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Dole Claim Held to Accrue on Date Judgment Is Paid by Party Seeking Contribution

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Roseman on the ground of forum non conveniens illustrates the way in which administrative benefits may be derived from use of the doctrine while preserving the "interests of justice."

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ARTICLE 14—CONTRIBUTION

Dole *claim held to accrue on date judgment is paid by party seeking contribution*

Article 14 of the CPLR, the codification of the seminal *Dole v. Dow Chemical Co.*[87] decision, authorizes a claim for contribution among joint tortfeasors in proportion to their relative culpability.[88] Although the legislation describes the procedure for claiming contribution,[89] it does not expressly define when the cause of action accrues.[90] One line of cases in New York has held that the *Dole* cause of action ripens on the date the claimant actually pays the judgment for which contribution is sought.[91] A second view has main-

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[87] 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 185 (1972).

[88] CPLR 1401-1402. The *Dole* Court stated:

> [W]here a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party. To reach that end there must necessarily be an apportionment of responsibility between those parties.

30 N.Y.2d at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

This reasoning has been codified in CPLR 1401, which states, in pertinent part, that "two or more persons who are subject to liability for damages for the same personal injury . . . or wrongful death, may claim contribution among them . . . ," and in CPLR 1402, which provides that a tortfeasor is entitled to contribution for the amount paid in excess of his "equitable share . . . determined in accordance with the relative culpability of each person liable for contribution."

[89] CPLR 1403 provides that "[a] cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third-party claim in a pending action."

[90] The accrual issue has particular significance when the claimant is seeking contribution from the state. In such cases, the claimant cannot bring the state into the primary action, since the state can only be sued in the Court of Claims. Breen v. Mortgage Comm'n, 285 N.Y. 425, 429, 35 N.E.2d 25, 26 (1941); *see In re* Dormitory Auth., 18 N.Y.2d 114, 218 N.E.2d 693, 271 N.Y.S.2d 983 (1966). Instead, the claimant must bring a separate action for contribution in the Court of Claims after complying with the jurisdictional filing and notice requirements of the Court of Claims Act. N.Y. CT. CL. ACT § 8 (McKinney 1963); *see* McCorkle v. Degl, 74 Misc. 2d 611, 344 N.Y.S.2d 802 (Sup. Ct. Kings County 1973); 2A WK&M ¶ 1403.05. Since the limitations period for filing an action in the Court of Claims is unusually abbreviated, *see* note 101 *infra*, the question when the cause of action accrues becomes extremely important.

[91] *See, e.g.*, Blum v. Good Humor Corp., 57 App. Div. 2d 911, 394 N.Y.S.2d 894 (2d Dep't 1977); Bay Ridge Air Rights, Inc. v. State, 57 App. Div. 2d 237, 394 N.Y.S.2d 464 (3d Dep't

tained that the claim accrues upon entry of judgment,[92] while a third line of decisions has suggested that the claim arises on the date of the underlying tortious act.[93] Recently, in *Bay Ridge Air Rights, Inc. v. State*,[94] the Court of Appeals resolved this conflict,

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1977), *aff'd*, 44 N.Y.2d 49, 375 N.E.2d 29, 404 N.Y.S.2d 73 (1978); Berlin & Jones, Inc. v. State, 85 Misc. 2d 970, 381 N.Y.S.2d 778 (Ct. Cl. 1976); Adams v. Lindsay, 77 Misc. 2d 824, 354 N.Y.S.2d 356 (Sup. Ct. Monroe County 1974), *discussed in The Survey*, 49 ST. JOHN'S L. REV. 170, 207 (1974). Many commentators have also endorsed the use of the date-of-payment rule. *See, e.g.*, CPLR 1402, commentary at 17 (McKinney Supp. 1977-1978); CPLR 3019, commentary at 21 (McKinney Supp. 1977-1978); 2A WK&M ¶¶ 1401.19, 1403.03. *But see* Occhialino, *Contribution*, NINETEENTH ANN. REP. N.Y. JUD. CONFERENCE 217 (1974) [hereinafter cited as *Contribution*].

The date-of-payment rule is derived from the accrual rule traditionally applied to common law indemnity claims. In Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 67 N.E. 439 (1903), the Court of Appeals approved the fiction of an implied contract of indemnity in order to permit a tortfeasor whose negligence was "passive" to recover from an "active" joint tortfeasor. In adopting the quasi-contract approach, the Court noted the distinction between indemnity protecting against liability and indemnity protecting only against loss. The former requires the indemnitor to respond as soon as a liability is incurred, while the latter creates no obligation to indemnify until actual loss is suffered. 175 N.Y. at 218, 67 N.E. at 440; *see* Brown v. Mechanics & Traders' Bank, 43 App. Div. 173, 59 N.Y.S. 354 (1st Dep't 1899). The *Dunn* Court concluded that an implied contract of indemnity is analogous to an express indemnity contract for "loss or damage." 175 N.Y. at 218, 67 N.E. at 440. Other courts, extrapolating from this reasoning, concluded that a cause of action for indemnity accrued only upon payment of the awarded damages. *See* Musco v. Conte, 22 App. Div. 2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964); Satta v. City of New York, 272 App. Div. 782, 70 N.Y.S.2d 575 (2d Dep't 1947).

The availability of certain pre-judgment procedural devices for asserting *Dole* claims, however, seems inconsistent with this "traditional analysis." Despite the apparent contradiction, the courts generally have taken a pragmatic position, allowing assertion of claims for contribution prior to the theoretical date of accrual, in the interest of consolidating actions and promoting judicial economy. *See* Taca Int'l Airlines, S.A. v. Rolls Royce of England, Ltd., 47 Misc. 2d 771, 263 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1965). *See generally Contribution, supra*, at 230.

[92] *See, e.g.*, O'Sullivan v. State, 83 Misc. 2d 426, 371 N.Y.S.2d 766 (Ct. Cl. 1975); Winn v. Peter Bratti Assocs., 80 Misc. 2d 756, 364 N.Y.S.2d 137 (Sup. Ct. Albany County 1975); Zillman v. Meadowbrook Hosp. Co., 73 Misc. 2d 726, 342 N.Y.S.2d 302 (Sup. Ct. Nassau County 1973), *rev'd on other grounds*, 45 App. Div. 2d 267, 358 N.Y.S.2d 466 (2d Dep't 1974). In adopting the date-of-judgment approach, the *O'Sullivan* court was persuaded by the language of CPLR 5011, which provides that "[a] judgment is the determination of the rights of the parties in an action." CPLR 5011; 83 Misc. 2d at 433, 371 N.Y.S.2d at 774. Reasoning that the obligation to pay damages does not arise until a judgment is entered, the court rejected argument that the rendition of a verdict should mark the accrual of a *Dole* claim. *Id.* at 434, 371 N.Y.S.2d at 774 (citing CPLR 5011). The *O'Sullivan* court also pointed out that the date-of-judgment rule is preferable to the date-of-payment rule because it results in less delay and therefore is less prejudicial to the party from whom contribution is sought. 83 Misc. 2d at 438-39, 371 N.Y.S.2d at 778.

[93] *See, e.g.*, Bay Ridge Air Rights, Inc. v. State, 84 Misc. 2d 801, 376 N.Y.S.2d 895 (Ct. Cl. 1975), *modified*, 57 App. Div. 2d 237, 394 N.Y.S.2d 464 (3d Dep't 1977), *aff'd*, 44 N.Y.2d 49, 375 N.E.2d 29, 404 N.Y.S.2d 73 (1978); Leibowitz v. State, 82 Misc. 2d 424, 371 N.Y.S.2d 110 (Ct. Cl. 1975).

[94] 44 N.Y.2d 49, 375 N.E.2d 29, 404 N.Y.S.2d 73 (1978), *aff'g* 57 App. Div. 2d 237, 394 N.Y.S.2d 464 (3d Dep't 1977), *modifying* 84 Misc. 2d 801, 376 N.Y.S.2d 895 (Ct. Cl. 1975).

holding that a *Dole* claim accrues when the judgment is paid by the party seeking contribution.[95]

The claimant in *Bay Ridge* was sued in federal court for the allegedly negligent hiring of a building custodian who had killed one of the building's tenants.[96] The custodian had been released from a state psychiatric facility shortly before the incident.[97] Seeking contribution from the state in the federal action, Bay Ridge filed a third-party impleader complaint,[98] which ultimately was dismissed for lack of jurisdiction.[99] Following the dismissal, almost 3 years after the killing, Bay Ridge instituted a separate action in the New York Court of Claims by serving the state attorney general with both a notice of intention to file a claim and a proposed claim for indemnity and apportionment from the State.[100] Holding that claimant's *Dole* cause of action accrued on the date of the killing, the Court of Claims dismissed the action for failure to comply with the filing requirements of the Court of Claims Act.[101] The Appellate Division,

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[95] 44 N.Y.2d at 53, 375 N.E.2d at 30, 404 N.Y.S.2d at 74.

[96] *Id.* The killing occurred on July 2, 1972, and the victim's estate commenced a wrongful death action against Bay Ridge, the building owner, on April 1, 1974.

[97] *Id.*

[98] *Id.* In its impleader complaint, Bay Ridge alleged that the custodian was released prematurely from the state facility. Before serving its complaint, Bay Ridge notified the state of its plan to assert a claim for contribution should a judgment be entered against it. *Id.*

[99] The eleventh amendment has been held to immunize the states from suits brought in the federal courts by their own citizens. Hans v. Louisiana, 134 U.S. 1,21 (1890); *see* Edelman v. Jordan, 415 U.S. 651, 662-63 (1974). Presumably, it was on this basis that the federal district court dismissed Bay Ridge's impleader complaint.

[100] 44 N.Y.2d at 53, 375 N.E.2d at 30, 404 N.Y.S.2d at 74. Notice of intention to file a claim and the proposed claim were served on June 3, 1975, approximately 3 years after the killing and 2 months after the dismissal of claimant's impleader complaint. *Id.*

[101] *Id.* In granting the state's motion to dismiss, the Court of Claims held that the 6-month filing limitation in § 10(4) of the Court of Claims Act was applicable. Bay Ridge Air Rights, Inc. v. State, 84 Misc. 2d 801, 803 n., 376 N.Y.S.2d 895, 897 n. (Ct. Cl. 1975). *See* N.Y. CT. CL. ACT § 10(4) (McKinney 1963). Section 10(4), which governs contract actions against the state, generally has been applied in actions for contribution. The courts have reasoned that, because a *Dole* claim is essentially one for partial or full indemnity derived from an implied-in-law contract, *see* note 91 *supra*, the contract limitations period of § 10(4) controls. *See, e.g.*, Bay Ridge Air Rights, Inc. v. State, 57 App. Div. 2d 237, 238, 394 N.Y.S.2d 464, 465 (3d Dep't 1977), *aff'd*, 44 N.Y.2d 49, 375 N.E.2d 29, 404 N.Y.S.2d 73 (1978); Gates-Chili Cent. School Dist. v. State, 55 App. Div. 2d 44, 46, 389 N.Y.S.2d 716, 718 (4th Dep't 1976); Berlin & Jones, Inc. v. State, 85 Misc. 2d 970, 973, 381 N.Y.S.2d 778, 780 (Ct. Cl. 1976); Leibowitz v. State, 82 Misc. 2d 424, 429, 371 N.Y.S.2d 110, 114 (Ct. Cl. 1975); *cf.* O'Sullivan v. State, 83 Misc. 2d 426, 371 N.Y.S.2d 766 (Ct. Cl. 1975), *discussed in The Survey*, 50 ST. JOHN'S L. REV. 771, 801 (1976) (*Dole* claim is within "catch all" provision of subdivision 4). Similarly, CPLR 213(2), which provides that an action upon a contract shall be commenced within 6 years of accrual, has been held to govern *Dole* claims which are asserted in a separate action. *See, e.g.*, Blum v. Good Humor Corp., 57 App. Div. 2d 911, 911, 394 N.Y.S.2d 894, 896 (2d Dep't 1977). Pre-*Dole* decisions also construed actions for indemnification or contribution as quasi-contractual in nature and therefore governed by the period of limitations for

Third Department, affirmed the dismissal on the ground that the suit was premature since judgment had neither been entered nor paid.[102]

On appeal, a unanimous Court of Appeals affirmed, holding that a *Dole* claim does not accrue until payment of the judgment by the claimant.[103] Chief Judge Breitel, writing for the Court, observed that, while common law claims for indemnity classically were deemed to accrue on the date the claimant discharged his liability to the injured party, disagreement persisted as to when *Dole* contribution claims ripen.[104] While acknowledging that the "evil attendant upon a delayed accrual date [is] substantial,"[105] the Court nonetheless was unable to discern anything in either *Dole* or article 14 to justify disparate treatment of *Dole* claims for apportionment and traditional claims for indemnity.[106] Absent legislative authorization, the Court concluded,[107] it was not empowered "to cut

contract actions. *See, e.g.*, Musco v. Conte, 22 App. Div. 2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964); Taca Int'l Airlines, S.A. v. Rolls Royce of England, Ltd., 47 Misc. 2d 771, 773, 263 N.Y.S.2d 269, 272 (Sup. Ct. N.Y. County 1965); Hansen v. City of New York, 43 Misc. 2d 1048, 252 N.Y.S.2d 695 (Sup. Ct. Kings County 1964).

[102] 57 App. Div. 2d at 240, 394 N.Y.S.2d at 466. Bay Ridge's claim was dismissed without prejudice to the filing of a new claim should one accrue. *Id.*

[103] 44 N.Y.2d at 53, 375 N.E.2d at 30, 404 N.Y.S.2d at 74.

[104] *Id.* at 53-54, 375 N.E.2d at 31, 404 N.Y.S.2d at 75; *see* notes 91-93 *supra.*

[105] *Id.* at 55, 375 N.E.2d at 31, 404 N.Y.S.2d at 75. While the date-of-payment accrual rule generally placed the impleaded defendant at a significant disadvantage, the *Bay Ridge* Court observed that "[i]n this particular case, the State [was] not hopelessly disadvantaged," because the claimant had notified the state attorney general of its intention to seek apportionment in December 1974. The claimant's unsuccessful attempt to implead the state in the underlying federal action also served to give notice of potential liability. *Id.*, 375 N.E.2d at 32, 404 N.Y.S.2d at 76.

[106] *Id.*, 375 N.E.2d at 31, 404 N.Y.S.2d at 75. The Court rejected, without explanation, the state's contention that the contribution claim accrued upon commencement of the underlying tort action. It also declined to adopt a date-of-injury rule, observing that, under this approach, the injured party's failure to commence a tort action within the short Court of Claims limitations period, *see* note 101 *supra,* could foreclose any claim the defendant might have for contribution from the state. 44 N.Y.2d at 53, 375 N.E.2d at 31, 404 N.Y.S.2d at 75. Moreover, in the Court's view, the date-of-injury rule, which would deem the apportionment claim to accrue before entry or payment of judgment, is inconsistent with "traditional conceptual analysis of accruals of causes of action [for indemnity]." *Id.* at 55, 375 N.E.2d at 31, 404 N.Y.S.2d at 75.

[107] 44 N.Y.2d at 55-56, 375 N.E.2d at 31-32, 404 N.Y.S.2d at 75-76. In deferring to the legislature, the *Bay Ridge* Court joined numerous other courts that have suggested a legislative solution to the question of when a *Dole* claim accrues. *See* Berlin & Jones, Inc. v. State, 85 Misc. 2d 970, 977, 381 N.Y.S.2d 778, 783 (Ct. Cl. 1976); O'Sullivan v. State, 83 Misc. 2d 426, 437, 371 N.Y.S.2d 766, 777 (Ct. Cl. 1975); Leibowitz v. State, 82 Misc. 2d 424, 429, 371 N.Y.S.2d 110, 114 (Ct. Cl. 1975). With respect to claims for contribution against the state, the *Bay Ridge* Court offered two alternative approaches to resolving the accrual imbroglio. It suggested that an earlier accrual date could be established by statute. The Court was more supportive, however, of legislation which would authorize the claimant to implead the state in the underlying action. 44 N.Y.2d at 56, 375 N.E.2d at 32, 404 N.Y.S.2d at 76.

off abruptly a cause of action good until then under conventional law."[108]

While the *Bay Ridge* Court's resolution of the date of accrual controversy comports with longstanding precedent,[109] it is submitted that the Court's uncritical adherence to this authority is ill-advised in view of the policies underlying the statutory changes in third-party practice prompted by the *Dole* decision. Article 14 was intended, in part, to encourage trial of multi-party tort litigation in a single action.[110] The *Bay Ridge* decision, which sanctions maintenance of separate *Dole* claims years after the original tortious act,[111] is clearly not supportive of that aim. Moreover, it is difficult to reconcile the Court's continued endorsement of the date-of-payment accrual, which is based upon the concept of indemnity against loss,[112] with the *Dole* Court's holding that liability, not loss, is to be apportioned among tortfeasors.[113] Since indemnity princi-

[108] 44 N.Y.2d at 55, 375 N.E.2d at 31, 404 N.Y.S.2d at 76. Since Bay Ridge's *Dole* apportionment claim had not yet accrued, the Court did not reach the issue of which Court of Claims Act limitations period would have been applicable. *Id.* at 56, 375 N.E.2d at 32, 404 N.Y.S.2d at 76. *See also* note 101 *supra.*

[109] *See* note 91 *supra.*

[110] *See* Addiego v. Interboro Gen. Hosp., 81 Misc. 2d 96, 365 N.Y.S.2d 718 (Sup. Ct. Kings County 1975); Meckley v. Hertz Corp., 88 Misc. 2d 605, 388 N.Y.S.2d 555 (N.Y.C. Civ. Ct. N.Y. County 1976). *See also* TWENTIETH ANN. REP. N.Y. JUD. CONFERENCE 221 (1975).

[111] In O'Sullivan v. State, 83 Misc. 2d 426, 371 N.Y.S.2d 766 (Ct. Cl. 1975), the court observed that adherence to the date-of-payment rule and the attendant possibilities of "motions addressed to judgments, appeals and cross appeals therefrom . . . would result in . . . delay . . . so overbearing in prejudice that it can neither be countenanced nor permitted." *Id.* at 438-39, 371 N.Y.S.2d at 778. The practical effect of such delay may be to give considerable tactical advantage to a third-party plaintiff who delays bringing a separate action for contribution until after witnesses disappear or memories dim and a reasonable opportunity to ascertain the facts surrounding the claim has passed. In fact, the jurisdictional filing requirements of the Court of Claims Act are designed to avoid such delays and to give the state an opportunity to promptly and thoroughly investigate claims. *See* Atlantic Mut. Ins. Co. v. State, 80 Misc. 2d 454, 363 N.Y.S.2d 186 (Ct. Cl. 1975), *aff'd*, 50 App. Div. 2d 356, 378 N.Y.S.2d 95 (3d Dep't 1976), *aff'd mem.*, 41 N.Y.2d 884, 362 N.E.2d 624, 393 N.Y.S.2d 994 (1977); Wasserberger v. State, 6 Misc. 2d 678, 164 N.Y.S.2d 877 (Ct. Cl. 1957). *See also* Williams v. State, 77 Misc. 2d 396, 353 N.Y.S.2d 691 (Ct. Cl. 1974); Gonzales v. State, 69 Misc. 2d 432, 330 N.Y.S.2d 437 (Ct. Cl. 1972). The consequences of delay cannot be minimized in view of the magnitude of annual awards in the Court of Claims. *See* [1976] N.Y. Dep't R. 49 ($19,674,296.73); [1975] N.Y. Dep't R. 48 ($38,397,002.22). In view of the *Bay Ridge* decision, however, it appears that the only remedy a third-party defendant would have where assertion of the *Dole* claim has been inordinately delayed is the interposition of a laches defense. Recently, such a defense was recognized in Blum v. Good Humor Corp., 57 App. Div. 2d 911, 911-12, 394 N.Y.S.2d 894, 896 (2d Dep't 1977), where a separate action for apportionment was commenced many years after the original tortious act and 13 months after payment of the judgment awarded in the underlying action. *But see* Musco v. Conte, 22 App. Div. 2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964).

[112] *See* note 107 *supra.*

[113] *See* note 91 *supra.*

ples underlying the date-of-payment rule are actually nothing more than judicially created fictions,[114] the *Bay Ridge* Court's deference to the legislature[115] and concomitant reluctance to repudiate this rule are difficult to justify.[116]

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CRIMINAL PROCEDURE LAW

Representation by layman held not to deprive accused of right to counsel

The right to counsel embodied in the sixth amendment[117] has been interpreted to include the right to effective representation by counsel at trial.[118] While it is clear that incompetent advocacy by a

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[114] *See* note 91 *supra.*

[115] 30 N.Y.2d at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

[116] Professor Occhialino's recognition of the conflict between post-*Dole* third-party practice principles and a date-of-payment accrual led him to propose that *Dole* claims be deemed to accrue when the defendant in the underlying action is served with process. *Contribution, supra* note 91, at 231. This proposal has several practical advantages. For example, all claims arising from a single incident would more likely be tried in one proceeding, thereby minimizing the impact on already crowded dockets and simplifying the apportionment of fault among the parties. *Id.* Where the claimant seeks contribution from the state, of course, adoption of a date-of-service rule would alleviate much of the prejudice to the state resulting from adherence to date-of-payment accrual. *See* note 111 *supra.* Moreover, the tortfeasor served with process would not be placed at a disadvantage, since he will generally be aware at the time of service of any contribution rights he might have against joint tortfeasors. *Contribution, supra* note 91, at 231. Professor Occhialino also suggested a specific 1-year limitation period for *Dole* claims, but acknowledged the "element of arbitrariness" inherent in the choice of time period. *Id.* at 233.

[117] U.S. CONST. amend. VI. As early as 1932, the Supreme Court characterized representation by counsel in capital cases as "vital and imperative." Powell v. Alabama, 287 U.S. 45, 71 (1932). In Betts v. Brady, 316 U.S. 455 (1942), however, the Court stated flatly that "appointment of counsel is not a fundamental right, essential to a fair trial" in all criminal cases. *Id.* at 471. In Gideon v. Wainwright, 372 U.S. 335, 344 (1963) the Court expressly overruled *Betts,* holding that the sixth amendment right to counsel was applicable to state felony proceedings through the fourteenth amendment. Thereafter, the Court extended the right to counsel to all criminal prosecutions involving a potential deprivation of liberty. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972). For a critical analysis of the results of these decisions, see Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811 (1976).

[118] McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970); Reece v. Georgia, 350 U.S. 85, 90 (1955); Powell v. Alabama, 287 U.S. 45, 71 (1932); *see* People v. LaBree, 34 N.Y.2d 257, 313 N.E.2d 730, 357 N.Y.S.2d 412 (1974); People v. Bennett, 29 N.Y.2d 462, 466, 280 N.E.2d 637, 639, 329 N.Y.S.2d 801, 804 (1972). The Supreme Court has declined to establish specific standards for determining whether "effective representation" has been provided. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970). In New York, the courts have utilized the "mockery of justice" test articulated by the Court of Appeals for the District of Columbia Circuit in Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied,* 325 U.S. 889 (1945). Under this test, the defendant has the burden of showing that his attorney made glaring errors that