir.), cert. denied, 393 U.S. 849 (1968), the Fourth Circuit specified certain duties of defense counsel, including an unqualified duty to investigate. Decoster II, supra, at 15. See 389 F.2d at 226. Subsequently, in Jackson v. Cox, 435 F.2d 1089 (4th Cir. 1970), the Fourth Circuit apparently limited Coles, stating that Coles was not controlling where there were shortfalls in counsel's investigation, yet counsel performed more than a "perfunctory" investigation. Decoster II, supra, at 15. See 435 F.2d at 1093.


68. For a discussion of the "farce and mockery" standard, see notes 15-20 and accompanying text supra.

69. Decoster II, supra note *, at 11-12. Judge Leventhal stated that it is now clear that courts will not abstain completely from overseeing counsel's performance, yet he conceded that some arguments advanced in an earlier case retain merit as reasons for limiting the degree of judicial intervention. Id., citing Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958) (defending an approach of nonintrusion into the attorney-client relationship).

70. See notes 32-37 and accompanying text supra.

71. See notes 21-25 and accompanying text supra.

72. Decoster II, supra note *, at 13. Judge Leventhal noted that these uncertainties are not resolved by such generalized standards, pointing to the fact that performance which falls below average does not necessarily amount to negligence. Id. The judge concluded that there must be "serious derelictions" in counsel's performance to warrant judicial intervention. Id. at 14, quoting McMann v. Richardson, 397 U.S. 759, 774 (1970).

73. Decoster II, supra note *, at 17, quoting Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977) (Duniway, J., concurring), vacated, 586 F.2d 1325 (9th Cir. 1978) (en banc). Judge Leventhal implied that all formulations of standards of competency are inherently alike and constitute "limited efforts to describe that courts will condemn only a performance that is egregious and probably prejudicial." Decoster II, supra, at 17.

74. See notes 25 & 48-49 and accompanying text supra.
standard requiring “serious incompetency that falls measurably below the performance ordinarily expected of fallible lawyers.” 75 Further relying upon Saferian, Judge Leventhal stated that the defendant can prove counsel’s failure under this standard by showing that counsel’s deficiency was likely to deprive him “of an otherwise available, substantial ground of defense.” 76 Judge Leventhal concluded that if a defendant met this burden, he would then be entitled to judicial intervention.77

75. Decoster II, supra note *, at 21. Judge Leventhal considered this language to be a refinement of the “gross incompetency” language of Bruce. Id. at 18. For a discussion of Bruce, see notes 25-31 and accompanying text supra. Judge Robinson, however, opined that this decision left the Bruce standard “dead,” a result which he endorsed. See Decoster II, supra, at 4 (Robinson, J., concurring in the result).

76. Decoster II, supra note *, at 17-18 (plurality opinion), quoting 366 Mass. at 96, 315 N.E.2d at 883. See notes 48-49 and accompanying text supra. Judge Leventhal asserted that this language reduced Bruce’s requirement of showing an actual effect on the outcome of the trial, see notes 46-47 and accompanying text supra, to the less demanding standard of showing only a likely effect on the outcome. Decoster II, supra, at 18 n.61. Judge Leventhal sought to justify this modification by stating that “[o]verarching concepts of justice tug on the court whenever it is seriously troubled by the likelihood of injustice, even though there is no concrete establishment of injustice as a fact.” Id. at 18.

77. Decoster II, supra note *, at 17-18. By characterizing the defendant’s burdens of 1) proving counsel’s ineffectiveness and 2) showing the likely effect of such ineffectiveness on the trial as “conditions to judicial intervention,” Judge Leventhal merged the question of whether the appropriate constitutional standard had been satisfied with the issue of whether a prejudicial effect must be shown. See id. at 53-56 (Bazelon, J., dissenting). For a discussion of the dissent’s view that these are distinct conceptual issues which may not properly be merged, see notes 112-13 and accompanying text infra.

In support of his decision to merge these issues, Judge Leventhal interpreted the Ninth Circuit’s decision in Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (en banc), as a quality of performance case in which the burden was placed on the accused to establish both serious derelictions by counsel and a prejudicial effect caused by counsel’s inept performance. Decoster II, supra, at 10-11. See 586 F.2d at 1330. Judge Leventhal also interpreted language in a recent decision of the California Supreme Court to require that defendant establish likely prejudice to his defense. Decoster II, supra, at 16-17, quoting People v. Pope, 23 Cal. 3d 412, 425, 590 P.2d 859, 886, 152 Cal. Rptr. 732, 739 (1979) (following establishment of counsel’s failure to perform in accordance with a “reasonable competence” standard, burden remained on defendant to establish that “counsel’s acts or omissions resulted in the withdrawal of a potentially meritorious defense”).

It was also necessary for Judge Leventhal to reject the “harmless error” and “per se reversal” approaches to examining the prejudicial effect of counsel’s deficiency on defendant’s trial. See Decoster II, supra, at 37-40; notes 50-56 and accompanying text supra. In a series of comments directed at the dissent, Judge Leventhal criticized Judge Bazelon’s use of the Chapman “harmless error” rule:

The realistic thrust of Judge Bazelon’s approach . . . is a rule structured toward a conclusion of prejudice from any deviation from the checklist of standards concerning preparation, whatever the likely or actual consequence. Omissions of investigation lead to new trials on the rationale that one can never be certain what might have happened had counsel performed better. A new trial is needed if exculpatory information might have been turned up (obviously) and also if the fruits of the investigation would have proved neutral or even inculpatory, for defense counsel could have been in a stronger position to lead his client to plead guilty. This kind of speculation renders no error harmless. Decoster II, supra, at 38. For a discussion of the viability of the Chapman rule, see notes 120-23 and accompanying text infra.

Commenting on the inappropriateness of a per se approach which assumes prejudice and demands reversal upon a mere showing that counsel has failed to satisfy the constitutional standard, Judge Leventhal disagreed with the dissent’s premise that the sixth amendment dictates an inevitable progression toward categorical rules governing the assistance of counsel. Decoster
Judge MacKinnon, joined by Judges Tamm and Robb, filed a separate opinion, agreeing with Judge Leventhal’s affirmance of the defendant’s conviction and apparently accepting his proposed constitutional standard. Judge MacKinnon departed from the plurality, however, by insisting that a defendant must prove that counsel’s inadequacy had an actual and substantial, rather than a likely, effect on the outcome of his trial.

Although Judge Robinson concurred in affirming the defendant’s conviction, he endorsed the Decoster I “reasonable competence” standard, but without the checklist of substantive duties. On the issue of prejudice to

11, supra, at 39. Judge Leventhal buttressed his position with a case involving a defendant’s claim of denial of counsel wherein the Supreme Court implicitly rejected the per se reversal approach by considering the facts of the case. Id. at 8-9, 39-40, citing Chambers v. Maroney, 399 U.S. 42, 54 (1970).

78. Decoster II, supra note *, at 1-61 (MacKinnon, J., concurring in the result). It should be noted that Judge Tamm joined in both the plurality opinion and Judge MacKinnon’s concurrence. See id. at 2 (plurality opinion). No explanation was offered as to how Judge Tamm would reconcile the differing views of Judges Leventhal and MacKinnon concerning the degree of prejudicial effect which must be shown by the defendant before a reversal may be ordered. See note 81 and accompanying text infra.

79. Decoster II, supra note *, at 2 (MacKinnon, J., concurring in the result).

80. Id. at 1 (MacKinnon, J., concurring in the result). Judge MacKinnon expressly limited the scope of his opinion to a discussion of his views on the defendant’s burden of proof, stating that he wished to avoid repetition of Judge Leventhal’s opinion. Id. at 1-2 (MacKinnon, J., concurring in the result). See note 81 and accompanying text infra.

81. Compare Decoster II, supra note *, at 3 (MacKinnon, J., concurring in the result) with id. at 17-18 (plurality opinion). Judge MacKinnon’s conclusion that the defendant bears the burden of showing substantial prejudice to his defense was partially based upon precedent in the District of Columbia Circuit. Id. at 3-11 (MacKinnon, J., concurring in the result). See, e.g., Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970) (burden on defendant to show prejudice from acts or omissions of counsel); Bruce v. United States, 379 F.2d at 116-17 (accused has heavy burden of showing that gross incompetence of counsel has in effect blotted out the essence of a substantial defense). Judge MacKinnon gathered additional support from traditional common law principles governing the burden of proof and from the Supreme Court’s approach in analogous fifth amendment cases. Decoster II, supra, at 21-25 (MacKinnon, J., concurring in the result). See, e.g., United States v. Agurs, 427 U.S. 97, 112 (1976) (defendant claimed violation of right to fair trial where prosecutor failed to inform her of victim’s criminal record; court refused new trial since no reasonable doubt of defendant’s guilt had been raised); Murphy v. Florida, 421 U.S. 794, 803 (1975) (although members of jury heard news accounts of petitioner’s case, fifth amendment was not violated because petitioner failed to show inherent or actual prejudice). Furthermore, even though Judge MacKinnon did not directly address the issue of the proper constitutional standard to be applied, it is apparent from his language that he effectively merged the concept of a constitutional violation with defendant’s burden of showing substantial prejudice to his trial. See Decoster II, supra, at 3 (MacKinnon, J., concurring in the result) (stating that “a defendant who alleges that his counsel was ineffective must show that substantial prejudice to his defense resulted” (emphasis in original)). See also notes 112-13 and accompanying text infra.

82. Decoster II, supra note *, at 1 (Robinson, J., concurring in the result).

83. Id. at 9 (Robinson, J., concurring in the result). Citing Decoster I with approval, Judge Robinson stated that “a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.” Id., citing United States v. DeCoster, 487 F.2d at 1202.

84. Decoster II, supra note *, at 12 n.44 (Robinson, J., concurring in the result). Urging a more flexible approach, Judge Robinson declined to support Judge Bazelon’s use of the ABA standards as a means for giving substance to the sixth amendment right to effective assistance of counsel. Id. Cf. note 40 and accompanying text supra. It was Judge Robinson’s position that judges are able to state with confidence that particular activities constitute effective performance, and that beyond those activities, the precise content of effective assistance must be
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defendant's trial, Judge Robinson took the position that once a defendant establishes a constitutional violation, the burden of showing that counsel's incompetency was harmless shifts to the government.85

Judge Bazelon, joined by Chief Judge Wright, filed a vigorous dissent,86 contending that the analysis of this case should be guided by the constitutional standard and the burden of proof principles that were established in Decoster I.87 The heart of the dissent's approach, and the point which most vividly distinguishes its position from that of Judge Leventhal,88 is its focus on the quality of counsel's performance, rather than on the effect of his actions on the outcome of trial.89

It is submitted that the plurality's rejection of Decoster I's categorical approach90 in favor of a more flexible subjective approach91 reflects a focus which misconceives the problems inherent in the area of ineffective assistance of counsel.92 In view of recent criticisms charging lack of competence among trial lawyers,93 it is suggested that the plurality's focus on the effect of counsel's actions on the outcome of the case, rather than on counsel's

developed on a case-by-case basis. Decoster II, supra, at 12 n.44 (Robinson, J., concurring in the result).

85. Decoster II, supra note *, at 14 (Robinson, J., concurring in the result). Relying on Chapman, Judge Robinson concluded that the right to effective assistance of counsel is amenable to the harmless error rule. Id. at 14-30 (Robinson, J., concurring in the result). For a discussion of the Chapman approach, see notes 54-56 and accompanying text supra; notes 120-23 and accompanying text infra. Having concluded that the harmless error approach is appropriate, Judge Robinson placed the burden of establishing that the constitutional violation was in fact harmless on the government, contending that proof of actual or potential harm is not a prerequisite to establishing a violation of a right specifically enumerated in the Constitution. Decoster II, supra, at 30-39 (Robinson, J., concurring in the result). See Dickey v. California, 398 U.S. 30, 54 (1970) (Brennan, J., concurring) (within context of sixth amendment rights, defendant generally does not have to show that he was prejudiced by the denial of counsel).

86. Decoster II, supra note *, at 1-81 (Bazelon, J., dissenting).

87. Id. at 25-26 (Bazelon, J., dissenting). For a discussion of the constitutional standard and burden of proof analysis adopted in Decoster I, see notes 38-43 & 54-56 and accompanying text supra.

88. See notes 57-76 and accompanying text supra.

89. Decoster II, supra note *, at 26 (Bazelon, J., dissenting). Judge Bazelon's emphasis on counsel's performance is reflected in his three-step inquiry into whether reversal is warranted. Id. After determining whether counsel violated one of the articulated duties, the question is raised whether the violation was substantial. Id. If so, the remaining inquiry is whether the government has established that no prejudice resulted. Id.

90. See notes 63-66 and accompanying text supra.

91. For a discussion of the constitutional standard adopted by the plurality, see notes 74-77 and accompanying text supra.

92. It is Judge Bazelon's position that the problems of ineffective assistance of counsel are not limited to achieving justice for an individual under particular circumstances. Decoster II, supra note *, at 8 (Bazelon, J., dissenting). Judge Bazelon focused upon problems which pervade our entire system of criminal justice, particularly the widespread inability of indigents to receive a fair trial as a result of their inability to hire competent and conscientious attorneys. Id. at 1-8.

performance,94 bypassed an opportunity to provide much needed guidance to the practitioner and to ensure better representation for criminal defendants.95

It is further suggested that Judge Leventhal’s argument that the categorical approach is inappropriate for fact-laden situations96 ignores the inherent flexibility of DeCoster I. The minimal duties set forth in DeCoster I were intended to represent “a starting point for the court to develop, on a case by case basis, clearer guidelines for the courts and for lawyers as to the meaning of effective assistance.”97 Moreover, Judge Leventhal’s supporting contentions that the categorical approach disrupts the attorney-client relationship in the adversary system98 and that it is viewed unfavorably by the Supreme Court99 are, it is suggested, likewise readily answerable.

It is suggested that the judicial intervention which accompanies a categorical approach does not disrupt the adversary system, but rather enhances it by assuring that, by conforming with certain articulated duties, the defense will be sufficiently prepared for the courtroom confrontation.100

94. See Decoster II, supra note *, at 26 (Bazelon, J., dissenting). It is submitted that the heart of the three-pronged inquiry of DeCoster I was this change in focus from trial outcome to counsel’s duties. See note 89 supra. It is Judge Bazelon’s contention that focusing on the quality of representation and providing incentives for counsel to exceed or meet minimum standards reduces the likelihood that any particular defendant will be prejudiced by counsel’s shortcomings. Decoster II, supra, at 26 (Bazelon, J., dissenting).

95. Recognizing inadequate representation by counsel as the evil to be remedied, a categorical approach using a checklist to identify duties owed by counsel to a criminal defendant would, it is suggested, provide a significant measure of guidance to the practitioner. At the very least, it would reveal gross violations of counsel’s duties, heighten counsel’s sensitivity to the need for adequate factual and legal investigations, and provide a record of counsel’s performance for appeal. See Decoster II, supra note *, at 73-74 (Bazelon, J., dissenting).

96. See notes 63-65 and accompanying text supra.

97. Decoster II, supra note *, at 30 (Bazelon, J., dissenting), quoting 487 F.2d at 1204. Judge Bazelon noted that preserving flexibility is not incompatible with establishing minimum components of effective assistance, and that the ABA Standards provide helpful guidance in pursuing both aims. Decoster II, supra, at 29 (Bazelon, J., dissenting). See notes 38-40 and accompanying text supra. Conceding that it would be impractical to “engrave in stone” rules which did not allow for the professional discretion required in any given case, Judge Bazelon nevertheless contended that the duties articulated in DeCoster I constituted tasks that any reasonably competent lawyer should perform. Decoster II, supra, at 27-31 (Bazelon, J., dissenting). Thus, it is suggested that the role of the ABA Standards in this scheme is to provide a yardstick for the evaluation of the alleged claims of ineffectiveness, a role which suggests a comparison rather than a mandatory result for a given set of facts. See ABA Standards, supra note 40, at 10.

98. See notes 64-65 and accompanying text supra.

99. See note 62 and accompanying text supra.

100. See Decoster II, supra note *, at 74-75 (Bazelon, J., dissenting). Judge Bazelon maintained that the adversary system provides adequate protection for the rights of the accused only when both sides are equally prepared. Id. at 75 (Bazelon, J., dissenting). In addition, Judge Bazelon stated that many of the failings of the adversary system stem not from inherent defects in its process, but rather from an imbalance between the opposing parties which frequently results from the inferior representation available to the poor. Id. at 75 n.165 (Bazelon, J., dissenting). Judge Bazelon further emphasized that he was not proposing an “inquisitional sys-
Furthermore, the Supreme Court has indicated that the trial judge may assume an active role in criminal proceedings, noting that the trial judge bears the ultimate responsibility for the conduct of a fair and lawful trial and "should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases."  

It is also suggested that a categorical approach does not jeopardize the attorney-client relationship because such an approach does not require that defense counsel reveal the precise information and reasoning underlying his actions at each stage of the proceedings. Counsel need only be prepared to assert that his actions were based upon informed tactical decisions if called upon to justify his conduct in a post-trial inquiry. Moreover, it is submitted that where counsel's decisions are informed and rational, it is unlikely that a reviewing court will substitute its judgment for that of counsel.

Although Judge Leventhal felt constrained by Supreme Court opinions which he interpreted as precluding categorical approaches in cases where counsel's performance is in issue, it is submitted that a close reading of those cases indicates that Judge Leventhal relied upon unsupported dicta. As the dissent pointed out, the Supreme Court has never directly addressed the issue of minimum competency standards and, until such time, stating that "[t]he purpose of our approach is merely to assure that our 'adversary system of justice' really is adversary." Id. at 77 n.168 (Bazelon, J., dissenting) (emphasis in original).

Responding to Judge Leventhal's fears that holding counsel accountable for his actions would undercut the adversary system and seriously disrupt the administration of justice, see id. at 22-23 (plurality opinion), Judge Bazelon criticized the plurality for its failure to elucidate the perceived dire consequences, noting that he failed to see how the adversary system would be negatively affected by forcing counsel to be aware that he may have to justify his conduct at some future date. Id. at 77 n.168 (Bazelon, J., dissenting).


102. McMann v. Richardson, 397 U.S. 759, 771 (1970) (good sense and discretion of trial courts must guarantee that defendants are not left at the mercy of incompetent counsel).

103. See Decoster II, supra note *, at 77 n.168 (Bazelon, J., dissenting).

104. Id.

105. Id.

106. See note 61 and accompanying text supra.

107. See Tollett v. Henderson, 411 U.S. 258, 264 (1973); McMann v. Richardson, 397 U.S. 759, 771 (1970). In both Tollett and McMann, the Court focused upon the relationship between counsel's allegedly erroneous advice and the negation of an intelligent and voluntary guilty plea. See 411 U.S. at 264; 397 U.S. at 771. In examining the inherent uncertainty of guilty plea advice, the Court failed to discuss categorical approaches when it rejected any requirement of a per se rule invalidating guilty pleas. See 411 U.S. at 266; 397 U.S. at 771. Judge Leventhal also relied upon the Court's unexplained assertion in another case that counsel's failure to obtain the alleged murder victim's prior criminal record did not demonstrate ineffectiveness. Decoster II, supra note *, at 9 (plurality opinion), citing United States v. Agurs, 427 U.S. 97, 102 n.5 (1976). It should be noted that the Supreme Court addressed this ineffectiveness issue during a discussion of defendant's right to a fair trial under the due process clause of the fifth amendment, not during an analysis of defendant's sixth amendment guarantee of effective representation. See 427 U.S. at 102 n.5.

time as it does, it is suggested that there is no justification for contending that any Supreme Court constraint exists.

It is further suggested that although Judge Leventhal successfully identified the weaknesses of the existing standards for determining ineffective representation, he was not so successful when adopting the Saferian approach. It is submitted that the standard eventually settled upon is not distinguishable from the other standards and indeed appears to be just another semantical configuration. However, it is suggested that Judge Leventhal's formulation needlessly complicates matters by merging the inquiry concerning whether the constitutional standard is met with the question whether defendant was prejudiced—issues which deserve distinct analytical treatment.

The failure to separate these issues, and the resulting burden on the defendant to establish either likely or actual prejudicial effect on the outcome of the trial as an element of the constitutional violation, has, it is submitted, led a majority of the D.C. Circuit to stray from the presumption that a defendant is innocent until proven guilty. It is contended that a defendant who has not been provided effective assistance of counsel has not yet "had his day in court." Consequently, to require such a defendant to

110. See Decoster II, supra note *, at 17-18 (plurality opinion).
111. See id. at 21 (plurality opinion). Judge Leventhal admitted that the standard he chose is merely a refinement of the Bruce standard which differed from the others only in semantics. Id. at 17-18 (plurality opinion). For a discussion of the Bruce standard, see notes 26-31 and accompanying text supra.
112. Decoster II, supra note *, at 17-18 (plurality opinion). See note 77 supra.
113. It has been suggested that the burden of proving a violation of the constitutional standard is always on the defendant, and prejudicial effect becomes an issue only after such a violation has been established. Ineffective Representation, supra note 19, at 72. See also Decoster II, supra note *, at 54 (Bazelon, J., dissenting).
Judge Bazelon argued:

Separating the inquiry into the adequacy of counsel's performance from that of prejudice to the defendant reflects the distinction between the Sixth Amendment right to the effective assistance of counsel and the Fifth Amendment right to a fair trial. Although demonstrating a likelihood of prejudice may be required to make out a due process claim under the Fifth Amendment, it should be clear that prejudice is not an element that must be shown in establishing a violation of the Sixth Amendment. . . . ("[T]he ultimate issue is not whether a defendant was prejudiced by his counsel's act or omission, but whether counsel's performance was at the level of normal competency"). Indeed, this distinction between the Fifth and Sixth Amendment sources of the right to effective assistance was the basis for this circuit's rejection of the due process "farce and mockery" test in favor of the "reasonably competent assistance" standard.

Id. at 54 n.121 (Bazelon, J., dissenting), quoting Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970) (en banc). For further support for the contention that these issues must receive separate analytical treatment, see Bazelon, The Realities of Gideon and Argersinger, supra note 41, at 825 n.65.
114. Decoster II, supra note *, at 18 (plurality opinion).
115. Id. at 2-3 (MacKinnon, J., concurring in the result).
117. Bazelon, supra note 12, at 27. Judge Bazelon stated: "No defendant can be said to have had his day in court unless he had effective assistance on that day." Id.
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establish that prejudice flowed from counsel's inadequacies effectively requires him to disprove his guilt before his guilt was constitutionally established. It is submitted that such a result is both untenable\(^{118}\) and unfair.\(^{119}\)

It is suggested that the "harmless error" approach of *Chapman v. California*\(^{120}\) presents a viable solution to this problem.\(^{121}\) The *Chapman* approach avoids the dilemma of requiring the defendant to show prejudice to his defense where such evidence is probably not reflected by the record,\(^{122}\) yet permits the government to come forward with evidence establishing that counsel's error was harmless.\(^{123}\)

Although a majority of the court has rejected the constitutional standard of *DeCoste I*,\(^{124}\) which had been the law in the D.C. Circuit for six years, the impact of *DeCoste II* is limited by the failure of a majority of the court to agree on the degree of prejudice that a defendant must prove in order to obtain judicial relief.\(^{125}\) Although it is clear that a defendant must establish some prejudice,\(^{126}\) in subsequent adjudications in the D.C. Circuit, it will still be an open question as to whether likely or actual prejudice must be shown by the defendant as a condition to judicial relief.\(^{127}\) It is respectfully

\(^{118}\) It has been contended that the entire framework of the adversary system is thrown into question when one assumes that a conviction is factually justifiable even after the ineffectiveness of defendant's counsel has been shown. Note, *supra* note 53, at 1404.

\(^{119}\) See *United States v. DeCoster*, 487 F.2d at 1204. The unfairness of this approach arises from the fact that any proof of prejudice resulting from the ineffectiveness of trial counsel might not be reflected in the record and would, therefore, be unreviewable precisely because of counsel's incompetence. *Id.*

\(^{120}\) 386 U.S. 18 (1967). See notes 54-56 and accompanying text *supra*.

\(^{121}\) For a further discussion of the compromise position that the "harmless error" approach reflects, see *Ineffective Representation*, *supra* note 19, at 79-85.

\(^{122}\) See note 119 *supra*.

\(^{123}\) See *Ineffective Representation*, *supra* note 19, at 79-80.

\(^{124}\) See *Decoster II*, *supra* note *\(^{*}\)*, at 1 (opinion of Wright, C.J.). Only Chief Judge Wright and Judges Bazelon and Robinson continue to espouse *DeCoste I*’s standard of "reasonably competent assistance of an attorney acting as the defendant's diligent, conscientious advocate," *id.*. Although Judge Robinson does not support *DeCoste I*’s accompanying criteria of duties owed by counsel to his client. See *id.*, at 12 n.44 (Robinson, J., concurring in the result). See notes 82-84 and accompanying text *supra*.

Only Chief Judge Wright and Judges Bazelon and Robinson continue to support *DeCoste I*’s application of *Chapman* which maintains that once the defendant shows that his lawyer failed to meet the constitutional standard of competency, it is presumed that the defendant has been denied his constitutional right to counsel and, therefore, must have his conviction reversed unless the government meets its burden of proving that the ineffective assistance of counsel was harmless. *Decoster II*, *supra*, at 1 (opinion of Wright, C.J.). See notes 54-56 and accompanying text *supra*.

\(^{125}\) Judges Leventhal, McGowan, and Wilkey favor a showing that counsel's ineffective performance created a likely effect on the outcome of the trial before a constitutional violation may be found. *Decoster II*, *supra* note *\(^{*}\)*, at 18 (plurality opinion). Judges MacKinnon and Robb, however, would require a showing of actual prejudice. *Id.* at 2-3 (MacKinnon, J., concurring in the result). Since Judge Tamm signed both of the aforementioned opinions, his position on the issue is unclear. See note 78 *supra*. In either case, his vote would still be insufficient to create the requisite five-judge majority.

\(^{126}\) See note 125 *supra*.

\(^{127}\) See note 125 *supra*.
submitted that the Decoster II opinion has failed to clear the confusion surrounding this controversial issue and, in fact, tends to further cloud it.\textsuperscript{128} Given the divergent views among the circuit courts, it is suggested that this question of fundamental importance to the administration of criminal justice is ripe for Supreme Court review.\textsuperscript{129}

\textit{Clifford H. Lange}

\textsuperscript{128} The breakdown of the court and the strong arguments advanced by such noted legal scholars as Judge Bazelon and Chief Judge Wright are indicative that matters are far from resolved. See notes 8, 86-89 \& 124-25 and accompanying text \textit{supra}.

\textsuperscript{129} See Maryland v. Marzullo, 435 U.S. 1011, 1012-13 (1978) (White \& Rehnquist, JJ., dissenting from denial of certiorari).