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“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that's all.” ¹

A criminal defendant enjoys not only a right to the assistance of counsel,² but also a right to effective assistance.³ But what does sixth amendment “effectiveness” mean? Current understanding of the word focuses on “competence.” For example, a trial lawyer who refuses to argue a particular defense because he feels that it will create difficult problems has acted competently; however, a trial lawyer who refuses to argue a particular defense because he has made no pre-trial investigation of its pertinence has acted incompetently.⁴ Unfortunately, this definition doesn't go far enough—current understanding should consider “prejudice” as well as “competence.” Because of the recent relaxation of the automatic reversal rule, a court will condemn only incompe-

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² The Supreme Court recognized a federal defendant's right to assistance of counsel in Johnson v. Zerbst, 304 U.S. 458, 462 (1938); however, the Court did not recognize a state defendant's right to assistance of counsel until Gideon v. Wainwright, 372 U.S. 335, 342 (1963), in which the Court overruled Betts v. Brady, 316 U.S. 455, 471 (1942).

³ The Court first recognized the “effectiveness” requirement in Powell v. Alabama, 287 U.S. 45 (1932). The case gained national attention when juries condemned the “Scottsboro boys,” a group of illiterate black youths accused of the rape of two white girls, to death. The Supreme Court found a violation of the fourteenth amendment due process clause, because the state trial court’s appointment of “all the members of the bar” did not result in an “effective” appointment of counsel. Id. at 56, 71.

In two cases decided in the early forties, the Supreme Court established the following rule: if the defendant enjoys a right to assistance of counsel, then the Constitution guarantees him a right to “effective” assistance. The first case, Glasser v. United States, 315 U.S. 60 (1942), reversed the conviction of a federal defendant, based on the violation of an “effectiveness” requirement derived directly from the sixth amendment “assistance” requirement. Id. at 76. The other case, Betts v. Brady, 316 U.S. 455 (1942), refused to reverse the conviction of a state defendant, because the sixth amendment “assistance” requirement did not apply to the states. Id. at 471. Nevertheless, the decision reaffirmed Powell, which did reverse a state defendant's conviction by deriving the “effectiveness” requirement from the fourteenth amendment due process clause when a state statute provided the “assistance” requirement. Id. at 463-64. Thus, the Court simultaneously implied “effectiveness” from the sixth amendment and from the fourteenth amendment.

When Gideon v. Wainwright, 372 U.S. 335 (1963), finally overruled Betts to extend the sixth amendment “assistance” requirement to the states, the due process source of “effectiveness” disappeared. Consequently, both state and federal defendants now enjoy a sixth amendment right to “assistance” and a sixth amendment right to “effectiveness.”

⁴ The courts usually distinguish between trial performance and trial preparation according to the principle of “informed, professional deliberation.” E.g., United States v. Hinton, 631 F.2d 769, 782 (D.C. Cir. 1980) (quoting Marzuollo v. Maryland, 561 F.2d 540, 544 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978)). When counsel has investigated tactical alternatives prior to trial, his conduct during the trial evidences tactical decisions which no judge will condemn because of judicial reluctance to second-guess the defense. See, e.g., Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945).
tence prejudicial to the defense. Either the defendant or the government must show that the trial lawyer's representation prejudiced or did not prejudice the trial result. Thus, the real meaning of "effectiveness" depends upon the interaction of "competence" and "prejudice." A provocative line of cases in the District of Columbia Circuit—a line culminating in the reasoning originally asserted by the Fourth Circuit—illustrates this interaction.

In Diggs v. Welch the court used a "farce and mockery" test to measure "effectiveness": the 1945 opinion refused to reverse defendant's conviction because counsel's advice to plead guilty to a lesser offense did not render the trial a sham. This test equated competence with prejudice. After all, the defend-
ant's demonstration that defense counsel's representation robbed him of a fair trial subsumed a showing that counsel's representation adversely affected the outcome of that trial. Consequently, a violation of the constitutional "effectiveness" requirement meant more than "incompetent" representation, it meant "prejudicially incompetent" representation. Presumably, the court tolerated "non-prejudicially incompetent" representation whenever the defendant failed to carry the burden of proving prejudice.

More than twenty years later, Bruce v. United States1 described "farce and mockery" as a metaphor for the "gross incompetence" which "blotted out the essence of a substantial defense."13 Although this language teased competence apart from prejudice, the opinion actually changed the test of "effectiveness" very little. Defendant, who argued that counsel erroneously induced defendant's guilty plea, still had to prove prejudice in order to prove incompetence.14

The court abandoned "farce and mockery" completely in United States v. DeCoster (DeCoster I).15 The 1973 decision noted the following blunders by counsel: failure to interview the robbery victim, the codefendants, and the arresting officers; failure to request a jury trial when the same judge who heard codefendants' guilty pleas sat on defendant's case; and failure to realize that the only alibi witness produced by the defense would place defendant at the scene of the crime.16 The appellate panel asked the government to show "lack of prejudice"17 after defendant proved a "substantial" violation of a particular

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After all, a Supreme Court case decided three years earlier plainly stated that a federal defendant's "right to have the effective assistance of counsel, guaranteed by the Sixth Amendment... is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 76 (1942). By adopting a fair trial test, the circuit court dealt with the impact of counsel's conduct on the verdict—i.e., with the prejudicial effect of counsel's incompetence. Although Mitchell v. United States, 259 F.2d 787, 789-93 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958), later recognized the sixth amendment as the proper source of "effectiveness," the decision retained the established "farce and mockery" test.

Indeed, some judges recently revived the due process notion of "effectiveness." They saw a "continuum" stretching from sixth amendment cases like Gideon v. Wainwright, 372 U.S. 335 (1963) (state impairment of trial representation), to fifth amendment cases like United States v. Agurs, 427 U.S. 97 (1976) (counsel's own incompetence). See United States v. DeCoster (DeCoster III), 624 F.2d 196, 201 (D.C. Cir. 1979) (en banc). The court in DeCoster III found that under the principles established by Chapman v. California, 386 U.S. 18 (1967), Gideon-type cases deserved automatic reversal, or disproof of prejudice by the government; Agurs-type cases required proof of prejudice by the defendant. 624 F.2d at 201-03. But this argument contained two serious flaws. On one end of the "continuum," the judges confused sixth amendment "assistance" with sixth amendment "effectiveness." Compare Gideon, 372 U.S. at 342, with Glasser, 315 U.S. at 76. On the other end, they employed a due process case that explicitly avoided the "effectiveness" issue. See Agurs, 427 U.S. at 112 n.20. Thus, the continuum spread itself too widely.

12. 379 F.2d 113 (D.C. Cir. 1967).
13. Id. at 116-17.
14. Id. at 116.
15. 487 F.2d 1197 (D.C. Cir. 1973). (The reporters vary in the spelling of defendant's name; in this Note it will appear "DeCoster.")
16. Id. at 1200-01.
17. Id. at 1204 (quoting Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968)).
“duty” owed by “reasonably competent” counsel, and remanded to the district court for a supplemental hearing on counsel’s performance. Subsequently, *DeCoster II* reversed defendant’s conviction. Together, these two decisions established a tougher test of “effectiveness.”

Reacting to the panel’s opinions in *DeCoster I* and *II*, the District of Columbia Circuit met *en banc* to decide *DeCoster III*. With the panel in dissent, the court changed the competency test to “serious incompetency,” and placed the burden on defendant to prove “likely prejudice,” and only then on the government to disprove “actual prejudice.” This plurality opinion actually revived *Bruce*. “Serious incompetency” differed only slightly from “gross incompetence.” Similarly, the “likely prejudice” standard restored defendant’s burden of proving that counsel’s conduct “blotted out the essence of a substantial defense.” As a result, “actual prejudice” had only formal significance. Once again, the defendant had to prove prejudice in order to prove incompetence.

The *DeCoster I* and *II* panel acted promptly to counter the repercussive *DeCoster III* decision. In *United States v. Wood*, the panel argued that a majority of the *en banc* court, through four of the five opinions, had actually adopted a “reasonable competence” test. And in *United States v. Hinton*, Judge Bazelon, the author of the first two *DeCoster* opinions, rewrote the

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18. Id. at 1202-04. The opinion suggested the ABA Standards Relating to the Prosecution Function and the Defense Function (Approved Draft 1971) as a general source for the duties which the trial courts should develop on a case-by-case basis. Compare the ABA Standards with the list of duties in Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968).
22. *United States v. DeCoster* (DeCoster II), 624 F.2d 196 (D.C. Cir. 1979) (en banc).
24. Id. at 206 & n.64, 208, and id. at 245 (Robinson, J., concurring).
25. Id. at 206. The court described this slight change as a “refinement.” Id.
26. Id. at 206 n.64. The court expressly equated the two phrases. Id.
27. The *DeCoster I* and *II* panel consisted of three judges. Chief Judge Bazelon and Judge Wright formed the majority. Judge MacKinnon concurred in part and dissented in part.
28. 628 F.2d 554 (D.C. Cir. 1980) (en banc) (counsel failed to interview witnesses before trial, failed to understand the legal principles involved in the insanity defense, and failed to seek a continuance when the court disqualified the only favorable expert witness).
29. *DeCoster III*, 624 F.2d at 222 (MacKinnon, J., concurring opinion); id. at 248 (Robinson, J., concurring opinion); id. at 267 (Bazelon, J., dissenting opinion); id. at 300 (Wright, C. J., dissenting opinion).
30. *United States v. Wood*, 628 F.2d at 569-70 & n.57 (Bazelon, J., concurring and dissenting); id. at 561 & n.5 (Robinson, J., concurring and dissenting).
31. 631 F.2d 769 (D.C. Cir. 1980) (counsel failed to request a recess when the Government’s disclosure of witnesses’ statements overwhelmed the defense).
32. Judge Bazelon has spent more than thirty years on the District of Columbia Circuit, fifteen as Chief Judge. His service there has marked him as a man of courage, compassion, and creativity. He now holds the semi-retired status of a senior judge. Wash. Post, Mar. 30, 1978, § A, at 22, col. 1.
"likely prejudice" "actual prejudice" formula. He interpreted "likely prejudice" as a "likelihood," inviting the presumption of prejudice from defendant's proof of counsel's incompetence;\(^3\) and he interpreted "actual prejudice" as governmental demonstration "beyond a reasonable doubt that . . . [counsel's] deficiencies . . . [constituted] harmless [error]," returning the real burden to the government.\(^4\) Together, Wood and Hinton reestablished the progressive DeCoster I and II test of "effectiveness."\(^5\)

By adopting the "reasonable competence" language, the District of Columbia Circuit has joined the growing majority of appellate courts.\(^6\) Ten of the eleven circuits have abandoned the once universal "farce and mockery" test,\(^7\) and nine of which\(^8\) have adopted either a "reasonable competence" test,\(^9\) or a "normal competence" test,\(^10\) or both.\(^11\) This reform movement\(^12\)

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34. United States v. Hinton, 631 F.2d at 783.

35. Hinton reestablished "reasonable competence" plus proof of "lack of prejudice" by the government. Id. at 780 & n.31, 783.

36. See, e.g., McMann v. Richardson, 397 U.S. 759 (1970), in which the Court adopted a "reasonably competent" test, described as assistance "within the range of competence demanded of attorneys in criminal cases." Id. at 770, 771. But the opinion also recognized the discretionary power of trial judges "to maintain proper standards of performance by attorneys . . . representing [criminal] defendants . . . in their courts." Id. at 771.

37. Only the Second Circuit clings to this standard. United States v. Bubar, 567 F.2d 192 (2d Cir.), cert. denied, 434 U.S. 872 (1977) (counsel’s decision to forego insanity defense in favor of courtroom portrayal of defendant as persecuted religious psychic did not constitute ineffective assistance).


38. The Seventh Circuit measures competency under a "minimum standard of professional representation." William v. Twomey, 510 F.2d 634 (7th Cir.), cert. denied, 423 U.S. 876 (1975) (counsel’s failure to interview codefendant who would have exculpated defendant constituted ineffective assistance).

39. See United States v. Hinton, 631 F.2d 769 (D.C. Cir. 1980); Dyer v. Crisp, 613 F.2d 275 (10th Cir.), cert. denied, 445 U.S. 945 (1980) (effective assistance found without discussion of facts); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), cert. denied, 440 U.S. 974 (1979) (counsel’s failure to anticipate future holdings in the criminal law concerning warrants, interrogation, and identification did not constitute ineffective assistance); Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978) (counsel's failure to investigate circumstances of defendant’s arrest based upon his decision that only an insanity defense would exculpate defendant did not constitute ineffective assistance); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974) (counsel’s failure to advise defendant of elements of robbery, including intent to permanently appropriate property, constituted ineffective assistance); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) (counsel’s failure to call a police expert who would have rebutted the government’s crucial identification evidence constituted ineffective assistance).

40. See Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978) (counsel’s failure to make a motion to exclude the jury while the court dismissed the first rape indictment, and counsel’s decision to forego his peremptory challenges in the second rape indictment, constituted ineffective assistance); Moore v. United States, 432 F.2d 730 (3d Cir. 1970) (counsel’s failure to impeach two witnesses’ courtroom identifications of defendant when the witnesses could not identify him at the line-up, and to impeach another witness’ courtroom identification when the witness identified him only after the FBI pointed him out, warranted evidentiary hearing on ineffective assistance).

41. See United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978) (counsel’s unnecessary introduc-
seeks to rid the criminal courts of incompetent defense attorneys. Young lawyers often begin their careers representing criminal defendants; other more experienced lawyers take dozens of cases at a time; a few lawyers simply lack the ability to present a proper defense. Meanwhile, the civil courts have protected these defense attorneys from private actions brought by dissatisfied defendants, and the professional bar has proven unwilling to entertain disciplinary proceedings against them. Consequently, the reform of counsel's prior convictions into a trial in which defendant did not testify constituted ineffective assistance). The different labels attached to this strict competency test have caused some confusion over whether "reasonable" implies something different than "normal." After all, substitution of the word "reasonable" in place of the word "normal" suggests that the court has avoided a malpractice standard. See, e.g., Restatement (Second) of Torts § 299A (1965) ("skill and knowledge normally possessed by members of that profession"). Actually, the Supreme Court in McMann v. Richardson, 397 U.S. 759 (1970), described "reasonable" competence by alluding to the "range of competence demanded of attorneys in criminal cases." Id. at 770-71.

42. The reform of the competency test left a couple of unanswered questions in the courts of appeals. Both problems threatened to develop "reasonable" competency into a double standard. The courts resolved most of the arguments in favor of a single constitutional standard. Although McMann adopted the "reasonably competent" test in a habeas corpus case, some doubt lingered as to whether defendant should show a greater violation of effective assistance in collateral attack than on direct appeal. See, e.g., Garton v. Swenson, 497 F.2d 1137, 1139 n.4 (8th Cir. 1974). Recent cases have not pursued this distinction. See, e.g., Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978). Nevertheless, the distinction survives in joint representation cases. Compare Holloway v. Arkansas, 435 U.S. 475 (1978) (direct attack: defendant need not show that a conflict of interest actually affected counsel's representation), with Cuyler v. Sullivan, 446 U.S. 335 (1980) (collateral attack: defendant must show that a conflict of interest actually affected counsel's representation).

43. See, e.g., Bazelon, supra note 21; Bines, Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus, 59 Va. L. Rev. 927 (1973); Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 Nw. L. Rev. 289 (1964).

44. See, e.g., United States v. Cariola, 323 F.2d 180 (3d Cir. 1963) (counsel corroborated defendant's contention that counsel's inexperience evoked an improper guilty plea).

45. See, e.g., Coles v. Peyton, 389 F.2d 224 (4th Cir.), cert. denied, 393 U.S. 849 (1968) (court-appointed public defender, burdened with a heavy schedule, failed to prepare adequately for trial).

46. See, e.g., DeCoster III, 624 F.2d at 264 (Bazelon, J., dissenting) (counsel's numerous errors described as "slovenly, indifferent representation").


sel's competence has fallen upon the criminal courts themselves. "Reasonable competence" represents their response.

This language merits comparison with other well-known measures of counsel's conduct. According to the ABA Code of Professional Responsibility, a "lawyer should represent a client competently." 49 Unfortunately, a constitutional competency test based on the Code's general statement would not provide a judge with any guidelines for the defense of criminal cases. 50 The ABA Standards Relating to the Prosecution Function and the Defense Function remedy this problem with a list of duties owed by counsel; for example, client conferences, pre-trial motions, and preparatory investigations. 51 But a constitutional test based on the Standards' specific duties would thrust a judge into an active role in the defense of criminal cases. 52 Finally, a tort standard of counsel's conduct exists: a reasonably prudent lawyer should possess the care, skill, and knowledge attributed to members of the profession similarly situated. 53 Although "reasonable competence" comes very close to this approach, no circuit has actually adopted a tort standard. 54 Perhaps the courts' caution stems from a desire to avoid retrial for mere negligence. 55 At any rate, "reasonable competence" demonstrates the judges' determination to improve the performance of attorneys representing criminal defendants in their courts.

Although the District of Columbia Circuit has adopted the majority position on competence, that court has adopted the minority position on prejudice—only one other circuit places the burden on the government rather than on the defendant. 56 The disagreement indicates different responses to the fact that counsel's failure to prepare for trial rarely makes its way into the trial record. Neither the defendant nor the government can easily show that some act which never took place prejudiced or did not prejudice the verdict. Consequently, most of the circuits believe that the absence of a written record invites a "disappointed prisoner" to use his "imagination" to create an "opportunity to try his former lawyer." 57 However, the District of Columbia Circuit has expressed the view that actual prejudice may well escape the record as an inev-

49. ABA Code of Professional Responsibility, Canon 6 (1980).
52. See, e.g., DeCoster III, 624 F.2d at 208 ("[a categorical approach] would open the door to a fundamental reordering of the adversary system into a system more inquisitorial in nature").
54. The two circuits which adopted the "normal competence" test came closer to a tort standard than the other circuits, comparing their approach to a professional standard of care. Marzullo v. Maryland, 561 F.2d 540, 544 n.9 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978); Moore v. United States, 432 F.2d 730, 737 & n.27 (3d Cir. 1970). See notes 39-40 and accompanying text supra.
56. See Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968) (counsel failed to interview the rape victim, her male companion, and a disinterested witness; failed to advise defendant of the elements of the crime, including penetration; and failed to discover the victim's medical report showing the absence of spermatozoa).
itable result of counsel’s incompetence. By promoting the goal of improved trial representation, the minority position actually takes the better view. A brief return to the interaction of competence and prejudice demonstrates just how governmental disproof of prejudice helps to increase a trial lawyer’s “effectiveness.”

If counsel’s performance passes muster under the “reasonable competence” standard, then the defendant has received “effective” assistance; if counsel’s performance has not passed muster, and if that performance has prejudiced the verdict, then the defendant has received “ineffective” assistance. But between these two extremes lies a void where the defendant receives “not ineffective” assistance of counsel. Here, the defendant has not received “effective” assistance, because he has not received reasonably competent representation; however, the defendant has not received “ineffective” assistance, because counsel’s incompetence has not prejudiced the guilty verdict.

The creatures of this void, the “not ineffective” trial lawyers, avoid detection when courts allocate proof of prejudice to the defendant. They risk detection when courts allocate disproof of prejudice to the government. Consider what happens when the defendant must show prejudice. By assuming without deciding that counsel’s conduct violated the “reasonable competence” standard, the courts can proceed directly to the issue of prejudice, dispensing with the issue of competence altogether. Consequently, a slovenly trial attorney has no reason to improve his incompetent representation as long as that representation does not deteriorate to the point of prejudicing the verdict. But consider what happens when the government must show the lack of prejudice. This burden does not arise until the defendant has clearly established counsel’s violation of the “reasonable competence” standard. Consequently, a slovenly trial attorney must improve his incompetent representation in order to escape public condemnation, regardless of whether that representation prejudiced the verdict. In short, the defendant’s assumption of the burden of proving prejudice hinders the competency test, while the government’s assumption of the burden of disproving prejudice saves the competency test.

“Reasonable competence” plus governmental proof of “lack of prejudice” should vastly improve criminal trial representation. Nevertheless, this double-barreled approach cannot completely solve the problem: mere negligence may escape the competency test, and disproof of prejudice by the government may falsely exonerate a poor performance. The best possible meaning of sixth amendment “effectiveness” ultimately depends on those con-

58. DeCoster 1, 487 F.2d at 1204.
59. Gregory Bateson has demonstrated the significance of the double negative in psychology, anthropology, and biology. G. Bateson, Steps to an Ecology of Mind (1972).
60. See United States v. Wood, 628 F.2d 554, 559-60 (D.C. Cir. 1980) (en banc) (the appellate court did not reach the issue of counsel’s incompetence, because that court felt that no prejudice resulted from counsel’s conduct assuming such incompetence).
61. See United States v. Hinton, 631 F.2d 769 (D.C. Cir. 1980). The Hinton decision does not signal the end of the “effectiveness” controversy, given the differences which divide the court.
scientious trial attorneys who truly want to “master” their profession.\footnote{L. Carroll, supra note 1. Of course, this “looking glass” appeal to professionalism addresses Holmes’ “good [man] . . . who finds his reasons for conduct . . . in the . . . sanctions of conscience,” rather than Holmes’ proverbial “bad man . . . who cares only for the . . . knowledge . . . of what courts will do in fact.” Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459, 461 (1897).}