The Constitutional Mandate of Effective Assistance of Counsel: The Duty to Investigate

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THE CONSTITUTIONAL MANDATE OF EFFECTIVE ASSISTANCE OF COUNSEL: THE DUTY TO INVESTIGATE

The first appellate claims of ineffective assistance of counsel were based on denial of a fair trial in violation of the due process clause of either the fifth or fourteenth amendments. Recent cases, however, considered these claims as violations of the sixth amendment guarantee of effective assistance of counsel. In this sixth amendment context, judicial review focused on ascertaining standards by which to judge effectiveness. United States v. DeCoster (DeCoster II) is a turning point in judicial analysis of ineffectiveness claims. DeCoster II established specified duties as a measure of effectiveness and designated failure to fulfill one such duty as a constitutional violation. Where such a violation occurred, the court shifted to the government the burden to prove that the defendant was not harmed. Furthermore, the effect of DeCoster II was to elevate one of the enumerated obligations, the duty to conduct pretrial investigation, to a sixth amendment mandate.

2. U.S. Const. amend. V: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."
3. U.S. Const. amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."
4. E.g., Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977); United States v. Hurt, 543 F.2d 162 (D.C. Cir. 1976); Davis v. Johnson, 495 F.2d 335 (3d Cir.), cert. denied, 419 U.S. 878 (1974); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); United States v. Ingram, 477 F.2d 236 (7th Cir. 1973).
5. U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." Powell v. Alabama, 287 U.S. 45, 71 (1932) held that this provision guarantees the right to "effective" assistance of counsel.
STANDARDS USED TO DEFINE INEFFECTIVE ASSISTANCE OF COUNSEL?

Powell v. Alabama\(^8\) was the first Supreme Court decision which required that assigned counsel render “effective aid in the preparation and trial of [a] case.”\(^9\) Powell involved habeas corpus review of a state conviction for a capital offense. The state court appointed the entire Scottsboro, Alabama, bar as counsel at the arraignment of the nine defendants. Until the morning of the trial, however, no lawyers had been specifically assigned to represent the defendants.\(^10\) “[F]rom the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense . . . .”\(^11\) The Supreme Court emphasized the importance of pretrial investigation: “Neither they [the lawyers] nor the Court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate.”\(^12\) However, the Court never defined “effective,” and subsequent lower court decisions have searched for the precise standard to apply.\(^13\)

The first case which attempted to define effectiveness was


\(^8\) 287 U.S. 45 (1932).

\(^9\) *Id.* at 71. Although this holding was expressly limited to capital offenses, subsequent Supreme Court decisions extended the requirement of effective aid to noncapital felonies, Gideon v. Wainwright, 372 U.S. 335, 343 (1963), and to misdemeanors where a prison sentence may be imposed, Argersinger v. Hamlin, 407 U.S. 25, 30-31 (1972).

\(^10\) Powell v. Alabama, 287 U.S. 45, 56 (1932). This case involved one of the three trials of the “Scottsboro Boys,” nine defendants convicted of the capital offense of rape.

\(^11\) *Id.* at 57.

\(^12\) *Id.* at 58.

Diggs v. Welch.14 In Diggs defendant sought habeas corpus review, claiming that ineffective counsel had influenced him to enter a plea of guilty.15 The District of Columbia Circuit found the sixth amendment analysis inappropriate:

[O]nce competent counsel is appointed his subsequent negligence does not deprive the accused of any right under the Sixth Amendment. All that amendment requires is that the accused shall have the assistance of counsel. It does not mean that the constitutional rights of the defendant are impaired by counsel's mistakes subsequent to a proper appointment.16

The court then rejected the due process claim because "to justify habeas corpus on that ground an extreme case must be disclosed. It must be shown that the proceedings were a farce and mockery of justice."17 Although the articulation of this standard (the "farce and mockery of justice" standard) varied, it was initially adopted by every circuit.18

Recent opinions in three of the four circuits which still apply the "farce and mockery of justice" standard indicate awareness of different standards which have emerged in other circuits. In Dunker v. Vinzant,19 the First Circuit did not explicitly reject the established "farce and mockery of justice" standard, but it did ac-

15. Id. at 668.
16. Id. (footnote omitted).
17. Id. at 669.
18. Bottiglio v. United States, 431 F.2d 930, 931 (1st Cir. 1970) ("a mockery, a sham or a farce"); Cardarella v. United States, 375 F.2d 222, 230 (8th Cir. 1967) ("farce and a mockery of justice, shocking to the conscience of the Court"); Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965) ("farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation"); Bouchard v. United States, 344 F.2d 872, 874 (9th Cir. 1965) ("farce or a mockery of justice"); Root v. Cunningham, 344 F.2d 1, 3 (4th Cir.), cert. denied, 382 U.S. 866 (1965) ("extreme instances where the representation is so transparently inadequate as to make a farce of the trial"); Frand v. United States, 301 F.2d 102, 103 (10th Cir. 1962) ("trial becomes mockery and farcical"); O'Malley v. United States, 285 F.2d 733, 734 (6th Cir. 1961) ("farce and a mockery of justice, shocking to the conscience of the Court"); Darcy v. Handy, 203 F.2d 407, 427 (3d Cir.), cert. denied, 346 U.S. 865 (1953) ("farce and a mockery of justice"); United States v. Wight, 176 F.2d 375, 379 (2d Cir.), cert. denied, 333 U.S. 950 (1949) ("shock the conscience of the Court and make the proceedings a farce and mockery of justice"); Feeley v. Ragen, 166 F.2d 976, 980 (7th Cir. 1948) ("travesty on justice").
19. 505 F.2d 503 (1st Cir. 1974). Counsel's summation was the basis of defendant's claim of ineffective assistance; it referred to his court appointed status and to an attorney's obligation to defend even if his client admits guilt.
knowledge a newer, less extreme standard. The court stated that counsel's assistance did not fall below either the established or newer standard of effectiveness:20 "It is the factual circumstances of [defendant's] case, not the application of a lenient legal standard that disentitles him to relief."21 In United States v. Daniels,22 the Second Circuit found it unnecessary to reconsider the "farce and mockery of justice" standard, but it concluded that "under either the traditional standard or any of more 'liberal' standards suggested, Daniels was adequately represented at trial."23 The Fourth Circuit applies the older standard: "Ordinarily, one is deprived of effective assistance of counsel only in those extreme instances where representation is so transparently inadequate as to make a farce of the trial."24 In a subsequent Fourth Circuit decision, Coles v. Peyton,25 the court did not reject that extreme standard; but, like courts espousing newer standards, it did enumerate duties which constitute effective representation.26 The Tenth Circuit is the only circuit which has not acknowledged the new standard. In United States v. Grismore,27 the court stated:

[Relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only

20. Id. at 504. In a subsequent decision, Karger v. United States, 388 F. Supp. 595 (D. Mass. 1975), the court did not use the "farce and mockery of justice" language, but stated that it was following Dunker v. Vinzant, 505 F.2d 503 (1st Cir. 1974), by measuring appellant's claim against the higher standard. Id. at 598 n.6. Although in Dunker the court had measured the claim against both standards, it stated that the result would be the same under either standard. Thus Karger should be classified with Dunker.
22. 558 F.2d 122 (2d Cir. 1977).
23. Id. at 126.
26. The court "distilled" the following principles from earlier cases: Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.
27. 546 F.2d 844 (10th Cir. 1976).
perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation.\textsuperscript{28}

In \textit{Bruce v. United States},\textsuperscript{29} the District of Columbia Circuit, which had initiated the "farce and mockery of justice" standard, asserted: "These words are not to be taken literally, but rather as a vivid description of the principle that the accused has a heavy burden in showing the requisite unfairness."\textsuperscript{30} The appellant may obtain relief for ineffectiveness of counsel when he shows "both that there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense."\textsuperscript{31} This interpretation of the "farce and mockery of justice" standard established a divergent standard,\textsuperscript{32} one which requires two elements of proof.\textsuperscript{33} Cases applying the \textit{Bruce} standard generally imposed the burden of proving prejudicial impact on the defendant.\textsuperscript{34} Unlike the extreme "farce and mockery of justice" standard, which gener-
ally precludes relief, the Bruce standard provides relief to defendants who prove that counsel’s gross incompetence obliterated a substantial defense.

In McMann v. Richardson, the Supreme Court considered whether an otherwise valid guilty plea could be collaterally attacked by assertions or proof that the plea was motivated by a prior coerced confession. Defendant claimed that his plea had been induced by a coerced confession and by ineffective counsel. His attorney had conferred with him for only ten minutes; despite defendant’s wish not to plead guilty, his attorney advised him to do so because the coerced confession issue could be raised subsequently. The Court stated that an intelligent guilty plea required reasonably competent advice, “within the range of competence demanded of attorneys in criminal cases.” This “normal competency” standard is currently applied in seven circuits. Chief Judge Bazelon, author of the majority opinion in United States v. DeCoster (DeCoster I), and of the subsequent appeal following remand, DeCoster II, commented that although the “normal competency” standard is gaining acceptance, the new test is relatively inconsequential because it is “built on words like ‘customary’ or

35. “[W]e know of no case in the Eighth Circuit or elsewhere which has ever concluded that the ‘farce and mockery’ rule has ever been violated in a particular case.” Garton v. Swenson, 417 F. Supp. 697, 705 (W.D. Mo. 1976).


37. 397 U.S. 759 (1970). Although there were two other respondents, only Richardson claimed ineffectiveness of counsel.

38. Id. at 771.


'reasonable' which are themselves empty vessels into which content must be poured.\textsuperscript{41} \textit{DeCoster II} attempted to clarify the "reasonably competent assistance" standard by requiring that counsel perform the duties enumerated in the American Bar Association Standards for the Defense Function.\textsuperscript{42}

**THE \textit{DeCoster} INNOVATIONS**

**Specific Duties**

In \textit{DeCoster I}\textsuperscript{43} defendant appealed his conviction for aiding and abetting armed robbery and assault with a deadly weapon.\textsuperscript{44} On this first appeal, the court vacated the assault conviction as a lesser included offense.\textsuperscript{45} Moreover, the court noted, \textit{sua sponte}, several indications that appellant's sixth amendment right to effective assistance may have been violated.\textsuperscript{46} There were five circumstances which indicated the possibility of ineffective assistance.\textsuperscript{47} The record, however, did not reflect whether these circumstances were the result of inadequate preparation or of informed tactical choices. The case was therefore remanded to the district court for

\textsuperscript{41} Bazelon, \textit{The Realities of Gideon and Argeringer}, 64 Geo. L.J. 811, 820 n.48 (1976).

\textsuperscript{42} ABA STANDARDS, \textit{THE DEFENSE FUNCTION} (App. Draft 1971) [hereinafter cited as ABA STANDARDS]:

\begin{quote}
While these standards may prove useful to the courts [to lessen the ambiguity as to the lawyer's function] it should be emphasized that the Committee has not proposed them as a set of \textit{per se} rules applicable to post-conviction procedures. . . . It will remain for courts to determine how the standards may be employed in the context of appeals and other post-conviction procedures.
\end{quote}

\textit{Id.} at 11. These standards are the same whether counsel is privately retained, appointed by the court, or serving through a legal aid or defender system. \textit{Id.} at 222-23.


\textsuperscript{44} \textit{Id.} at 1199.

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} \textit{Id.} at 1199-1200.

\textsuperscript{47} These circumstances were: (1) delay in filing bond review motion; (2) announcement of "ready" by counsel although he was not prepared for trial; (3) waiver of jury trial by counsel despite his having made no effort to discover that appellant's two alleged accomplices had already pleaded guilty before the same judge; (4) indications of a lack of communication between appellant and counsel; (5) call of only one witness other than appellant. The testimony elicited from this witness on direct examination contradicted defendant's testimony on a fundamental point. \textit{Id.} at 1199-1201. According to the court, "[t]his confused the defense case and stripped it of its credibility." \textit{Id.} at 1201.
a supplemental hearing on counsel's preparation and investigation.\textsuperscript{48} In addition, the court granted new counsel leave to file a motion for a new trial,\textsuperscript{49} a procedure thereafter referred to as a "De-Coster motion."\textsuperscript{50}

In the first decision, before remand, the court of appeals adopted the newer competency standard formulated in \textit{McMann v. Richardson}:
\textsuperscript{51} "A defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."\textsuperscript{52} The \textit{DeCoster I} court noted that although this standard is rapidly gaining acceptance, "there is reason to believe that defendants are not now generally receiving this level of assistance."\textsuperscript{53} The court attributed this deficiency to the general nature of the competency standard: It is not subject to ready application.\textsuperscript{54} The majority cited with approval\textsuperscript{55} \textit{Coles v. Peyton},\textsuperscript{56} where the Fourth Circuit specified counsel's duties. In its articulation of duties, the \textit{DeCoster I} majority stated that counsel generally should be guided by the ABA Standards.\textsuperscript{57} The court then set forth three categories of obligations which counsel should fulfill.\textsuperscript{58} Al-

\begin{itemize}
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id. at 1204-05. \textit{DeCoster I} established that an ineffective assistance of counsel claim should first be presented to the trial court in a motion for a new trial, during which evidence beyond the record may be presented. U.S. v. Tindle, 522 F.2d 689, 693 (D.C. Cir. 1975). \textit{Accord}, DiAngelo v. United States, 406 F. Supp. 880, 885 (E.D. Pa. 1976). \textit{Contra}, Harshaw v. United States, 542 F.2d 455, 456-57 (8th Cir. 1976) (record itself must contain indications that counsel was incompetent).
\item \textsuperscript{50} See, e.g., United States v. Tindle, 522 F.2d 689, 693 (D.C. Cir. 1975).
\item \textsuperscript{51} 397 U.S. 759 (1970).
\item \textsuperscript{52} United States v. DeCoster, 487 F.2d at 1202.
\item \textsuperscript{53} Id. at 1202 n.21.
\item \textsuperscript{54} Id. at 1203.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} 389 F.2d'224 (4th Cir.), \textit{cert. denied}, 393 U.S. 849 (1968). See text accompanying note 26 supra.
\item \textsuperscript{57} United States v. DeCoster, 487 F.2d at 1203.
\item \textsuperscript{58} The Court enumerated the following duties:
\begin{enumerate}
\item 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. (2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. . . . (3) 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 . . . [a]nd, of course, the duty to investigate also requires adequate legal research.
\end{enumerate}
\end{itemize}
though this appellate court remanded the case for a supplemental hearing on several possible violations of counsel’s duties, only the duty to investigate was the subject of analysis on the return to the court of appeals.

The Presumption

Claims of ineffective assistance typically required the appellant to prove: (1) that counsel’s acts or omissions constituted ineffective assistance of counsel, a constitutional violation and (2) that the violation prejudiced the defense. DeCoster I subdivided the first burden of proof into two issues: The defendant must prove that (1) counsel violated one of the articulated duties and (2) that violation was substantial. If the traditional burden is met by proof that counsel committed a constitutional violation, the DeCoster I burden should be met on its first two issues by proof that counsel violated a specific duty and that this violation was substantial. However, DeCoster II eliminated the second requirement of the DeCoster I analysis. Citing United States v. Glasser, DeCoster

Id. at 1203-04 (footnotes omitted). Subsequent cases have cited with approval the DeCoster court’s application of the ABA Standards. E.g., State v. Tucker, 97 Idaho 4, 8-9, 539 P.2d 556, 591 (1975); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). The DeCoster I majority was uncertain whether counsel’s decisions in five circumstances it questioned, see note 47 supra, were strategic and tactical or uninformed because of inadequate preparation. United States v. DeCoster, 487 F.2d at 1201. However, it was only the district court’s conclusion that failure to interview witnesses did not constitute ineffective assistance of counsel, id. at 8-9 n.14, which was the subject of appellate review. The court of appeals stated that the district court’s conclusion on this point “can be read as either holding that there was no constitutional violation and in any event no prejudice, or simply holding that no prejudice was shown.” Id. at 9.

1. E.g., McQueen v. Swenson, 498 F.2d 207, 218 (8th Cir. 1974); United States v. Johnson, 495 F.2d 335, 340 (3d Cir. 1974); United States v. Ingram, 477 F.2d 236, 240 (7th Cir. 1973).


4. 315 U.S. 60 (1942). In Glasser the defendant’s privately retained counsel was appointed by the court to represent a codefendant at the joint conspiracy trial. The Supreme Court stated: “Irrespective of any conflict of interest, the additional
II created the presumption of a constitutional violation arising from breach of an attorney’s duty; this presumption eliminated the need to prove “substantial violation.”

In DeCoster I the court remanded for the initial determination of whether any violation had occurred.\(^6\) Thus, only in DeCoster II did the court progress to the second stage of the inquiry to determine if the violation was substantial. In this second stage, the majority referred to Pinkney v. United States\(^6\) which had defined “substantial” as “consequential,” the impairment of a defense. Defendant in DeCoster II retained the burden of proving that the violation had impaired the defense;\(^6\) but the court of appeals in DeCoster II articulated its newly created presumption: “In certain circumstances . . . the acts or omissions of counsel are so likely to have impaired the defense, and yet this consequence would be so difficult to prove, that, in accordance with well established evidentiary principles, such impairment can be presumed.”\(^6\) The court burden of representing another party may conceivably impair counsel’s effectiveness.” Id. at 75. The Court refused to inquire into the amount of prejudice which resulted because “[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.” Id. at 76. Hence, the Court held there was a denial of effective assistance of counsel. Courts in subsequent cases have presumed a constitutional violation without inquiring into the extent of prejudice in situations of late appointment of counsel, Garland v. Cox, 472 F.2d 875 (4th Cir.), cert. denied, 414 U.S. 908 (1973); Martin v. Virginia, 365 F.2d 549 (4th Cir. 1966). But see Rastrom v. Robbins, 440 F.2d 1251 (1st Cir. 1971); Moore v. United States, 432 F.2d 730 (3d Cir. 1970). The presumption was also applied in Geders v. United States, 425 U.S. 80 (1976). The Supreme Court in Geders held that the trial court’s order preventing defendant from consulting his attorney during the overnight recess between his direct and cross-examination impinged his sixth amendment right to assistance of counsel. The order was inherently suspect and no showing of prejudice was required. Id. at 1337 (Marshall, J., concurring).

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66. 543 F.2d 908 (D.C. Cir. 1976). The basis for the Pinkney claim of ineffective assistance was counsel’s failure to inform defendant of the contents of the Government’s sentencing memorandum. Although defendant offered no proof of any violation, the opinion cited DeCoster I with approval: “[W]e readily reaffirm, that once a substantial violation of counsel’s duties is shown, the Government’s burden is to demonstrate lack of prejudice therefrom . . . .” Pinkney v. United States, 543 F.2d 908, 916 n.59 (D.C. Cir. 1976).

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created the rebuttable presumption\(^69\) that counsel's failure to conduct factual investigations\(^70\) impaired the defense.\(^71\) The decision thus held failure to investigate to be another act presumptively injurious to the defendant: Such a violation is substantial *per se*. Defendant need only show that counsel violated an ABA Standard\(^72\)—here, the duty to investigate—to establish a constitutional violation. Hence, this decision elevates an ABA Standard, intended merely as a guideline,\(^73\) to a sixth amendment mandate.

**The Burden of Proof**

Traditional analysis required the defendant to bear the burden of proof on two issues: the existence of a constitutional violation and its resultant prejudice.\(^74\) *DeCoster II* eliminated the first burden by an explicit presumption which established the constitutional violation and shifted the second burden to the Government according to harmless error analysis. This analysis recognizes that some constitutional violations may be harmless if proven as such by the beneficiary of that error.

Prior to *DeCoster II*, Chief Judge Bazelon noted that frequent reversals would have a prophylactic impact on the effectiveness of assistance rendered to indigent defendants.\(^75\) Chief Judge Bazelon's
view could rely on the scant authority which supports automatic reversal upon the finding of a constitutional violation of counsel’s duty to investigate. However, Chief Judge Bazelon did not rely on automatic reversal in *DeCoster II*. Instead of halting the inquiry upon finding a constitutional violation, the *DeCoster II* majority proceeded to harmless error analysis. Automatic reversal might have been rejected because harmless error analysis, a method approved by the Supreme Court in *Chapman v. California,* would yield the same result. Moreover, automatic reversal, which required that all constitutional violations be found harmful *per se,* had been explicitly rejected in *Chapman.* Thus, the *DeCoster II* majority relied on precedent to achieve a firmer foundation for its result than a policy of automatic reversal would have provided.

Despite no mention of *Chapman* or harmless error analysis in *DeCoster I*, the *DeCoster II* majority adopted this approach. The use of this analysis is traceable to an article by Chief Judge Bazelon, written in the period between the two *DeCoster* decisions, which recognized a mistake in the first decision:

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Finally, frequent reversals are likely to attract the attention of the press, and through it the public, and that exposure will enhance the likelihood of legislative action. Bazelon, supra note 41, at 822 n.5 (citations omitted). But see United States v. Hurt, 543 F.2d 162 (D.C. Cir. 1976). In *Hurt* because appellate counsel charged that trial counsel rendered ineffective assistance, the trial attorney sued appellate counsel for libel. The case from which the libel suit arose was remanded to the district court to determine if trial counsel had been ineffective. The appellate counsel asked to be excused from participating in the remand hearing because he was fearful that his further participation would only aggravate the pending libel suit against him. The district courts refused to excuse appellate counsel from participating in the remand hearing; on appeal, the court held that appellate counsel’s forced participation in the remand hearing hindered his effectiveness. *Id.* at 163.


77. 386 U.S. 18 (1967). *Chapman* concerned a prosecutor’s comment regarding petitioner’s failure to testify; subsequent judicial instructions permitted inferences of guilt from that failure to testify. It is possible to limit the Court’s holding to “illegally admitting very prejudicial evidence or comments.” *Id.* at 24. However, the Court said without qualification that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt,” *id.* This statement suggests that there is no limitation upon the type of constitutional error that may be considered in harmless error analysis.

78. *Id.* at 21-22.

79. Bazelon, supra note 41.
The question of prejudice is analytically separate from the question of whether the defendant's sixth amendment rights were violated. The "mockery" and "gross incompetence blotting out a substantial defense" tests failed to recognize this distinction by blurring the issue of ineffectiveness with the question of prejudice. DeCoster, I have come to realize makes the same mistake. . . . A nonprejudicial denial of effective assistance need not result in reversal, but the analysis should be distinct. 80

Chief Judge Bazelon then approved the Chapman harmless error analysis: 81 "[i]f anything, courts should apply Chapman with greater, not lesser, force in reviewing ineffectiveness of counsel claims, since the finding of ineffectiveness necessarily casts grave doubt on the entire adjudicative process." 82 Thus, the mistake in the first opinion of commingling the analysis of the existence of a constitutional violation with that of prejudice was corrected in the second opinion: "The primary distinction between our approach and that followed in the cases cited is that we distinguish between the question of whether counsel's violations were consequential, i.e., impaired the defense, and the question of whether the impairment was harmful, i.e., affected the outcome." 83

Thus, the DeCoster II majority used a harmless error analysis to shift the burden to the Government, following Chapman. 84 The majority's decision to place the burden on the Government to prove harmless error reflected its desire to "avoid effectively penalizing a defendant for his counsel's failures" where such a burden is impossible to meet by either the Government or the defendant. 85 The result, reversal and remand, was the same as that which automatic reversal would have produced because the allocation of the burden was dispositive in this case.

In dissent in DeCoster II, Judge MacKinnon distinguished the cases of presumed prejudice cited by the majority. He described his view of DeCoster II, stating:

80. Id. at 825 n.65.
81. Id. at 825.
82. Id.
85. Id. at 25.
This is not a case where counsel had insufficient time to consult with the defendant, where there was an obvious conflict of interest, or where the court denied the defendant his right to confer with his counsel. Here, every alleged failing relates to a subjective decision made with sufficient time, without conflict of interest and with ample opportunity to consult. Prejudice is not inherent or obvious and must be proved.¹⁸

Unlike the majority, Judge MacKinnon did not presume prejudice. He would require that the defendant prove prejudice as part of the burden of proving a constitutional violation. The dissenting judge characterized the means by which the majority separated the analysis of harm from that of the existence of a constitutional violation as “an exercise in elementary semantics.”¹⁹ The dissent maintained that proof of prejudice is necessarily integrated in proof of a constitutional violation. Judge MacKinnon asserted that Chapman v. California²⁰ had shifted the burden to the Government according to harmless error analysis only “after a substantial constitutional violation had been found. [Yet in DeCoster II] the existence of constitutional error is the issue, and the majority has presented neither facts nor law to establish that any constitutional right of defendant has been violated at all, particularly his sixth amendment counsel right.”²¹

In sum, there are two means to establish a constitutional violation: (1) the use of a presumption or (2) the satisfaction of the burden by affirmative proof. According to the dissent, the presumption invoked was inappropriate²² and the defendant did not meet the required burden of proof.²³ Therefore, since a constitutional violation had not been established, the majority's progression to harmless error analysis which shifted the burden to the Government was unwarranted. The essence of the disagreement between majority and dissent lies in the majority's presumption that counsel's failure to investigate was a constitutional violation. This, in turn, triggered the shift of the burden to the Government on the prejudice issue; the dissent viewed the initial presumption as inap-

¹⁸. Id. at 33-34 (MacKinnon, J., dissenting) (footnotes omitted).
¹⁹. Id. at 54 (MacKinnon, J., dissenting).
²⁰. 386 U.S. 18 (1967).
²². Id. at 33-34 (MacKinnon, J., dissenting).
²³. Id.
propriate and therefore demanded that defendant prove a constitutional violation.

**Scope of Application of DeCoster II**

The scope of application of the *DeCoster II* presumption remains to be determined by subsequent decisions. Although the presumption raised involved counsel's failure to investigate, the degree of dereliction necessary to invoke this presumption was not elucidated. The opinion indicated that failure to interview only certain named witnesses would not raise the presumption, but that total failure to investigate would raise the presumption. It is unclear whether near-total failure is necessary to trigger the presumption of impaired defense. Perhaps less egregious failure would suffice.

Also unanswered by *DeCoster II* is the extent of its applicability to violations of other enumerated ABA duties. The opinion leaves uncertain which other duties qualify as “inherently prejudicial.” One does not know, for example, whether total failure to discuss tactics with the client would raise the presumption of impaired defense. Also unanswered is whether the nature of the violation, the degree of dereliction, or a weighted combination of these factors is determinative. Equally nebulous is whether there can be any predetermined set of violations sufficient to raise a presumption, given that the *DeCoster II* court disagreed as to whether the violation involved was inherently prejudicial. Without such a predetermination, case-by-case analysis—the focus advocated by the dissent—may be necessary. In that event, the presumption could only be appropriately applied where the failure to investigate is comparable to that which occurred in *DeCoster*; the courts may therefore be unwilling to extend the use of the presumption to other duties.

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92. *Id.* at 22 n.36.
93. *United States v. DeCoster*, No. 72-1283 (D.C. Cir., Oct. 19, 1976), *rehearing granted en banc*, No. 72-1283 (D.C. Cir., Mar. 17, 1977), indicated the duty to discuss fully potential strategies with defendant. *Id.* at 10. A subsequent opinion by Chief Judge Bazelon in *United States v. Moore*, 554 F.2d 1086 (D.C. Cir. 1976), required appellant to show more than was required in *DeCoster II*; defendant in *Moore* was required to show that counsel's failure to consult with the defendant on a trial issue impaired the defense. *United States v. Moore*, 554 F.2d at 1092. Thus, it appears that counsel's violation of this duty will not, by itself, create a presumption of impaired defense.
CONCLUSION

The "competency" standard, the new measure of effectiveness of counsel, is rapidly gaining acceptance. It protects defendants more fully than the "farce and mockery of justice" standard, which grants relief only when counsel has been grossly ineffective. Even the dissent in DeCoster II concurred in the need for the competency standard. Although several circuits have not yet rejected the older "farce and mockery of justice" standard, recent opinions in three of those circuits indicate that their decisions would have been the same under either standard. Therefore, the newer standard may be readily applied in an appropriate future case: a case where the attorney's performance is more competent than a "farce and mockery of justice" but not "reasonably competent."

To apply the competency standard with consistency, specific duties which constitute effective assistance must be established. If defendant is relieved of the burden of proving that counsel's failure to perform one of those duties impaired the defense, then violation of that duty is a constitutional violation per se. Hence, that duty becomes a sixth amendment mandate.

In DeCoster II the nature of the violation, failure to investigate, led the majority to create the presumption that there had been a substantial constitutional violation. For other violations, however, the defendant would still be required to prove that counsel's acts or omissions were substantial. Once a constitutional violation is proven, either by presumption or by proof, harmless error analysis is appropriate.

DeCoster II would be less troublesome if it did not involve an appellant who subsequently, in effect, admitted guilt. The dissent stated that "the extent of any investigation by counsel necessarily must be affected by the guilt or innocence of a defendant," and thus "[o]nce defense counsel has reasonable ground for believing his client guilty, the extent of the investigation required is substantially diminished." There is great danger in this approach: It

95. Id. at 2 (MacKinnon, J., dissenting).
96. The Supreme Court held that once a constitutional violation has been established, harmless error analysis is appropriate. See Chapman v. California, 386 U.S. 18 (1967). See also note 77 supra.
98. Id. at 11 (MacKinnon, J., dissenting).
99. Id. at 12 (MacKinnon, J., dissenting).
would subject the defendant to an additional "trial" to obtain his sixth amendment right, because it would convert assigned counsel into a first instance judge of defendant. Effective assistance of counsel is a constitutional guarantee; no initial trial should be required to obtain this right. It would be unfair to diminish this right by inference, conjecture, or whim of assigned counsel. Even with an admission of guilt, the ABA has stated that the "duty to investigate exists regardless of the accused's admissions or statements to the lawyer of fact constituting guilt."  

However, the issue in DeCoster II was not appellant's subsequent statement; rather, it was his constitutional right to effective assistance of counsel. That guarantee requires that attorneys' choices be deliberate rather than uninformed decisions made without adequate preparation. In civil malpractice cases, monetary damages compensate one who has suffered ineffective assistance of counsel. In criminal cases, however, no such remedy is available because ineffective assistance of counsel threatens defendants' personal liberty. The importance of personal liberty requires that judicial review focus on assurance of that guarantee. Thus, the majority in DeCoster II properly recognized the primacy of the sixth amendment guarantee of effective assistance of counsel, a guarantee which should not be jeopardized by the personal pretrial judgment of assigned counsel.  

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100. ABA STANDARDS, supra note 42, at 226.
102. As this note went to press, the Fourth Circuit adopted the newer competency standard for effective assistance of counsel. Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977).