Washington and Lee Law Review

Volume 37 | Issue 4 Article 17

Fall 9-1-1980

Drawing the Line on the Ineffective Assistance of Counsel Defense: United States v. Decoster (III)

DRAWING THE LINE ON THE INEFFECTIVE ASSISTANCE OF COUNSEL DEFENSE: *UNITED STATES V. DECOSTER (III)*

In all critical stages of a criminal proceeding where an accused may be imprisoned, the Supreme Court has declared that the sixth amendment guarantees the accused a right to counsel.[1] While the Supreme Court requires the presence of an attorney for the defendant, the Court has not yet established constitutional standards to govern the quality of assistance.[2] A defendant's criminal rights cannot be adequately protected without effective assistance of counsel.[3] Consequently, the lower courts have had to develop standards to adjudicate ineffective assistance of counsel claims in all critical stages of the criminal proceedings.[4]

Uncertainty about the constitutional basis for the right to effective assistance, however, has hampered the courts in developing consistent standards to govern ineffective assistance claims.[5] Some courts adhere to

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[1] *See* United States v. Wade, 388 U.S. 210, 227 (1966) (counsel must be provided at critical stages of criminal proceeding to preserve defendant's right to fair trial); Gideon v. Wainwright, 372 U.S. 335, 344 (1963)(accused entitled to assistance of counsel whenever his liberty in jeopardy).

[2] *See* Note, *Effective Assistance of Counsel*, 16 AM. CRIM. L. REV. 67, 76-78 (1978) [hereinafter cited as *Effective Assistance*].

[3] *See* Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956). Schaefer believes that effective assistance of counsel is a defendant's most fundamental right because it affects his ability to assert any other right he may have. *Id. See also* Bazelon, *The Defective Assistance of Counsel*, 42 CIN. L. REV. 1, 3-5 (1973) [hereinafter cited as Bazelon]; Bines, *Remedying Ineffective Representation In Criminal Cases: Departures From Habeas Corpus*, 59 VA. L. REV. 927, 934-939 (1973) [hereinafter cited as Bines]; Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1078-81 (1973) [hereinafter cited as Finer]; Grano, *The Right To Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1248 (1970).

[4] *See, e.g.*, Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963) (failure to challenge validity of confession); Smotherman v. Beto, 276 F. Supp. 579 (N.D. Tex. 1967) (failure to advise defendant of time limitations and right to appeal); United States *ex rel.* Thurmond v. Mancusi, 275 F. Supp. 508 (E.D.N.Y. 1967) (improper representation as to terms of plea bargain). *See generally* Brody, *Ineffective Representation As A Basis For Relief From Conviction: Principles For Appellate Review*, 13 COL. J. OF L. & SOC. SC. PROBLEMS 1, 77-84 & n. 257-267 (1977) [hereinafter cited as Brody]; Finer, *supra* note 3, at 1081-1116.

[5] *See, e.g.*, Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978) (representation within range of competence demanded of attorneys in criminal cases); United States *ex rel.* Ortiz v. Sielaff, 542 F.2d 377, 379 (7th Cir.), *cert. denied sub nom.* Sielaff v. Williams, 423 U.S. 876 (1976) (minimum standard of professional representation); United States v. Ramirez, 535 F.2d 125, 129-30 (1st Cir. 1976) (ineffective representation defined as that which makes mockery, sham, or farce of trial); United States v. Yanishefsky, 500 F.2d 1327, 1333 (2d Cir. 1974) (whether woefully inadequate representation makes proceeding a farce and mockery of justice); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (customary skill and knowledge which normally prevails at the time

the position that the right to assistance of counsel necessarily implies the right to effective assistance, and so the sixth amendment is the source.[6] Other courts reason that the right to effective assistance of counsel is based on the due process clause of the fourteenth and fifth amendments.[7]

The consequences of the courts' uncertainty are readily apparent when a defendant brings an ineffectiveness claim based on defense counsel's breach of the duty to investigate.[8] Since the constitutional basis for the right is unclear, the courts have not outlined the parameters of the lawyer's obligation to investigate.[9] Without a definition of the duty, the appellate courts cannot consistently evaluate counsel's efforts at investigation.[10] Additionally, a lawyer's failure to investigate is difficult for the appellate courts to detect because often neither the trial court proceeding nor the transcript reflects counsel's ommissions.[11] Because the appellate courts are unable to protect a defendant's right to effective representation, the adversarial process does not function to ensure a fair trial.[12]

The court system has shortcomings which exacerbate the problem of lawyer's inadequate preparation.[13] Courts are unable to accommodate the ever increasing caseload. The backlog puts pressure on defense counsel to dispose of each case as rapidly as possible.[14] Where defense attorneys are paid on a per hour basis with a statutory case minimum, there is an economic incentive for lawyers to accept a large number of cases.[15] To expedite case turnover, some lawyers obtain guilty pleas from their clients as quickly as possible, often without investigation. If a trial is necessary, defense attorneys, cognizant that compensation is greater for litigation than investigation, may limit the time spent investigating, and as a result go to

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and place).

[6] Moore v. United States, 432 F.2d at 736 (sixth amendment constitutional source to right to effective assistance); *see* text accompanying notes 36-39 *infra.*

[7] *See* text accompanying note 21 *infra.*

[8] *See, e.g.,* Matthews v. United States, 518 F.2d 1245, 1246-47 (7th Cir. 1975); McQueen v. Swenson, 498 F.2d 207, 216-19 (8th Cir. 1974); Coles v. Peyton, 389 F.2d 224, 226-28 (4th Cir.), *cert. denied,* 393 U.S. 849 (1968).

[9] *Compare* text accompanying note 6 *supra with* text accompanying note 7 *supra.*

[10] *See* text accompanying notes 188-193 *infra.*

[11] *See* Tague, *The Attempt To Improve Criminal Defense Representation,* 15 AM. CRIM. L. REV. 109, 112 (1977) [hereinafter cited as Tague] (inadequate investigation rarely apparent to trial judge or appellate court reviewing record).

[12] *See* text accompanying notes 159-165 *infra.*

[13] *See* Brody, *supra* note 4, at 21-24; Bazelon, *supra* note 3, at 15-17.

[14] *See* Bazelon, *supra* note 3, at 15-16; *President's Comm'n On Law Enforcement And Ad. of Just., Task Force Reps: The Court* 57 (1967).

[15] *See* United States v. DeCoster III, No. 72-1283, slip op. at 37 n.89 (D.C. Cir. 1979) (en banc) (Bazelon dissenting); United States *ex rel* Green v. Randle, 434 F.2d 1112, 1115 (3d Cir. 1970); Bazelon, *supra* note 3, at 9-11. The Criminal Justice Act of 1964, 18 U.S.C. § 3006A(d)(1) (Supp. 1972) provides for payment on a per-hour basis with a statutory per case minimum. Volume is the essential element in the regular's practice; a number of lawyers have been able to earn $30,000 to $50,000 per year with fees averaging about $150 per case for 250 to 350 cases per year. Bazelon, *supra* note 3, at 9.

trial inadequately prepared.[16] Acknowledging that judges are confronted with overcrowded dockets, defense attorneys attempt to appease judges by limiting the number of motions and simplifying the trial.[17] Although trial judges have supervisory powers which can be exercised to prevent ineffective representation during the trial, the pressure to relieve the case load and to avoid interference with the attorney- client privilege discourages all but occasional exercise of judicial supervision.[18]

In reviewing claims for ineffective assistance of counsel, the appellate courts must balance the individual's right to a fair trial against the policy of finality of judgments.[19] Traditionally, the policy of finality of judgments had guided the courts. The courts have succumbed to the pressures of congested dockets and have avoided the temptation to reverse for technical errors. Courts have not generally considered ineffectiveness claims unless the attorney's performance was so shocking as to make the trial "a farce, a sham, or a mockery of justice."[20]

The farce and mockery standard is derived from the due process clause of the fifth amendment and is applicable to the states through the due process clause of the fourteenth amendment.[21] Courts employing the

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[16] *See* Criminal Justice Act of 1964, 18 U.S.C. § 3006A(d)(1) (1976) which states that attorneys are to be compensated at a rate of $30 per hour for time expended in court and at $20 per hour for out-of-court time. Another part of the statute states that compensation per case is not to exceed $1000 for felonys and $400 for misdemeanors. 18 U.S.C. § 3006A(d)(2) (1976).

[17] *See* Bazelon, *supra* note 3, at 15-16. The Criminal Justice Act of 1964, 18 U.S.C. § 3006A(b) (1976), entrusts trial judges with the power of appointment and payment of defense counsel. *Id.* Judges sometimes will subtract the cost of investigative services, provided by Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e)(1) (1976), from the defense attorney's renumeration or will not appoint lawyers to new cases where too much time is spent on a particular case. *See* Taque, *supra* note 11, at 131.

[18] *See* Brody, *supra* note 4, at 22-23. Trial judges will sometimes deny continuances to reduce case load, which spawns ineffectiveness claims because of the lawyer's inadequate preparation. *Id.; see, e.g.,* United States *ex rel.* Spencer v. Warden, Pontiac Correctional Center, 545 F.2d 21, 22 (7th Cir. 1976).

[19] *See* McNann v. Richardson, 397 U.S. 759, 764-65 (1969) (balancing finality of guilty plea against importance of informed voluntary waiver of a trial); Brody, *supra* note 4, at 23; Bines, *supra* note 3, at 929-33. Bines argues that raising the standard for habeas corpus review of ineffectiveness cases from the farce and mockery standard to a reasonable competence standard will not appreciably increase the number of habeas corpus actions. Bines, *supra* note 3, at 933. If the number of habeas corpus petitions increased, the balance would be tipped in favor of individual rights as opposed to finality of judgments. *Id.* at 941-942.

[20] *See* United States v. Larsen, 525 F.2d 444, 449 (10th Cir. 1975), *cert. denied,* 423 U.S. 1075 (1976); United States v. Yanishefsky, 500 F.2d 1327, 1333 (2d Cir. 1974); Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir. 1945), *overruled,* United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976).

[21] *See* U.S. CONST. amends. V, XIV. Both the fifth amendment and the fourteenth amendment contain due process clauses. *Id.; see, e.g.,* Root v. Cunningham, 344 F.2d 1, 3 (4th Cir. 1965), *overruled,* Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977) (in a direct appeal from state conviction fourteenth amendment due process clause basis for farce and mockery standard); Johes v. Huff, 152 F.2d 14, 15 (D.C. Cir. 1945) (fifth amendment was basis for farce and mockery standard when conviction attacked collaterally with federal habeas corpus writ).

farce and mockery standard must determine whether defense counsel's errors prejudiced the outcome by making a farce and mockery of the trial.[22] Specifically, a due process analysis requires the court to evaluate the fairness of the trial from the totality of the circumstances.[23] Applying the mockery of justice standard, the courts have granted a new trial only for egregious errors, faults or omissions of counsel.[24] The courts have labelled most claims of ineffectiveness as counsel's strategic or tactical decisions and refuse to grant relief.[25]

The mockery of justice standard has many substantive drawbacks. By focusing on the fairness of the trial, the standard limits the judicial inquiry to errors at trial.[26] Ineffective assistance of counsel, however, can occur at any stage of a criminal proceeding.[27] For example, defense counsel, without engaging in any independent factual investigation, may advise his client to plead guilty to a lesser charge.[28] If minimal investigation would have uncovered evidence to absolve the defendant of any guilt, a valid claim to ineffective counsel should exist.[29] Because counsel's error did not occur at trial, however, the appellate court has no basis for evaluating the defendant's claim. The appellate court is limited to whether the trial itself was a farce and mockery.

The farce and mockery standard is also criticized for its failure to create specific substantive duties of counsel to govern ineffective assistance claims.[30] The farce and mockery standard is too broadly framed to afford a consistent manner of enforcement, and consequently the courts' appraisal of the claim is inherently subjective.[31] Another problem which is amplified by the farce and mockery standard is that courts have summa-

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[22] Bines, *supra* note 3, at 937. *See also* Gideon v. Wainwright, 372 U.S. 335, 339-43 (1963). In *Gideon*, the court compared the due process analysis used in Betts v. Brady, 316 U.S. 455, 462 (1942), to the sixth amendment basis for the right to counsel, indicating that the due process analysis requires an appraisal of the totality of the facts. 372 U.S. at 339.

[23] *See* Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir. 1945); Jones v. Huff, 152 F.2d 14, 16 (D.C. Cir. 1954). In *Diggs*, the court decided that the standard for review is the presence or absence of fairness in the proceeding as a whole.

[24] *See, e.g.*, Miller v. Hudspeth, 176 F.2d 111 (10th Cir. 1949); Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945); Hudspeth v. McDonald, 120 F.2d 962 (10th Cir.), *cert. denied*, 314 U.S. 617 (1941).

[25] *See* Henderson v. Cardwell, 426 F.2d 150, 153 (6th Cir. 1970); Mitchell v. United States, 259 F.2d 787, 793-94 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

[26] *See* Brody, *supra* note 4, at 32; *see, e.g.*, United States v. Edwards, 488 F.2d 1154, 1164 (5th Cir. 1974).

[27] *See, e.g.*, United States v. Benn, 476 F.2d 1127, 1135 (D.C. Cir. 1973); Edwards v. United States, 256 F.2d 707 (D.C. Cir.), *cert. denied*, 358 U.S. 847 (1958); McLaughlin v. Royster, 346 F. Supp. 297 (E.D. Va. 1972).

[28] *See* McMann v. Richardson, 397 U.S. 759, 770-71 (1970); McLaughlin v. Royster, 346 F. Supp. 297, 301-02 (E.D. Va. 1972).

[29] *See* text accompanying note 40 *infra*.

[30] *See* Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968). In *Coles*, the Fourth Circuit articulated a set of specific duties counsel owes to his client. 389 F.2d at 226. *Cf.* note 42 *infra*.

[31] *See* Brody, *supra* note 4, at 34-35.

rily rejected ineffective assistance of counsel claims where the attorney had favorable credentials.[32] Since a lawyer's credentials are based on past performance, the courts should not utilize them as the sole criteria to determine whether defense counsel's performance was effective in a particular case.

These inherent drawbacks have led a majority of the courts to reject the farce and mockery standard.[33] Nonetheless, the Supreme Court has not provided an alternative standard.[34] Lower courts have adopted various formulations of sixth amendment standards to replace the farce and mockery test.[35] According to sixth amendment standards, lawyers must perform with reasonable competence and provide assistance within the range of competence demanded of criminal attorneys.[36] Courts employing a sixth amendment analysis separate the issue of the quality of counsel's performance from the issue of whether counsel's deficiency effected the trial's outcome.[37] The farce and mockery due process analysis requires

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[32] *See, e.g.*, Lee v. Alabama, 406 F.2d 466, 472 (5th Cir. 1968), *cert. denied*, 395 U.S. 929 (1969); Anderson v. Robertson, 145 F.2d 101, 102 (5th Cir. 1944), *cert. denied*, 324 U.S. 874 (1945); Taylor v. United States, 386 F. Supp. 132, 136 (E.D. Pa. 1974), *aff'd mem.*, 521 F.2d 1399 (3d Cir. 1975). *But see* United States v. Butler, 504 F.2d 220, 221 (D.C. Cir. 1974).

[33] *See* text accompanying note 35 *infra*. *But see* United States v. Ramirez, 535 F.2d 125, 129-130 (1st Cir. 1976); United States v. Larsen, 525 F.2d 444, 449 (10th Cir. 1975), *cert. denied*, 423 U.S. 1075 (1976); United States v. Yanishefsky, 500 F.2d 1327, 1333 (2d Cir. 1974). The first, second and tenth circuits have retained the farce and mockery test while all other circuits have rejected it.

[34] *See* United States v. Agurs, 427 U.S. 97, 102 n.5 (1976); *Effective Assistance, supra* note 3, at 72-77. In *Agurs*, the Court summarily dismissed an allegation of counsel's failure to request discovery of the defendant's past criminal record as a claim to ineffective assistance. 427 U.S. at 102 n.5.

[35] *See, e.g.*, Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979) (reasonably competent and effective representation); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978) (range of competence demanded of attorneys in criminal cases); United States v. Malone, 558 F.2d 435, 438 (8th Cir. 1977) (exercise customary skill and diligence that reasonably competent attorney would display under similar circumstances); United States *ex rel.* Ortiz v. Sielaff, 542 F.2d 377, 379 (7th Cir. 1976) (minimum standard of professional representation); Burston v. Caldwell, 506 F.2d 24, 27 (5th Cir.), *cert. denied*, 421 U.S. 990 (1975) (reasonably likely to render reasonably effective assistance); Beasley v. United States, 441 F.2d 687, 696 (6th Cir. 1974) (reasonably likely to render reasonably effective assistance); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (customary skill and knowledge which normally prevails at a time and place); Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970) (ineffective assistance when gross incompetence blotted out the essence of a substantial defense).

[36] *See* note 35 *supra*. The D.C. Circuit in United States v. Decoster, No. 72-1283, slip op. at 17-18 (D.C. Cir. 1979) (*Decoster III*) articulated a sixth amendment ineffective assistance standard which requires "serious incompetency, inefficiency or inattention of counsel - behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer."

[37] *See* United States v. DeCoster, No. 72-1283, slip op. at 40 n.96, 54 n.121 (Bazelon dissenting); Matthews v. United States, 449 F.2d 985, 988 (D.C. Cir. 1971); Scott v. United States, 427 F.2d 609, 611 (D.C. Cir. 1970); Mitchell v. United States, 259 F.2d 787, 789 (D.C. Cir.) *cert. denied*, 358 U.S. 850 (1958). Bazelon stressed the importance of separating the

courts to combine the two issues and evaluate the quality of counsel's performance in conjunction with the likelihood that counsel's errors prejudiced the outcome.[38] Rather than considering the overall fairness of the trial, courts utilizing a sixth amendment analysis determine whether the alleged specific acts or omissions breached a duty owed by counsel to his client.[39]

The sixth amendment formulation has overcome many of the shortcomings of the farce and mockery standard. The reasonable lawyer analysis does not confine the review of defense counsel's performance to the trial proceeding, allowing the court instead to evaluate all aspects of the assistance to the accused.[40] By comparing defense counsel's performance to that of a criminal lawyer with the customary skill and knowledge in the community, the standard avoids to some degree the subjectiveness of the farce and mockery standard.[41] Those circuits that have enumerated defense counsel's specific duties adhere to an objective test[42] that provides

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inquiry into the adequacy of counsel's performance from prejudice to the outcome of the case. The distinction is vital to the difference between a claim for effective assistance of counsel grounded in the sixth amendment rather than the fifth amendment due process clause. No. 72-1283, slip op. at 54 n.121 (Bazelon dissenting). Since the District of Columbia Circuit has adopted a reasonable competency standard based on the sixth amendment, Bazelon urged that the relevant inquiry should be whether consel's performance was below the level of reasonable competency rather than whether, under the totality of the facts, the defendant was prejudiced. *Id.* In addition, Bazelon indicated an action for violation of due process existed independently of the claim of ineffectiveness under the sixth amendment. *Id.* at 40 n.96. The court in *Mathews, Scott* and *Michell* indicated that the sixth amendment was the source of the right to effective assistance of counsel, however, the court applied the standard by considering whether the overall outcome of the trial was affected. 449 F.2d at 988; 429 F.2d at 610; 259 F.2d at 789. *See also* Brody, *supra* note 4, at 72 n.240; Bines, *supra* note 3, at 937-938.

[38] *See* text accompanying notes 36 & 37 *supra.*

[39] *See* note 37 *supra.*

[40] *See, e.g.,* Tollet v. Henderson, 411 U.S. 258, 264 (1973) (claim of improper assistance in entering guilty plea); Brochs v. Texas, 381 F.2d 619, 622 (5th Cir. 1967) (failure to raise insanity defense); United States *ex rel.* Wilkins v. Banmiller, 205 F. Supp. 123, 127-28 (E.D. Pa. 1962), *aff'd,* 325 F.2d 514 (3d Cir. 1963), *cert. denied,* 579 U.S. 847 (1964) (improper guidance at sentencing).

[41] *See* Beasley v. United States, 491 F.2d 687, 692 (6th Cir. 1974); Bines, *supra* note 3, at 938-40. In *Beasley,* the court asserted that the farce and mockery test had no intrinsic meaning and that the adoption of the reasonable lawyer standard provides the objective analysis which the law demands. A more objective standard is evaluating the lawyer's performance in terms of customary skill and knowledge in the community. *See* Finer, *supra* note 3, at 1079; *see, e.g.,* Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970). Some circuits adhere to the position that the test must be stated in terms of the reasonable competence of a criminal lawyer. *See* note 37 *supra; see, e.g.,* Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977), *cert. denied,* 435 U.S. 1011 (1978); United States *ex rel.* Ortiz v. Sielaff, 542 F.2d 377, 379 (7th Cir. 1976).

[42] *See* United States v. DeCoster (DeCosterI), 487 F.2d 1197 (D.C. Cir. 1973), *rev'd,* No. 72-1283, slip op. at 3 (D.C. Cir. 1979) (plurality); Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied,* 398 U.S. 849 (1968). The D.C. Circuit adopted basically the same standards set out by the Fourth Circuit. 487 F.2d at 1203-04; 389 F.2d at 226. Judge Bazelon in *Decoster I* promulgated the following standards:

concrete standards to guide the adjudication of ineffectiveness claims.[43]

In *United States v. Decoster III*,[44] the D.C. Circuit formulated a sixth amendment reasonable lawyer standard to govern claims of ineffective assistance of counsel.[45] The court also articulated a framework for review which expressly allocates the burden of proving prejudice.[46] In conjunction with describing the operation of the framework, the court attacked the problem of defining a lawyer's duty to conduct adequate investigation.[47] The decision is noteworthy not only for the plurality's approach, but also for the exhaustive additional opinions promoting alternative approaches.[48]

Chief Judge Bazelon raised the issue of ineffectiveness of counsel *sua sponte* and directed that it be presented to the district court on a motion for a new trial in *United States v. Decoster (Decoster I)*,[49] the first of

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In General—Counsel should be guided by the American bar Association Standards for the Defense Function. They represent the legal profession's own articulation of guidelines for the defense of criminal cases.

Specifically—(1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical chokes with his client.

(2) Counsel should promptly advise his client of his rights and take all actions necessary to prserve them. Many rights can only be protected by prompt legal action. The Supreme Court has, for example, recognized the attorney's role in protecting the client's privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436 (1966), and rights at a line-up, United States v. Wade, 388 U.S. 218, 227 (1967). Counsel should also be concerned with the accused's right to be released from custody pending trial, and be prepared, where appropriate, to make motions for a pre-trial psychiatric examination or for the suppression of evidence.

(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme court has noted that the adversary system requires that "all available defenses are raised" so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research. 487 F.2d at 1203-4.

[43] *See* United States v. DeCoster, No. 72-1283, slip op. at 22-23 (D.C. Cir. 1979)(*Decoster III*) (plurality), slip at 25-29 (MacKinnon concurring). Both the plurality opinion and MacKinnon, in his concurring opinion, express concern for the intrusion upon the attorney-client relationship that may result from the adoption of the enumerated duties. *Id.* Bazelon, however, stated in his dissent to *DeCoster III* that perserving flexibility is not incompatible with establishing minimum components of effective assistance. *Id.*, slip op. at 29 (Bazelon dissenting).

[44] United States v. Decoster, No. 72-1283, slip op. (D.C. Cir. 1979) (*Decoster III*).

[45] *Id.*, slip op. at 17-18 (plurality).

[46] *Id.*, slip op. at 20-21 (plurality).

[47] *See Decoster III*, slip op. at 24-27 (plurality), slip op. at 44-45, 50 (Bazelon dissenting); text accompanying notes 75-79, 85-88, 93, 107-116 *infra*.

[48] *See id.*, slip op. at 1 (plurality), slip op. at 1 (MacKinnon concurring), slip op. at 1 (Robinson concurring in result), slip op. at 1 (Bazelon dissenting).

[49] 487 F.2d 1197 (D.C. Cir. 1973) (*Decoster I*).

three appellate hearings of the case.[50] The events prompting the inquiry into the adequacy of the defense counsel's preparation included the conflict between the defendant's and co-defendant's testimony and counsel's failure to interview the arresting officers.[51]

To guide the district court in the resolution of the ineffectiveness issue, the appellate court stated that a defendant is entitled to the reasonably competent assistance of an attorney acting as the defendant's diligent, conscientious advocate.[52] Recognizing that the standard was merely a shorthand label, the D.C. Circuit enumerated minimum components of reasonably competent assistance.[53] Among the responsibilities the court articulated was counsel's duty to conduct appropriate legal and factual investigations.[54] The court went on to state that if the defendant shows a

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[50] *See* United States v. Decoster, No. 72-1283, slip op. (D.C. Cir. 1979) (*Decoster III*), United States v. Decoster, No. 72-1283 (D.C. Cir. 1976) (*Decoster II*); United States v. Decoster, 487 F.2d 1197 (D.C. Cir. 1973) (*Decoster I*).

Decoster was convicted by a jury of assault with a dangerous weapon and aiding and abetting two accomplices in an armed robbery. At trial, the arresting officers testified that they witnessed the robbery and apprehended Decoster without losing sight of him. Decoster offered an alibi as a defense to the charge. An accomplice, Eley, was called by the defense to testify in support of Decoster's alibi, but Eley's testimony placed Decoster at the scene of the crime. *Decoster III*, slip op. at 3-4 (plurality).

Decoster's two accomplices were not charged with armed robbery. Each was charged only with robbery and placed on a five month probation. *Id.*, slip op. at 11 n.20 (Bazelon dissenting). Judge Bazelon's dissent in *DeCoster III* tracks the opinion he wrote for the majority in *DeCoster I* and *DeCoster II*. *But see* note 97 *infra*. MacKinnon's dissent in *DeCoster II* analyzes the facts of the case in detail and his concurrence in *DeCoster III* sets forth an extended analysis of the principles he used to apply to the facts in his *DeCoster II* concurrence.

[51] 487 F.2d 1197, 1199-201. Appellant made seven allegations of defective performance by his counsel.

> (1) Counsel was dilatory in seeking a bond review while appellant was incarcerated for almost five months following his arrest on May 29, 1970;
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> (2) Counsel failed to obtain a transcript of appellant's preliminary hearing and failed to employ that transcript to impeach prosecution witnesses at trial;
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> (3) Counsel failed to interview any potential witnesses prior to trial;
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> (4) Counsel announced "ready" for trial at a time when he did not know whether or not he would present alibi witnesses and before he had fully developed his defense;
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> (5) Counsel offered to waive jury trial and to permit appellant to be tried before the court when the court had heard a part of the evidence in connection with the guilty pleas of the two co-defendants;
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> (6) Counsel failed to make an opening statement; and
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> (7) Counsel failed to see that appellant's sentence was properly executed, in that he failed to see that appellant was given credit for time served.
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> Appellant also alleges that he was denied the effective assistance of counsel because of cousel's failure to object to appellant's appearing before the jury in prison clothing. This objection was not asserted below, and therefore is not properly before this court.

Decoster III, slip op. at 27 (plurality).

[52] *Decoster I*, 487 F.2d at 1202; *see* text accompanying notes 35 & 36 *supra*.

[53] *Decoster I*, 487 F.2d at 1203-04; *see* text accompanying note 42 *supra*.

[54] *Decoster I*, 487 F.2d at 1203-04; *see* text accompanying note 42 *supra*.

substantial violation of the enumerated duties, it follows that he was denied effective assistance of counsel and is entitled to a new trial unless the government can prove harmless error.[55]

During the evidentiary hearing, defendant's trial counsel acknowledged that he had not interviewed any witnesses before the trial.[56] Trial counsel claimed, however, to have interviewed one witness during the trial immediately before he testified.[57] The district court therefore denied the motion for a new trial, finding counsel's factual investigation "lax" but not a substantial violation of the duty to investigate.[58]

In *United States v. Decoster (Decoster II)*,[59] the D.C. Circuit reversed the district court's denial of a new trial. The court stated that the attorney had breached the duty to perform independent investigation to identify witnesses and to substantiate new defenses.[60] Ordinarily, the burden is on the defendant to demonstrate the adverse consequences stemming from defense counsel's derelection.[61] The court held, however, that defense counsel's total failure to investigate was so inherently prejudicial that adverse consequences could be presumed where the consequences were too difficult to prove.[62] Although the court provided the government with the opportunity to rebut the presumption of adverse consequences, the government did not attempt to do so.

The D.C. Circuit in *Decoster III*,[63] on rehearing *en banc*, vacated the *Decoster II* order for a new trial and affirmed the district court's finding that Decoster's right to effective assistance of counsel had not been violated.[64] Although four different opinions were filed, all of the judges adopted a reasonable competence standard similar to the one formulated in *Decoster I*, and agreed that the right to effective assistance of counsel is grounded in the sixth amendment.[65] Despite the similarity of the general standards, the judges differed with respect to the content and scope of counsel's duty to investigate.[66] However, only Judge Bazelon, in his

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[55] *Decoster I*, 487 F.2d at 1204.

[56] *Decoster III*, slip op. at 28-29 (plurality).

[57] *Id.*, slip op. at 30-31 (plurality).

[58] *Decoster I*, Findings of Fact and Conclusion of Law on Remand at 19-20 (April 23, 1974).

[59] No. 72-1283 (D.C. Cir. 1976) (*Decoster II*).

[60] *Decoster II*, slip op. at 19.

[61] *Id.*, slip op. at 16-19.

[62] *Id.*, slip op. at 20-22.

[63] No. 72-1283 (D.C. Cir. 1979)(*Decoster III*).

[64] *Id.*, slip op. at 3 (plurality).

[65] *Id.*, slip op. at 17-18 (plurality), slip op. at 2-3 (MacKinnon concurring), slip op. at 4-5 (Robinson concurring in result), slip op. at 26-27 (Bazelon dissenting).

[66] *See id.*, slip op. at 24-27 (plurality), slip op. at 13 n.13, 14 & n.14, 16, 47-52. (MacKinnon concurring), slip op. at 12, 39 & n.153, 41 n.158 (Robinson concurring in result), slip op. at 31-36, 42-43 (Bazelon dissenting). The thrust of the plurality's and MacKinnon's perceptions of the duty to investigate is that the scope of the obligation depends on the particular facts of the case and the likelihood that investigation will affect the outcome of the trial. Bazelon and Robinson agree that counsel has an independent duty to conduct a thor-

dissenting opinion would retain the minimum duties of competent counsel specified in *Decoster I*.[67]

Judge Leventhal, author of the plurality opinion, advocated a case-by-case inquiry.[68] The plurality approach requires a defendant attempting to establish ineffective assistance of counsel first to prove serious incompetency, inefficiency, or inattention falling measurably below that which might be expected of an ordinary, fallible lawyer.[69] The defendant must also show that counsel's deficiency likely deprived him of a substantial defense.[70] After the accused makes an initial showing, the burden passes to the government to demonstrate that counsel's derelections did not taint the conviction and did not result in prejudice to the outcome of the case.[71] The weight of the government's burden will vary proportionately

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ough investigation regardless of the particular factual situation. Bazelon emphasizes the lawyer's obligation to promote diligently the interests of his client whereas the plurality and MacKinnon believe that investigation is necessary to preserve the reliability of the verdict.

[67] *Id.*, slip op. at 27-31 (Bazelon dissenting); *see* note 42 *supra*.

[68] *See Decoster III*, slip op. at 10 & 11, 22 & 23 (plurality). The plurality stated that the courts have utilized different approaches to determine whether sixth amendment rights are contravened depending on the nature of the particular claim of denial of assistance in each case. *Id.*, slip op. at 5 (plurality). The need for showing prejudice and the exactness with which violations can be identified and remedied is the basis for differences among the cases. *Id.* Where a structural or procedural impediment by the state results in the denial of the benefits of sixth amendment rights, the plurality indicated a categorical rule of *per se* reversal is appropriate. *Id.*, slip op. at 5-6 (plurality); *see, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (failure of state to appoint counsel to indigent defendant in criminal trial). Placing the various sixth amendment factual situations on a continuum, ranging from the structural impediment cases to ineffective assistance of counsel cases, the plurality stated the problem of late appointment necessitates a case-by-case approach requiring reversal whenever the government could not prove harmless error. *Id.*, slip op. at 8-9 (plurality); *see, e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970). Since there are many aspects to a lawyer's performance that create a potential basis for liability, the defendant must prove the likelihood of prejudice for ineffective assistance calims. *Id.; cf.* Cooper v. Fitzharris, 586 F.2d 1325, 1332-41 (9th Cir. 1978) (distinguishing ineffective assistance of counsel claims where prejudice must be shown from absence of counsel claims where showing prejudice unnecessary); McQueen v. Swenson, 498 F.2d 207, 218-20 (8th Cir. 1974) (same). *But cf.* Beasley v United States, 491 F.2d 687, 696 (6th Cir. 1974) (no showing of prejudice required for ineffective assistance of counsel or absence of counsel claims); Moore v. United states, 432 F.2d 730, 734-37 (3d Cir. 1970) (same); *but see Decoster III*, slip op. at 56 n. 126 (Bazelon dissenting). Bazelon indicates that the plurality's distinction between direct state interference cases and untrammelled and unimpaired ineffective assistance cases is irrelevant. *Id.* From the defendant's perspective, according to Bazelon, the cause of inadequate representation does not bear any relationship to the prejudice of the defendant's interests. *Id.*

[69] *Decoster III*, slip op. at 17-18 (plurality).

[70] *Id.*

[71] *Decoster III*, slip op. at 21 (plurality). The D.C. Circuit adopted the approach promulgated in Commonwealth v. Saferiun, 366 Mass. 89, 96, 315 N.E.2d 878, 883 (1974). *Id.* The standard utilized by the plurality modified the standard previously used by the D.C. Circuir in Bruce v. United States, 379 F.2d 113, 116-17 (D.C. Cir. 1967), that the defendant establishes ineffective assistance by demonstrating gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense. *Decoster III*, slip op. at 18 (plurality). The major change in the *Bruce* standard made by the *Decoster III* court was that the requirement that the defendant show actual effect on a defense has been tempered.

with the strength of the accused's showing.[72] Applying the inquiry to the *Decoster* facts, the D.C. Circuit found that the defendant established serious incompetency on the part of defense counsel, but did not show likely prejudice to the outcome of the trial.[73] Ultimately dispositive of the appeal was the strength of the government's case and Decoster's failure to demonstrate the likelihood that more effective counsel could have produced exculpatory evidence.[74]

A full understanding of the *Decoster* opinion necessitates an analysis of the parameters the plurality placed on the duty to investigate. The plurality stated that the duty to investigate depends on the facts and circumstances of the case.[75] Whether counsel has a duty to investigate a specific subject depends, according to the plurality, on the weight of the evidence and the potential impact the information may have on the case's outcome.[76] The plurality indicated that two factors which often condition defense counsel's duty to investigate are information otherwise available and already known to the attorney without specific investigation, and the strength of the government's case.[77] According to the plurality, Decoster's

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Id., slip op. at 18 n.61 (plurality). The defendant must show only a likelihood of prejudice to a defense. *Id.* The prosecution, however, is permitted to rebut the defendant's showing of prejudice. *Id.* Another change to the *Bruce* standard made by the *Decoster III* plurality is the requirement that the defendant show serious incompetency, ineffeciency or inattention - behavior of counsel falling measurably below that expected from an ordinary fallible lawyer, rather than gross incompetence. *Id.*, slip op. at 17-18 (plurality).

[72] *Decoster III*, slip op. at 21 n.71 (plurality). The Supreme Court stated that where a court determines a constitutional violation has been established, the government must show beyond a reasonable doubt that there has been no prejudice in fact. Chapman v. California, 386 U.S. 18, 21-24 (1967). If the defendant demonstrates serious derelections in counsel's performance, yet is unable to make a showing of prejudice, the court may be satisfied with a response by the government that no injustice has occurred. *Id.*

[73] *Decoster III*, slip op. at 29 (plurality). The plurality admitted that serious incompetency was established by the attorney's total failure to interview the policemen or the victim and his failure to interview co-defendant Eley prior to trial. *Id.*, slip op. at 39 (plurality). Despite counsel's failure to interview the policemen or the victim, the plurality relied on the trial judge's finding of no prejudice at the hearing and ruled that Decoster had not shown that the errors prejudiced the outcome. *Id.; see* text accompanying notes 78 & 79 *infra*. The plurality also found that counsel's failure to interview Eley before trial did not prejudice the outcome because Eley unexpectedly produced damaging testimony at trial in a turnabout from his testimony to counsel during the interview, and Decoster suggested his own guilt by claiming an alibi at trial and self-defense in the letters. *Decoster III*, slip op. at 39 (plurality).

74. *Decoster III*, slip op. at 34 (plurality).

[75] *Id.*, slip op. at 24 (plurality).

[76] *Id.*, slip op. at 24-27 (plurality). The plurality stated that a reasonable indication of materiality exists where a meaningful demonstration can be made that the specific investigation probably would have affected the outcome of the trial. *Id.*, slip op. at 29 (plurality).

[77] *Id.*, slip op. at 24-27 (plurality). The preliminary hearing and the client himself may make information otherwise available to defense counsel and thereby limit the duty to investigate. *Id; see* United States v. Clayborne, 509 F.2d 473, 477 (D.C. Cir. 1974) (decision not to cross-examine witness not ineffectiveness where client could supply information); United Stated *ex rel* Green v. Rundle, 452 F.2d, 232, 235 (3d Cir. 1971) (decision not to interview others not ineffective assistance); *cf.* Matthews v. United States, 518 F.2d 1245,

inconsistent testimony in addition to the government's overwhelming evidence of guilt limited trial counsel's duty to investigate.[78] Decoster's imaginative speculation that counsel's further investigation might have uncovered defense evidence was interpreted by the plurality as manifesting his guilt, and thus implicit proof that Decoster could not realistically meet the burden of proving likely prejudice.[79]

Judge MacKinnon filed a concurring opinion describing a three step process for establishing the defense of ineffective assistance of counsel under the sixth amendment.[80] Judge MacKinnon's analysis would require the appellant to demonstrate first the existence of a duty owed by counsel and, second, a substantial violation of that duty.[81] Third, the defendant would be required to show actual prejudice to the outcome of his case and, thus MacKinnon restricted the defense.[82] Once the requisite showing of actual prejudice was made, the burden would shift to the government to rebut the defendant's case.[83] After the government makes its showing, the appellate court would review the whole record. A new trial will be granted, if the defendant sustained his burden despite the government's

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1246 (7th Cir. 1975) (no duty to investigate witnesses when client does not allege witnesses or evidence exists).

[78] *Decoster III*, slip op. at 28-32 (plurality).

[79] *Id.*, slip op. at 29 (plurality).

[80] *Id.*, slip op. at 34-35 (MacKinnon concurring). MacKinnon stated that a three step inquiry would not be necessary when the violation and unfair prejudice to the defendant's constitutional right are apparent on the face of the record. *Id.*, slip op. at 29 n.24 (MacKinnon concurring); *see* text accompanying note 105 *infra*.

[81] *Decoster III*, slip op. at 34-35 (MacKinnon concurring).

[82] *Id.*, slip op. at 3 (MacKinnon concurring). MacKinnon stated that the defendant could show prejudice with evidence of direct interference to the right to effective assistance. *Id.*, slip op. at 14 n.15 (MacKinnon concurring). The evidence would have to show that the violation itself resulted in prejudice. *Id.* Alternatively, the defendant could demonstrate prejudice indirectly by evidence that he was denied the essence of a fair trial. *Id.* The defendant would have to show that the breach of duty, when added to the consequences, denied him effective assistance of counsel. *Id.*

MacKinnon supported his conclusion that the defendant bears the burden of proving actual prejudice for ineffectiveness claims, through an analysis of precedent in the D.C. Circuit, the Supreme Court's approach in fifth amendment cases, traditional common law principles governing the burden of proof and the attorney-client relationship in the context of the adversary system. *Id.*, slip op. at 3 (MacKinnon concurring); *see* United States v. Pinkney, 543 F.2d 908, 916 (D.C. Cir. 1976) (D.C. Circuit precedent interpreting *Decoster I* to indicate defendant must prove prejudice to his defense); Nader v. Allegheny Airlines, Inc., 512 F.2d 527, 538 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290 (1976) (common law principles support placing burden on defendant, person pressing claim and party with access to facts to prove claim); Bruce v. United States, 379 F.2d 113, 116-17 (D.C. Cir. 1967) (D.C. Circuit before *Decoster I* supporting that defendant must prove ineffective counsel blotted out essence of defense); Estes v. Texas, 381 U.S. 532, 542 (1963) (most cases involving fifth amendment due process deprivations require demonstration of prejudice to accused); Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir. 1958) (presuming prejudice would undermine adversary system, government would be forced to disprove prejudice from privileged discussions of accused and attorney).

[83] *Decoster III*, slip op. at 34 (MacKinnon concurring).

rebutal.[84]

Considering the facts before the *Decoster* court, MacKinnon agreed that the defense counsel had violated his duty to investigate but asserted that the defendant had failed to establish actual prejudice in light of the overwhelming evidence of guilt.[85] The duty to investigate, MacKinnon stated, required defense counsel to investigate only non-fabricated defenses.[86] In *Decoster,* however, the defense lawyer realized that Decoster was guilty. Counsel's obligation to investigate, concluded MacKinnon, was limited to obtaining information necessary to put the government to its proof.[87] The appellant had not demonstrated sufficient prejudice to the trial's outcome to merit relief, because appellant's counsel could not produce exculpatory facts to prove Decoster's innocence.[88]

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[84] *Id.*, slip op. at 27 n.24, 35 (MacKinnon concurring). MacKinnon stated that the defendant must carry the full burden of proving prejudice and that the harmless error doctrine does not apply to ineffective assistance of counsel claims. *Id.*, slip op. at 27 n.24 (MacKinnon concurring). Since the harmless error doctrine only applies to constitutional errors that do not affect substantial rights of a party, MacKinnon reasoned in effective assistance claims are outside the doctrine because the right is substantial. *Id.; see* Chapman v. California, 386 U.S. 18, 23 (1967). The Supreme Court in *Chapman* specifically mentioned that the right to counsel was a substantial right to which the harmless error doctrine would not apply. 386 U.S. at 23 n.8. However, the Court indicated *per se* reversal was appropriate where the defendant's substantial rights were violated. *Id.* at 23. MacKinnon requires the defendant to prove prejudice where substantial rights, such as the right to effective assistance of counsel, are involved and, therefore, contravenes the reasoning in *Chapman.*

[85] *Decoster III,* slip op. at 35-39 (MacKinnon concurring).

[86] *Id.*, slip op. at 35 (MacKinnon concurring).

[87] *Id.*, slip op. at 35-38 (MacKinnon concurring). MacKinnon emphasized that counsel's duty to investigate varies greatly from case to case. *Id.*, slip op. at 14 (MacKinnon concurring). The lawyer is responsible for adjusting his investigation strategy to accomodate the foreseeability of prejudice. *Id.*, slip op. at 14 n.14 (MacKinnon concurring). MacKinnon noted three stiuations where the possibility of prejudice to the client's case would be effectively eliminated, and therefore, and corresponding duty to investigate would be substantially reduced. *Id.* When the accused admits guilt to his attorney, or the lawyer knows from other evidence that the evidence of guilt is overwhelming or that the client is telling an untruthful story, counsel's duty to investigate ceases. *Id.* Accordingly, MacKinnon stated that Decoster's lawyer did not have a duty to investigate Decoster's contradictory statements because they were conclusive proof that at least one statement was false. *Id.*, slip op. at 49-50 (MacKinnon concurring). Decoster initially attested to an alibi defense which removed him from the scene of the crime and later in letters written to his counsel and Judge Waddy alleged a self-defense theory which effectively placed him at the scene of the crime. *See* Record at 69, 70-72 (February 6, 1974). Once convinced of Decoster's guilt, MacKinnon stated that Decoster's counsel did not have a duty to investigate Decoster's alibi defense because the lawyer would violate the ethical standards by attempting to fabricate a defense. *Id.*, slip op. at 50-53 (MacKinnon concurring). An overall appraisal of MacKinnon's opinion indicates that the lawyer's duty to investigate depends on whether circumstances exist which call into question the reliability of the verdict. *See id.*, slip op. at 47-49.

[88] *Id.*, slip op. at 39 (MacKinnon concurring). Other circuits adhere to MacKinnon's view that appellant's counsel must produce actual facts that could have been discovered had counsel performed adequate investigation to establish prejudice. *See, e.g.*, Davis v. Alabama, 596 F.2d 1214, 1221 (5th Cir. 1979) (defendant must provide affidavits, depositions, or, if necessary, live testimony of specific evidence that investigation would have uncovered); Matthews v. United States, 518 F.2d 1245, 1246 (7th Cir. 1975) (defendant must allege ex-

Judge Robinson, concurring in the result, advocated an approach to evaluate ineffectiveness claims that deviated substantially from both the plurality's and MacKinnon's tests. To establish a constitutional violation of the right to effective assistance of counsel under the Robinson scheme a defendant must demonstrate counsel's substantial breach of duty.[89] Adopting the *DecosterI* formulation of defense counsel's duty to his client, Robinson stated that a defendant is entitled to the reasonably competent assistance of an attorney acting as a diligent, conscientious advocate.[90] Once a defendant shows that assistance fell substantially below reasonable competence, a new trial must be granted unless the government can establish that breaching the duty owed to the defendant was harmless error.[91] Robinson argued that the government, the beneficiary of the error, must prove beyond a reasonable doubt that the constitutional

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culpatory evidence or witness that exists or that where made known to attorney or that could have been discovered by proper investigation); *cf.* Harshaw v. United States, 542 F.2d 455, 457 (8th Cir. 1976) (record must relfect allegation of anything investigation might have been expected to produce); McLaughlin v. Royster, 346 F. Supp. 297, 300 (E.D. Va. 1972) (defendant must demonstrate mere possibility that counsel's investigation might have unearthed favorable evidence). MacKinnon's requirement that the defendant produce evidence sufficient to prove his innocence, however, is contrary to the Anglo-Sazon principle of jurisprudence that the accused is innocent until proven guilty. *See Decoster III*, slip op. at 55-56 (Bazelon dissenting).

[89] *Decoster III*, slip op. at 14 (Robinson concurring in result).

[90] *Id.*, slip op. at 9 (Robinson concurring in result).

[91] *Id.*, slip op. at 36 (Robinson concurring in result). Robinson supported the position that the defendant need not prove prejudice to establish a claim of ineffective assistance of counsel by analyzing the principles of the harmless error doctrine in Supreme Court cases and also in cases specifically concerned with the right to counsel. *Id.*, slip op. at 18-34 (Robinson concurring in result). In Chapman v. California, 386 U.S. 18 (1967), the Court indicated that two basic inquiries were relevant to determining the role of prejudice in constitutional claims. *Id.* at 22-24. The first inquiry is whether the constitutional right at issue is so basic to a fair trial that *per se* reversal is necessary. *Id.* at 23. Assuming the constitutional right is not so basic that the government's violation of the right is not inherently prejudicial, the second inquiry is a determination of the party who must bear the burden of proving or disproving prejudice. *Id.* at 24. Robinson adopted the test in *Chapman* that requires that the beneficiary of the error either prove no prejudice to the outcome of the case or suffer a reversal of an erroneously obtained judgment. *Id.* (citing 1 J. Wigmore, EVIDENCE § 21 (3d ed. 1940)). Noting that the right to effective assistance of counsel is based in the sixth amendment, Robinson stated proof of harm is not normally necessary to establish a violation of a right specifically enumerated in the constitution. *Decoster III*, slip op. at 30 (Robinson concurring in result); *see, e.g.*, Dickey v. Florida, 398 U.S. 30, 54 (1970); Mapp v. Ohio, 367 U.S. 643, 645 (1961). Arguing from analogy to the right to counsel, Robinson indicated that a *per se* reversal rule may be appropriate for denial of effective assistanced of counsel. *Decoster III*, slip op. at 30-35 (Robinson concurring in result); *see* Chapman v. California, 386 U.S. at 23 n.8 (per se reversal rule applies to violations of right to counsel). Because the courts can measure the effect of a violation of the right to effective assistance of counsel on the outcome of the case, Robinson applied the principles inferred from prior cases dealing with the harmless error doctrine and adopted the harmless error test. *Id.*, slip at 36 (Robinson concurring in result); *see* United States v. Wade, 388 U.S. 218, 242 (1967) (case remanded to ascertain impact of lack of counsel at lineup); *cf.* Hamilton v. Alabama, 368 U.S. 52, 55 (1961) (per se reversal because degree of prejudice from absence of counsel at arraignment can never be known).

error complained of did not contribute to the verdict.[92] Although the conclusion is inescapable that defense counsel in *Decoster* failed to conduct a reasonably competent factual investigation, Robinson decided that the substantial violation was harmless error.[93] To justify finding harmless error, Robinson relied on the record which documented the government's direct and positive proof, the number of government witnesses and the consistency of their testimony.[94]

Chief Judge Bazelon, dissenting, recommended a three step approach to analyze ineffective assistance of counsel claims. Incorporating the enumerated duties articulated in *Decoster I*,[95] Bazelon stated that the defendant must first prove that one of the duties was breached.[96] The second

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[92] Decoster III, slip op. at 14 (Robinson concurring in result).

[93] *Id.*, slip op. at 39 (Robinson concurring in result). Robinson emphasized that the issue of whether defense counsel's investigation measured up to the constitutional standard is independent of whether the deficiency in counsel's performance had no impact. *Id.*, slip op. at 36-37 (Robinson concurring in result). The first issue, counsel's performance, demands an evaluation of the quality of service rendered, and the second compels an evaluation of the harm resulting from the error. *Id.* Robinson found support for his approach in United States v. Pinkney, 543 F.2d 908, 916-17 (D.C. Cir. 1976). Arguing that the defendant in *Pinkney* did not put forth evidence to establish counsel's substantial breach of duty, Robinson concluded that the question of prejudice was never reached. *Decoster III*, slip op. at 39-40 (Robinson concurring in result). The court in *Pinkney* did, however, explain that the government would be responsible for disproving prejudice once the defendant demonstrated a substantial violation. *Id.*: *see* 543 F.2d at 916-17 n.59. In *Decoster*, Robinson acknowledged that counsel substantially breached the duty to investigate, however, the error did not materially affect the outcome of the case. *Decoster III*, slip op. at 39 (Robinson concurring in result).

Although Robinson did not elaborate on counsel's duty to investigate, he expressed agreement with Judge Bazelon's description of the duty. Robinson indicated that the independent duty to investigate was necessarily a part of counsel's obligation diligently to advance the interests of his client. *See Decoster III*, slip op. at 12, 39 (Robinson concurring in result), slip op. at 31-34 (Bazelon dissenting). Robinson's view that counsel has an independent duty to investigate is consistent with his emphasis on separating the issue of the quality of counsel's performance from the issue of prejudice.

[94] *Decoster III*, slip op. at 40 (Robinson concurring in result). In applying the harmless error rule, the court must examine counsel's error, without regard to the weight of other evidence, to determine whether the error might have swayed the fact finder and contributed to the verdict. *See* Chapman v. California, 386 U.S. 18, 26 (1967); Field, *Assessing The Harmlessness of Federal Constitutional Error - A Process In Need Of A Rationale*, 125 U. PA. L. REV. 15, 16-17 (1976). Robinson considered the overwhelming evidence of guilt as a basis for evaluating the possibility that counsel would have obtained enough evidence to create reasonable doubt through more thorough investigation. *Decoster III*, slip op. at 40 (Robinson concurring in result). Since substantial evidence accumulated at the time of trial indicated that the probability of counsel discovering additional evidence was minimal, counsel's lack of investigation did not result in the omission of evidence. *See id.* Counsel's error, therefore, was harmless.

[95] *See* text accompanying notes 54 & 55 *supra*.

[96] *Decoster III*, slip op. at 126 (Bazelon dissenting); *see* note 42 *supra*. Although the drafters of the standards set forth in *Decoster I* stated that the guidelines are not criteria for judicial evaluation of effectiveness, Bazelon argued that the standards represent the rudiments of competent lawyering and should be the starting point for evaluating ineffectiveness claims. *Id.*, slip op. at 27-31 (Bazelon dissenting); *see American Bar Association*

stage of Bazelon's approach required inquiry into whether counsel's departures from the prescribed standards were excusable or justifiable.[97] Resisting the temptation to adopt a *per se* rule,[98] Bazelon stated that upon a showing of a substantial violation, the burden shifts to the government to prove harmless error.[99] Bazelon emphasized that the government could not discharge its burden of showing lack of prejudice simply by pointing to overwhelming evidence of guilt, because the record may fail to

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Project On Standards For Criminal Justice, The Prosecution Function And The Defense Function § 4-1.1(f) (2d ed. 1978).

[97] *Decoster III*, slip op. at 41 (Bazelon dissenting). Bazelon's approach for determining whether a lawyer's breach of a duty owed to defense counsel was a substantial breach, not excusable or jutifiable, is a change from the approach he advocated in *Decoster II*. *See* text accompanying notes 61 & 62 *supra*. The *Decoster II* approach required the court to perform a retrospective analysis of the facts to determine whether the presumption should be employed. The *Decoster III* approach required that the courts employ a forward-looking evaluation of the facts to determine the propriety of counsel's actions. Bazelon's *Decoster III* approach allows the courts to analyze the special problems from the perspective of the attorney engaged in the particular case. In *Decoster II*, Bazelon advocated that the court employ the presumption of adverse consequences where the defendant would not be able to prove such consequences. *See* text accompanying notes 61 & 62 *supra*.

[98] *Decoster III*, slip op. at 65-66 (Bazelon dissenting). Bazelon stated that prejudice from the denials of effective assistance of counsel may be so great and the possibility that the government can prove lack of prejudice so small, that a per se rule may be appropriate. *Id., see, e.g.*, Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978) (*per se* rule employed in conflict of interest case because harm so prevalent yet impossible to prove); Fields v. Payton, 375 F.2d 624, 628 (4th Cir. 1967) (likelihood of prejudice so great that court presumed prejudice where counsel not appointed until eve of trial). Bazelon also found support for the *per se* rule in the Supreme Court's treatment of the right to assistance of counsel. *Decoster III*, slip op. at 66 (Bazelon dissenting); *see* Holloway v. Arkansas, 435 U.S. 475, 488-489 (1978) (assistance of counsel constitutional right so basic to fair trial that harmless error inapplicable); Glasser v. United States, 315 U.S. 60, 76 (1942) ("assistance of counsel too fundamental for courts to indulge in nice calculations" regarding amount of prejudice resulting from its denial). Bazelon adopted the harmless error test to accommodate those cases where the reviewing court is able to isolate specific deficiencies in counsel's performance and can accurately guage the consequences of the errors. *Id.*, slip op. at 66 (Bazelon dissenting). Explicitly adopting the sixth amendment as the source of the right to effective assistance of counsel, Bazelon relied on sixth amendment precedent to support the proposition that the government has the burden of proving prejudice. *Id.*, slip op. at 54-55 (Bazelon dissenting); *see* Holloway v. Arkansas, 435 U.S. 475, 484 (1978); Geders v. United States, 425 U.S. 80, 86 (1976). According to Bazelon, the primary distinction between sixth amendment claim and a fifth amendment due process claim is that the defendant must demonstrate a likelihood of prejudice to establish a due process claim. *Decoster III*, slip op. at 54 n.121 (Bazelon dissenting); *see, e.g.*, Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970) (en banc) (recognizing sixth amendment basis for right to effective assistance, court stated ultimate issue not prejudice but level of counsel's competency). Bazelon emphasized that his approach separates the inquiry into the adequacy of counsel's performance, where the defendant has the burden of proof, from the question of prejudice to the defendant, where the government has the burden of proof. *Decoster III*, slip op. at 54 n.121, 59 n.131 (Bazelon dissenting). By separating the two inquiries, Bazelon's approach enables the court to identify and brand as ineffective any conduct falling below minimum standards of competent lawyering without regard to the client's guilt or innocence. *Id.*, slip op. at 59 n.131 (Bazelon dissenting).

[99] *Decoster III*, slip op. at 67 (Bazelon dissenting).

furnish proof of prejudice precisely because of counsel's ineffective performance. Therefore, the government must be able to isolate specific deficiencies in counsel's performance and accurately guage the harmless consequences of counsel's acts or omissions.[100]

Applying the above standards to *Decoster*, Bazelon found that counsel violated the duty to investigate.[101] Unable to find defense counsel's breach of the duty to investigate either excusable or justifiable, Bazelon concluded that counsel's breach was substantial.[102] The frequency and pervasiveness of defense counsel's omissions convinced Bazelon that the errors were not excusable.[103] According to Bazelon, there was no possible justification for counsel's failure to investigate since his inaction did not stem from prudent judgment or tactical considerations.[104] Since the government made no attempt to prove that counsel's gross violations did not affect the verdict, Bazelon would have remanded the case to allow the government to prove harmless error.[105] Bazelon noted that on several issues the district court did not find a violation of counsel's duties and, therefore, did not reach the question of prejudicial effect.[106]

Judge Bazelon was unable to find a justification for counsel's substantially inadequate investigation because he adhered to the theory that counsel has an independent duty to conduct appropriate investigation.[107]

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[100] *Id.*, slip op. at 66-67 (Bazelon dissenting). Both Bazelon and Robinson utilize the same harmless error test. *See* text accompanying note 92 *supra*.

[101] *Decoster III*, slip op. at 34-36 (Bazelon dissenting).

[102] *Id.*, slip op. at 42-51 (Bazelon dissenting).

[103] *Id.*, slip op. at 42 (Bazelon dissenting).

[104] *Id.*, slip op. at 42 (Bazelon dissenting); *see* United states v. Moore, 554 F.2d 1086, 1090-91 (D.C. Cir. 1976) (tactical decision not to place witness with impeachment testimony on stand justified where witness susceptible to credibility attack); United States v. Clayborne, 509 F.2d 473, 477 (D.C. Cir. 1974) (failure to cross-examine witness justified by tactical consideration of preventing possibly damaged testimony).

[105] *Decoster III*, slip op. at 70 (Bazelon dissenting).

[106] *Id.* slip op. at 68-70 (Bazelon dissenting). Bazelon stated that he was unable to satisfy the harmless error test until several important questions concerning prejudice were resolved. *Id.*, slip op. at 68 (Bazelon dissenting). One unanswered question was whether counsel's failure to investigate affected Decoster's decision to go to trial rather than plead guilty. *Id.* In addition, Bazelon was not convinced that the government in *Decoster II* was required to prove harmless error beyond a reasonable doubt. *Id.*, slip op. at 20 (Bazelon dissenting).

[107] *See id.*, slip op. at 44-45, 50 (Bazelon dissenting); Von Moltke v. Gillies, 332 U.S. 708, 721 (1948) (prior to trial accused entitled to rely on counsel's independent examination of facts); Wolfs v. Britton, 509 F.2d 305, 308 (8th Cir. 1975) (attorney must investigate accused's admissions or statements to lawyer of facts constituting guilt); Jones v. Cunningham, 313 F.2d 347, 353 (4th Cir. 1963) (lawyer has affirmative obligation to make suitable inquiry to determine whether valid defense exists).

Bazelon indicated that investigation is crucial for several reasons. *Decoster III*, slip op. at 31-32 (Bazelon dissenting). The proper functioning of the adversary system is achieved only where both sides investigate and organize their case in advance of trial. Investigation is vital to counsel's ability to cross-examine and impeach adverse witnesses. To assure that all available defenses are raised, counsel must perform thorough investigation. Finally, investigation is necessary to counsel's ability to plea bargain effectively, seeking advantageous terms at trial, and urging favorable sentencing. *Id.*

Bazelon reasoned that counsel's duty to investigate is not relieved by his perceptions of his client's guilt or innocence.[108] Bazelon argued, therefore, that Decoster's lawyer was not justified in ceasing investigation upon becoming convinced that Decoster did not have an alibi defense and was guilty.[109] Counsel's duty to investigate was not limited to witnesses that he believed would support the client's case.[110] When Decoster contradicted his alibi defense by a subsequent plea of self-defense, Bazelon argued that counsel was still not relieved of the duty to investigate.[111] Bazelon urged that counsel had an obligation to determine which account was truthful and might be used as a valid defense.[112] Even if both accounts turned out to be false, counsel had a duty to investigate the truthfulness of the statements to avoid suborning perjury.[113] Finally, Bazelon argued that the apparent strength of the government's case was not a justification for counsel's decision to limit the scope of his investigation.[114] According to Bazelon, an attorney must perform an independent evaluation of the government's case to assure that his client will make an informed decision to plead guilty or go to trial.[115] In sum, Bazelon found a substantial violation because counsel did not perform independent factual investigation to resolve the discrepancies in Decoster's alibis or interview

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[108] *Decoster III*, slip op. at 44 (Bazelon dissenting); *see* ABA STANDARDS § 4-4.1 (2d ed. 1978) (duty to investigate exists regardless of accused's admissions or statements to lawyer of facts constituting guilt). Both the Eighth and Fourth Circuits have adopted the ABA standard. *See, e.g.*, Wolfs v. Britton, 509 F.2d 305, 308 (8th Cir. 1975); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968). Bazelon stated that the Constitution entitled a criminal defendant to a trial by a jury, not by his court appointed defense counsel. *Decoster III*, slip op. at 45 (Bazelon dissenting).

[109] *Decoster III*, slip op. at 44 (Bazelon dissenting).

[110] *Id.*, slip op. at 48-49 (Bazelon dissenting). Since the co-defendants had pleaded guilty, defense counsel anticipated that their testimony would hurt Decoster's alibi defense. *Id.*, *see* Stokes v. Peyton, 437 F.2d 131, 137 (4th Cir. 1970) (failure to interview cannot be justified by attorney's belief that testimony would not help); ABA STANDARDS § 4-4.1 (2d ed. 1978) (duty of lawyer to explore all avenues leading to facts relevant to guilt or degree of guilt or penalty). Bazelon also noted that defense counsel cannot limit himself to interviewing only those witnesses his client affirmatively requests. *Decoster III*, slip op. at 49 n.110 (Bazelon dissenting); *see, e.g.*, Garton v. Swenson, 497 F.2d 1137, 1140 (8th Cir. 1974) (counsel's failure to investigate may constitute ineffective assistance although court did not inquire into communication between counsel and client); Andrews v. United States, 403 F.2d 341, 343-44 (9th Cir. 1966) (same).

[111] *Decoster III*, slip op. at 49-50 (Bazelon dissenting); *see* Jones v. Cunningham, 313 F.2d 347, 352 (4th Cir. 1963).

[112] *Decoster III*, slip op. at 50 n.112 (Bazelon dissenting).

[113] *Id.*, slip op. at 50 n.112 (Baselon dissenting).

[114] *Id.*, slip op. at 50-53 (Bazelon dissenting); *see* ABA STANDARDS § 4-5.1(b) (2d ed. 1978) (lawyer should inform himself on fact and law and then advise accused with complete candor as to his estimate of the probable outcome of trial).

[115] *Id.; see* Von Moltke v. Gillies, 332 U.S. 708, 721 (1948) (client has right to rely on counsel's independent examination of facts, circumstances, pleadings and laws to offer informed opinion as to enter guilty plea); ABA STANDARDS § 4-6.1(b) (2d ed. 1978) (duty to explore disposition of case without trial).

the officers and codefendants to impeach their testimony.[116]

The basic distinction between the various procedures developed in the four opinions for evaluating ineffectiveness claims centers on the allocation of the burden of proof. The plurality requires, and MacKinnon agreed, that the defendant should have to prove prejudice to establish a violation of his constitutional right to effective assistance of counsel.[117] The Robinson and Bazelon opinions, however, would place the burden on the government to prove harmless error.[118] In an analysis of the role of prejudice in *Decoster III,* the initial question must be whether actual prejudice is a legitimate consideration in the assessment of a claim of ineffective assistance of counsel. If prejudice is a relevant concern, the second issue that must be addressed is the party responsible for proving or disproving prejudice.

Turning to the first inquiry, courts' treatment of the role of prejudice should be similar for violations of the right to effective assistance of counsel and the right to counsel, since the expansion of the right to counsel is based on the accused's right to effective assistance of counsel.[119] The Supreme Court has applied a *per se* rule where a violation of the right to counsel is inherently prejudicial and encroaches on the accused's ability to assert his rights and defenses throughout the trial.[120] In cases involving right to counsel violations where the range of possible negative consequcences is capable of measurement, the Court has applied the harmless error test.[121]

The *Decoster III* court's decision to permit a showing of prejudice for denial of effective assistance of counsel is consistent with the Supreme Court's treatment of the role of prejudice for violations of the right to counsel. Where the right to effective assistance of counsel is violated, prejudice may not invariably occur and the extent of injury will usually be capable of accurate measurement.[122] Since the defendant is required to specify the aspects of counsel's performance that form the basis for the action, measuring the effect of prejudice is facilitated in claims of ineffective assistance.[123]

With respect to the second issue, the party bearing the burden of

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[116] *Decoster III,* slip op. at 42-43, 47-48 (Bazelon dissenting).

[117] *See* text accompanying notes 70 & 82 *supra.*

[118] *See* text accompanying notes 91 & 99 *supra.*

[119] *See* Cooper v. Fitzharris, 586 F.2d 1325, 1328-29 (9th Cir. 1978); Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970); People v. Pope, 23 Cal. 3d 412, _; 152 Cal. Rptr. 732, 739, 590 P.2d 859, 866 (1979) (en banc); Bines, *supra* note 3, at 936 n.47.

[120] *See, e.g.,* Chapman v. California, 386 U.S. 18, 43 (1967); White v. Maryland, 373 U.S. 59, 60 (1963); Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

[121] *See* Gilbert v. California, 388 U.S. 263, 272 (1967). *See also* Moore v. Illinois, 434 U.S. 220 (1977).

[122] *See, e.g.,* United States *ex rel.* Chambers v. Maroney, 408 F.2d 1186, 1194 (3d Cir. 1969), *aff'd,* Chambers v. Maroney, 399 U.S. 42 (1970); Martin v. Commonwealth of Virginia, 365 F.2d 549, 551-552 (4th Cir. 1966).

[123] *See* United States v. Pinkney, 543 F.2d 913-915 (D.C. Cir. 1976).

proof, courts should address violations of the right to effective assistance of counsel consistently with other sixth amendment violations. Prejudice is normally presumed when a defendant's sixth amendment right is violated. The government is provided the opportunity to rebut the presumption.[124] Only in cases involving the denial of the sixth amendment right to a speedy trial has the Court required that the defendant prove prejudice.[125] The harmless error test requires that the beneficiary of the error prove a lack of prejudice.[126] Since the denial of the right to a speedy trial may benefit the defendant, courts have allocated the burden of proving prejudice consistently with the harmless error rule.[127] The government is the beneficiary of defense counsel's omissions. Bazelon and Robinson argued correctly, therefore, that the government should be required to prove harmless error in the case of ineffective assistance.[128] The plurality's and MacKinnon assertion, however, that the defendant make a positive showing of prejudice is not consistent with Supreme Court precedent.[129]

The discrepancy among the opinions concerning the party responsible for carrying the burden on prejudice may be explained by the plurality's continued reliance on due process clause analysis used in conjunction with sixth amendment claims.[130] The plurality adopted a sixth amendment standard which requires the court to evaluate defense counsel's performance against the conduct expected of an ordinary fallible lawyer.[131] Although the plurality formulated a reasonable competency standard based on the sixth amendment, they evaluated counsel's performance with a totality of the circumstances approach, which emphasizes reliability of the verdict.[132] The proper approach for analyzing sixth amendment violations is to examine each alleged failure of defense counsel with reference to the obligation placed on criminal lawyers by the sixth amendment.[133] Chief Judge Bazelon emphasized the importance of separating

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[124] *See* text accompanying notes 72 *supra.*

[125] *See* Barker v. Wingo, 407 U.S. 514, 536 (1971).

[126] *See* Chapman v. California, 386 U.S. 18, 24 (1966). *See generally* 1 Wigmore, EVIDENCE § 21 (3d ed. 1940).

[127] *See* Barker v. Wingo, 407 U.S. at 521. The Court indicated that a delay in the trial may cause witnesses to become unavailable and their memories to fade, thereby weakening the prosecutor's case and benefitting the accused in some cases. *Id.* The inability of courts to provide a prompt trial also contributes to the backlog of cases, noted the Court, for which there is societal interest in assuring a speedy trial. *Id.* at 519.

[128] *See, e.g.,* Dickey v. Florida, 398 U.S. 30, 54-55 (1970); Snyder v. Massachusetts, 291 U.S. 97, 116 (1934).

[129] *See* Chapman v. California, 386 U.S. at 24.

[130] *See Decoster III,* slip op. at 29 (plurality), slip op. at 39 (MacKinnon concurring). The plurality and MacKinnon indicate that they are analyzing the *Decoster* facts in view of the totality of the circumstances.

[131] *See* text accompanying 69 *supra.*

[132] *See* text accompanying notes 73 & 74, 78 & 79 *supra.*

[133] *See* 543 F.2d at 916 & n.59 (D.C. Cir. 1976); Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970). The Third Circuit in *Moore,* relying on the sixth amendment, stated that

the inquiry into the adequacy of counsel's performance from the question of guilt, as the basic distinction between the sixth amendment right to effective assistance of counsel and the fifth amendment right to a fair trial.[134] The sixth amendment standard imposes a higher duty upon counsel to a client.[135] According to Judge Robinson, the accused's right to effective aid would place a duty on counsel to pursue a course reasonably calculated to achieve the most advantageous resolution of the case.[136] Bazelon's emphasis on defense counsel's independent obligation to investigate corresponds with Robinson's articulation of the duty to investigate.[137] By presuming prejudice upon counsel's substantial breach and allocating the burden to the government to disprove prejudice rather than to defense counsel to prove prejudice, both Bazelon and Robinson would reinforce counsel's substantial obligation to investigate.

As a consequence of the plurality's reliance on a due process analysis, lawyers will be held to a lesser standard of performance than would have been required under sixth amendment analysis. Since the courts will survey the overall fairness of the trial,[138] specific errors of counsel that constitute a potential sixth amendment violation may be overlooked.[139] Counsel's errors that do not influence the trial proceeding will go undetected. Since the D.C. Circuit will not enforce the duty to investigate independently of the verdict's reliability,[140] the quality of counsel will not improve.[141] By regarding the enumerated duties as mere guidelines, the court has failed to provide substantive content to the standard of reasonably competent assistance.[142] The court eliminated another opportunity to increase defense counsel's accountability to his client, by finding that the government did not have the burden of proving lack of prejudice.

The plurality's reluctance to employ the stricter sixth amendment approach rather than the due process analysis is based on their adherence to the principle of finality of judgments.[143] To limit the number of rever-

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the ultimate question is not whether a defendant was prejudiced by his counsel's act or omission, but whether counsel performed as a reasonably competent lawyer. *Id.*

[134] *See Decoster III*, slip op. at 54 n.121, 59 n.131 (Bazelon dissenting).

[135] *See* Scott v. United States, 427 F 2d 609, 610 (D.C. Cir. 1970). *See also* United States v. Wade, 388 U.S. 218, 223-27 (1967).

[136] *Decoster III*, slip op. at 7 (Robinson concurring in result).

[137] *Id.*, slip op. at 50 (Bazelon dissenting); *see* Jones v. Cunningham, 313 F.2d 347, 353 (4th Cir.), *cert. denied*, 375 U.S. 832 (1963).

[138] *See* text accompanying notes 73 & 74 *supra.*

[139] *See* text accompanying notes 23-29 *supra.*

[140] *See* text accompanying notes 77-79 *supra.*

[141] *See* text accompanying notes 133-136 *supra.*

[142] *See Decoster III*, slip op. at 14-15 (plurality). The plurality stated that the standards were not put forth by the ABA as a set of *per se* rules applicable to post conviction procedures but as a blend of description of function, functional guidelines, and ethical guidelines. The plurality dismissed them as aspirational, but impractical. *Id.* at 15. *But see* slip op. at 28-31 (Bazelon dissenting).

[143] *See Decoster III*, slip op. 19-20 (plurality); Note, *Identifying And Remedying Ineffective Assistance Of Counsel: A New Look After* United States v. Decoster, 93 HARV. L.

sals, appellate courts will often uphold a conviction as long as the trial court attained a reliable verdict.[144] Since a lawyer makes an infinite variety of decisions, the effectivenss standard should be flexible enough to accommodate the strategic decisions of counsel.[145] Counsel's competent judgments must be afforded great weight and a trial judge's decision should be respected because of his first-hand knowledge of the proceeding.[146]

The detrimintal consequences of reversals for ineffective assistance of counsel may subvert the judicial process.[147] Reversals for a new trial usually become lost convictions because the government's witnesses and evidence go stale in the interim between the reversal and the new trial.[148] As a result, the efficacy of the correctional process is destroyed. In addition, overgenerous reversals encourage frivolous appeals, introduce unreliability into the fact-finding process, drain adjudicatory resources and diminish public respect for the criminal process.[149]

Placing the burden on the government to disprove prejudice may require intrusion into the attorney-client relationship to insure that defense counsel performs adequately.[150] Such inquiries may redefine the institutional duties of the prosecutor, trial judge and counsel. The prosecutor may have to oversee decisions and activities of defense counsel to protect a prospective guilty verdict.[151] The prosecutor may ask the trial judge to correct and direct decisions or acts of defense counsel to prevent prejudice.[152] Judicial supervision of tactical decisions of counsel may inhibit counsel's ability to make quick judgments.[153]

REV. 752, 764-65 (1980) [hereinafter cited as *Remedying Assistance*]; text accompanying notes 130-134 *supra*. *See also* Bines, *supra* note 5; Comment, *Ineffective Assistance of Counsel:: Who Bears the Bruden of Proof*, 29 BAYLOR L. REV. 29 (1977) [hereinafter cited as *Who Bears the Burden*]; Note, *Effective Assistance Of Counsel: A Constitutional Right In Transition*, 10 VAL. L. REV. 509 (1976) [hereinafter cited as *Right In Transition*].

[144] *Decoster III*, slip op. at 29 (plurality).

[145] *Id.*, slip op. at 10 (plurality).

[146] *Id.*, slip op. at 14-16 (MacKinnon concurring).

[147] *See Decoster III*, slip op. at 22-23, 35 (plurality).

[148] *See id.*, slip op. at 35 (plurality), Mitchell v. United States, 259 F.2d 787, 791-92 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 850 (1967); *Bines, supra* note 3, at 940-41.

[149] *See* Bines, supra note 3, at 963-64. *But see Who Bears The Burden, supra* note 143, at 52; Note, *Standard For Effective Assistance of Counsel*, 1976 WASH. U. L. Q. 503, 507-08. [hereinafter cited as *Standard For Assistance*]. Some commentators argue that overgenerous reversals will result overall in lower quality lawyering. *See id.*; Who Bears The Burden, supra note 143, at 52. Attorneys may be discouraged from accepting appointments for fear of being called incompetent. *See Standard For Assistance, supra*, at 507-08. In addition, lawyers unconcerned with their repuration may seek to damage a strong government case by not preparing at all and obtaining an appeal in the hope that much of the government's evidence will go stale. *See Who Bears The Burden, supra* note 143, at 52.

[150] *Id.*, slip op. at 11, 22 (plurality), slip op. at 25-27 (MacKinnon concurring); *see Who Bears The Burden, supra* note 143, at 52-53.

[151] *Decoster III*, slip op. at 22 (plurality), slip op. at 25-26 (MacKinnon concurring).

[152] *Id.*, Bines, *supra* note 3, at 961.

[153] *Decoster III*, slip op. at 22 (plurality). MacKinnon noted that common law princi-

The right to effective assistance is an enumerated constitutional right however, and therefore, a sixth amendment approach should be followed to uphold the integrity of the court system.[154] The judicial system can only be sustained if the constitutional safeguards are enforced regardless of the guilt or innocence of a defendant.[155] The constitution entitles every defendant to an active advocate on his behalf, and therefore, the defendant should hot have to prove prejudice to obtain relief when effective advocacy is absent.[156] Employing a due process analysis and requiring the defendant to prove prejudice denudes the constitutional right to effective assistance of its value.[157] To improve the quality of lawyering for all defendants, the court's interest in constitutional procedural safeguards must outweigh the interest in finality of judgment.[158]

The success of the adversary system is dependent upon attorney competence.[159] The adversary system has been compared to a three-legged stool, the trial judge, prosecutor and defense attorney.[160] If anyone of the

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ples dictate that when the knowledge necessary to disprove an element of cause of action within special knowledge of a defendant, the defendant should have the burden of proof on that element. *Id.*, slip op. at 23-24 (MacKinnon concurring). Since the government is highly restricted in its ability to discover due to the attorney-client privilege and the fifth amendment privilege against self-incrimination, McKinnon reasoned that the defendant should have to prove prejudice to obtain relief for a claim of ineffective assistance. *Id.*

[154] *Id.*, slip op. at 54 & n.121 (Bazelon dissenting). *See generally* Gard, *Ineffective Assistance of Counsel - Standards And Remedies*, 41 Mo. L. Rev. 483, 503-04 (1976); Pool, *Defending The "Guilty Client"*, 64 Mass. L. Rev. 11 (1979).

[155] *Decoster III*, slip op. at 54-56 (Bazelon dissenting); *Remedying Assistance, supra* note 143, at 767-68; *Right In Transition, supra* note 143, at 550-52.

[156] *Decoster III*, slip op. at 54-56 (Bazelon dissenting); *see* Holloway v. Arkansas, 435 U.S. 475, 484 (1978); Geders v. United States, 425 U.S. 80, 85-86 (1976). Bazelon argued that both *Holloway* and *Geders* support his position that a showing of prejudice is unnecessary to establish a sixth amendment violation. *See Decoster III*, slip op. at 56-58 (Bazelon dissenting). The plurality distinguished *Geders* on the ground that counsel's ineffectiveness was impeded by direct state interference. *Decoster III*, slip op. at 7 (plurality). In *Geders*, the Court found a sixth amendment vilation where a defendant had been ordered not to consult with his attorney during overnight recess between direct and cross-examination. 425 U.S. at 82, 83 n.1. Bazelon remarked that the defendant is unconcerned with whether the state is responsible for counsel's inadequacy but whether his constitutional rights were violated. *See Decoster III*, slip op. at 56 n.126 (Bazelon dissenting). MacKinnon attempted to distinguish both *Geders* and *Holloway* as cases where counsel was actually denied his counsel, not bearing on the question of how effective was the representation. *See Decoster III*, slip op. at 30 (MacKinnon concurring). In *Holloway*, the Court found a sixth amendment violation where the trial judge refused to appoint separate counsel despite counsel's repeated assertions that a conflict of interests existed. 435 U.S. at 484. Bazelon rejected the distinction, urging that the sixth amendment demands active representation and, therefore, a defendant's constitutional rights would be violated regardless of whether the assistance is ineffective or is denied altogether. *Decoster III*, slip op. at 58 n.123 (Bazelon dissenting).

[157] *Decoster III*, slip op. at 39 (Robinson concurring in result).

[158] *Id.*, slip op. at 74-77 (Bazelon dissenting); *See Remedying Assistance, supra* note 143, 763-67; *Right In Transition, supra* note 143, at 549.

[159] *See Decoster III*, slip op. at 74-75 (Bazelon dissenting); Bazelon, *supra* note 3, at 2; *Remedying Assistance, supra* note 143, at 767.

[160] *See* Comment, *A Standard For The Effective Assistance Of Counsel*, 14 Wake For-

three is inadequate, imbalance will result depriving the defendant of his day in court.[161] The sixth amendment demands that counsel diligently represent the interests of his client.[162] If defense counsel is ineffective, the prosecution will not be forced to meet the burden of proof,[163] and the fact-finding process will not be reliable.[164] Reversal is necessary regardless of the reliability of the trial court's verdict because the defendant has not been tried by constitutional standards.[165] To limit the number of retrials based on claims of ineffective assistance, the trial judge must take an active role in assuring that the accused receives a fair trial.[166]

Enumerating the minimum duties of counsel would give content to the standard of effective assistance and permit a court to evaluate specific errors of counsel under a sixth amendment approach.[167] A court adopting the minimum duties would provide the trial judge and appellate courts with an objective measure of counsel's performance.[168] In addition, an objective basis for reviewing counsel's assistance enables the client to gauge accurately counsel's performance. The client would be able to question the lawyer about his actions to prevent ineffective assistance claims from arising. The client would also be aware of the evidence needed to make a colorable claim for ineffectiveness on appeal.[169] The courts' articulation of minimum duties would aid counsel himself because counsel could more readily avoid breach.[170]

The source of the confustion surrounding the issue of which party must prove prejudice arises from the procedural requirements for raising a claim of ineffective assistance.[171] A claim for ineffective assistance may

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EST L. REV. 175, 193 (1978).

[161] *See* Bazelon, *supra* note 3, at 2, 26-27.

[162] *See Decoster III*, slip op. at 54 (Bazelon dissenting); Anders v. California, 386 U.S. 738, 744 (1967).

[163] *Decoster III*, slip op. at 61 n.134 (Bazelon dissenting); *See Right In Transition, supra* note 143, at 546.

[164] *See Decoster III*, slip op. at 61-63, 63 n.139 (Bazelon dissenting); *Right In Transition, supra* note 143, at 542-43.

[165] *Decoster III*, slip op. at 54 (Bazelon dissenting).

[166] *Decoster III*, slip op. at 76-77 (Bazelon dissenting); *see id.*, slip op. at 14 n.38 (Bazelon dissenting). Bazelon stated that when the defendant makes a pretrial challenge to the adequacy of counsel, the trial judge should inquire into the defendant's allegations. *Id.*

[167] *Decoster III*, slip op. at 8 (Bazelon dissenting); *see* Brody, *supra* note 4, at 53; text accompanying notes 42 *supra*. Ensuring that a defendant received a fair trial in compliance with due process does not comport with *Gideon's* requirement of equal partisan advocacy under the sixth amendment. Gideon v. Wainwright, 372 U.S. 335, 340-43 (1963); *see* Bines, *supra* note 3, at 936-38; *Right In Transition, supra* note 143, at 512-14. The courts' adoption of the minimum duties of counsel will ensure that a defendant's sixth amendment rights are protected.

[168] *Decoster III*, slip op. at 26-27 (Bazelon dissenting); *see* Brody, *supra* note 4, at 53; *Remedying Assistance, supra* note 167, at 765; *Effective Assistance, supra* note 2, at 125-27.

[169] *See Effective Assistance, supra* note 2, at 125-27.

[170] *See Decoster III*, slip op. at 28-31 (Bazelon dissenting); *Remedying Assistance, supra* note 1, at 765-64; *Effective Assistance, supra* note 2, at 125-27.

[171] *See* Taque, *supra* note 11, at 148-152. Taque outlines the procedures for bringing

be raised on direct appeal. The appellate court must evaluate counsel's performance based on the trial record.[172] Counsel's breach of the duty to investigate will probably not be substantiated by the record because the claim arises from counsel's omissions rather than his actions at trial.[173] The D.C. Circuit in *Decoster I* explained that a claim of ineffectiveness could best be raised as a motion for a new trial based on newly discovered evidence.[174] Under the procedure, the record could be supplemented by affidavit and when necessary the district judge could order a hearing to aid the defendant in establishing his claim.[175]

A motion for a new trial requires the disclosure of evidence that is both material and capable of mounting a serious challenge.[176] The plurality's failure to distinguish between a defendant's showing of prejudice and a showing of materiality explains the D.C. Circuit's break from Supreme Court precedent.[177] The D.C. Circuit defines material evidence as that which might have led the jury to entertain a reasonable doubt about appellant's guilt.[178] The court's application of the test for demonstrating materiality requires an overall examination of the verdict's reliability and will necessarily depend on the strength of the government's case.[179] Although a defendant's presentation of material evidence will approach that which a defendant presents to demonstrate prejudice, a defendant should not have to prove prejudice as an element of the constitutional claim of ineffective assistance of counsel.

Bazelon presented a workable approach to the problem of ineffective representation which balances the competing policies.[180] The courts' enforcement of the minimum duties of counsel would provide content to the

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claims for ineffective assistance of counsel on direct appeal and on collateral attack. *Id. See also Decoster III*, slip op. at 18-20 (plurality); Bruce v. United States, 379 F.2d 113, 116-17 (D.C. Cir. 1967). In *Bruce*, the court stated a more powerful showing of ineffectiveness is necessary on collateral attack than on direct appeal. 379 F.2d at 117. The D.C. Circuit in *Decoster III* indicated the standard for bringing a claim for ineffectiveness in a habeas corpus action. *Decoster III* slip op. at 19 (plurality). Save for an exceptional claim that both could not have been raised on appeal and that constituted a fundamental defect resulting in an inherent miscarriage of justice, the defendant must show a constitutional violation. *Id.*

[172] *See* United States v. Thompson, 475 F.2d 931, 932 (D.C. Cir. 1973) (affidavits not considered on direct review); Brubaker v. Dickson, 310 F.2d 30, 32 n.3 (9th Cir. 1962) (examination limited to trial record on direct appeal); Brody, *supra* note 4, at 87.

[173] *See* United States v. Benn, 476 F.2d 1127, 1135 (D.C. Cir. 1973) (failure to investigate rarely apparent from record); United States v. Mandello, 426 F.2d 1021, 1022 (4th Cir. 1970) (same).

[174] 487 F.2d at 1204-05.

[175] *Id.* at 1205.

[176] *See* United States v. Pinkney, 543 F.2d 908, 916 (D.C. Cir. 1976).

[177] *See* text accompanying notes 125-129 *supra*.

[178] *See* United States v. Lemonakis, 485 F.2d 941, 964-65 (D.C. Cir. 1973); Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966).

[179] *Compare* United States v. Lightfoot, 506 F.2d 238 (D.C. Cir. 1974) *and* Marshall v. United States, 436 F.2d 155 (D.C. Cir. 1971) *with* United States v. Smallwood, 473 F.2d 98 (D.C. Cir. 1972) *and* Newsome v. Smyth, 261 F.2d 452 (4th Cir. 1958).

[180] *See* text accompanying notes 95-100 *supra*.

sixth amendment standard, permit lawyer self-regulation and accommodate objective judicial review. Since Bazelon articulated the duties in general terms and the courts would be required to find a substantial violation of a duty to reverse, the flexibility a defense lawyer needs would be retained. Needless retrials would be avoided through the application of the harmless error doctrine. Adopting Bazelon's premise that constitutional safeguards must be upheld regardless of the verdict's reliability would restore the integrity to the criminal justice system that is lost when a lawyer abdicates his responsibility to his client.[181]

In addition to changes in the substantive law that are needed to assure effective prepresentation, structural improvements to the judicial system are necessary. The court system has integrated lawyers outside of the criminal field and recent law school graduates into the criminal system to reduce the case load on regular criminal attorneys.[182] The complexities of criminal representation, however, minimize the practical significance of an inexperienced lawyer's contribution to criminal defense. An excellent device for improving the quality of representation is placing limits on the number of cases an attorney can accept in a year.[183] If caseload limits are imposed, a defense lawyer's compensation per case must rise to retain private attorneys. Since the compensation per case is presently inadequate, criminal lawyers carry a large caseload to obtain reasonable yearly compensation.[184] In addition, more lawyers will be needed to account for the reduction in each lawyer's caseload. Therefore, the budget of the court system must be increased to accommodate the need for higher pay and more lawyers to make reduced caseload limits a viable alternative.[185]

The threat of a legal malpractice claim regulates the quality of legal representation outside of the criminal justice field.[186] However, only eight criminal malpractice claims have ever been brought before the courts and all of them have been decided in favor of the attorney.[187] In addition, a

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[181] *Accord, Remedying Assistance, supra* note 143, at 770-72. *But cf.* Bines, *supra* note 3, at 959-70.

[182] *See* Bazelon, *supra* note 3, at 11-14; Brody, *supra* note 4, at 21-22.

[183] *See Joint Comm. of the Judicial Conf. of the D.C. Cir. and the D.C. Bar (Unified), Report on Criminal Defense Services in the District of Columbia* (Austern-Rezneck Report) (April 1975) 99-100, 122-23; *Working Papers from the Nat'l Conf. on Crim. Jus.: The Courts* § 13.12 (Jan. 26, 1973).

[184] *See id.;* note 183 *supra.*

[185] *See* Bazelon, *supra* note 3, at 8-9; Finer, *supra* note 3, at 1120. Bazelon points out the disparity between criminal lawyers' fees and corporate attorney's compensation. Bazelon, *supra* note 3, at 8. *See also Decoster III*, slip op. at 2 n.3 (Bazelon dissenting).

[186] *See* Kaus & Mallen, *The Misguiding Hand of Counsel—Relections on "Criminal Malpractice,"* 21 U.C.L.A. L. REV. 1191, 1196 (1974) [hereinafter cited as Kaus]; Kaus and Mallen assert that regardless of the standard adopted to govern ineffective assistance of counsel claims, a lawyer's performance that is poor enough to upset a criminal conviction would raise a showing of negligence sufficient to provide a jury question on an action for criminal malpractice. *Id.*

[187] *See Annot.* 53 A.L.R.3d 731 (1973). *See also* Bazelon, *supra* note 3, at 17; Bines,

malpractice action is expensive and most criminal defendants are indigent and unaware that such an action exists.[188] Therefore, legal malpractice suits have been an unacceptable method of assuring effective representation. Other recent alternatives to correcting the institutional shortcomings have been offered. Suggestions include requiring criminal lawyers to be certified, requiring defense counsel to complete a checklist of investigative duties before going to trial, which the judge can monitor, and requiring the trial judge to supervise lawyers more closely during trial to remedy questionable defense counsel representation.[189]

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supra note 3, at 972-77. Bazelon described criminal malpractice litigation as insignificant. Bazelon, *supra* note 3, at 17. Bines stated that the remedies such as criminal malpractice actions, while theoretically available, are virtually nonexistent. Bines, *supra* note 3, at 972.

[188] *See* Bines, *supra* note 3, at 973. *See also Decoster III*, slip op. at 1-6, 70-75 (Bazelon dissenting). Bazelon argues that the indigent, those least likely to be aware of and assert their rights, suffer most from ineffective assistance. *Id.*

[189] *See* Taque, *supra* note 11, at 161-65; Bazelon, *supra* note 3, at 18-21; Bines, *supra* note 3, at 976-983; Finer, *supra* note 3, at 1116-1120. Bazelon suggests that lawyers should have to be certified for the criminal law as a specialty. Bazelon, *supra* note 3, at 18-19. To become certified, Finer suggests that criminal lawyers be required to take an examination and obtain a certain amount of experience before being permitted to represent a defendant alone. Bines, *supra* note 3, at 1116-19. Taque advocates the check list of preparation responsibilities because it is easily administered and requires a minimum intrusion on the attorney-client privilege. Taque, *supra* note 11, at 161-67.

Judge Bazelon advocated that the trial judge employ a more formalized procedure to inquire into the adequacy of counsel's preparation than asking the simple question, "Is defense ready?". *Decoster III*, slip op. at 72-73 (Bazelon dissenting). The checklist approach proposed by Bazelon would include vital aspects of counsel's preparation such as, what records were obtained, which witnesses were interviewed, when defendant was consulted, and what motions were filed. *Id.* During trial, the judge could take a more active role in preventing ineffectiveness claims according to Bazelon. *Id.* slip op. at 74 n.162 (Bazelon dissenting). Where defense counsel has apparently overlooked a valid defense or made a major tactical error the trial judge could ask whether counsel's action is based on an informed tactical reason. *Id.* If counsel is unable to provide an affirmative response to the trial judge's initial inquiry, the defendant would welcome a further inquiry to safeguard his rights. *Id.* Since the attorney-client privilege is designed to protect the client, not the attorney, the trial judge's inquiry would be consistent with the defendant's interests. *Id.; see* Lakeside v. Oregon, 435 U.S. 333, 341-42 (1978) (judge is ultimately responsible for conduct of fair trial); United States v. Powe, 591 F.2d 833, 846-47 (D.C. Cir. 1978) (trial judge must prevent forfeit of criminal defendant's constitutional rights through ineffective performance of ill-prepared counsel).

The primary obstacle to a court's increased use of supervisory powers is that the court would have to oversee major decisions and activities of defense counsel, changing the essential nature of the adversary process. *See Decoster III*, slip op. at 25-30 (MacKinnon concurring in result); *Decoster III*, No. 72-1283, slip op. at 22-23 (plurality); Commonwealth v. Irby, 230 Pa. Super. Ct. 317, 321-22, 326 A.2d 617; 619-20 (1974). In *Irby*, the court recognized that counsel must be afforded discretion in his employment of trial strategy.