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CUMULATIVE DIGEST

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§13-1
Right to Counsel

§13-1(a)
Generally

Maples v. Thomas, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2012) (No. 10-63, 1/18/12)

Because an attorney is the agent of the client, the latter bears the risk of negligent conduct by counsel. Thus, for purposes of the "cause" and "prejudice" test concerning a federal *habeas* court's ability to consider issues which were procedurally defaulted in State court, negligence by post-conviction counsel does not usually qualify as "cause."

An exception to the general rule applies, however, where counsel abandons the defendant without notifying him that he is no longer being represented. Furthermore, no principal-agent relationship exists once an attorney severs his relationship with a client. Thus, a defendant cannot be bound by a failure to act by an attorney who does not purport to represent him. "[C]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." (Quoting concurring opinion of Justice Alito, **Holland v. Florida**, 560 U.S. 2549 (2010)).

Where the defendant had been represented by three attorneys, two of who had abandoned the case without notifying defendant or moving to withdraw and a third whose role was solely a formality to allow out-of-state *pro bono* counsel to appear in State courts, there was no attorney-client relationship by which defendant would be held responsible for counsel's failure to comply with the time requirements for filing a notice of appeal.

In re Denzel W. & Smith, 237 Ill.2d 285, 930 N.E.2d 974 (2010)

1. Under Supreme Court Rule 711, a recent law graduate or senior law student who has completed three-fifths of the required coursework and who is in good academic standing may perform legal services under the supervision of a member of the Illinois Bar. Rule 711 requires that the written consent of the client be filed and brought to the attention of the trial judge.

In criminal cases in which imprisonment is an authorized penalty, a 711 student may participate in pretrial, trial and post-trial proceedings as an assistant of the supervising member of the bar, who must be present and who is responsible for conducting the proceedings. In civil cases and in criminal cases in which imprisonment is not a potential penalty, the 711 student must work under the supervision of a licensed attorney, who need not be present during the proceeding.

Rule 711 is intended to permit law students to gain practical courtroom experience under the supervision of a licensed attorney. A 711 student must adhere to the same rules of legal procedure, ethics, and practice as a licensed attorney.

2. Under the plain language of Rule 711, the client's written consent must be obtained before a law student may provide legal services. A student who fails to comply with the requirements of Rule 711, including obtaining the written consent of the client, is not "counsel" for Sixth Amendment purposes. However, because the constitutional right to counsel exists only where imprisonment is a potential penalty, and Rule 711 specifically requires that in such

cases the licensed attorney must be present and actively supervising the student's actions, the defendant is not denied "counsel" merely because a student did not satisfy the consent requirement.

The supervising attorney does not satisfy his or her obligations under Rule 711 merely by being physically present. Under **Strickland**, the defendant may establish ineffective assistance of counsel by showing that the conduct of the supervising attorney was objectively unreasonable and caused prejudice. The court rejected defendant's argument that **Strickland** is inapplicable where a law student appeared without complying with Rule 711.

3. The court rejected defendant's argument that consent to participation by a 711 student amounts to a partial waiver of counsel, and that the failure to obtain the client's consent is therefore an independent constitutional error. Because the right to counsel is afforded by the supervising attorney, rather than the law student, the defendant does not waive counsel by consenting to the student's participation.

4. In **Denzel W.**, the trial court's actions were "troubling" because the judge refused to allow the supervising attorney to conduct redirect examination once direct examination had been conducted by the 711 student. The court stressed that trial courts before whom 711 law students appear must "be particularly mindful of the supervising attorney's obligation to ensure that counsel is effective." **Denzel W.** was remanded for the Appellate Court to determine whether the trial court's actions, along with respondent's other claimed errors, violated the right to counsel.

5. Because defendant Smith argued only that a *per se* rule should be applied when a 711 student fails to obtain the client's consent, and did not argue that counsel was ineffective in his case, the court affirmed the lower court's finding that defense counsel was not ineffective.

(Defendant Denzel W. was represented by Assistant Defender Caroline Bourland, Chicago.)

(Defendant Smith was represented by Assistant Defender Brian McNeil, Chicago.)

People ex rel. Glasgow v. Kinney, 2012 IL 113197 (No. 113197, 5/24/12)

In **Scott v. Illinois**, 440 U.S. 367 (1979), the United States Supreme Court held that if no prison sentence is imposed, the appointment of counsel is not constitutionally required for a defendant charged with a misdemeanor. One year after **Scott**, a majority of the court held that a prior uncounseled misdemeanor conviction, although constitutional under **Scott** because no prison term was imposed, cannot be used to enhance a subsequent misdemeanor conviction to a felony. **Baldasar v. Illinois**, 446 U.S. 222 (1980).

In **People v. Finley**, 209 Ill. App. 3d 968, 568 N.E.2d 412 (3rd Dist. 1991), the Illinois Appellate Court applied **Baldasar** to find that a prior uncounseled misdemeanor conviction may not be used to enhance a subsequent misdemeanor to a felony. In **Nichols v. U.S.**, 511 U.S. 738 (1994), however, the United States Supreme Court overruled **Baldasar** and held that an uncounseled conviction that is valid under **Scott** may be relied upon to enhance the sentence for a subsequent offense.

Here, the Illinois Supreme Court concluded that because **Finley** was based solely on **Baldasar**, which was subsequently expressly overruled by the United States Supreme Court, **Finley** should be overturned as well. Thus, an uncounseled misdemeanor conviction which is valid under **Scott** because no prison term was imposed may be used to enhance the punishment for a subsequent conviction.

Where the trial court erroneously believed that it was compelled by **Finley** to exclude defendant's prior uncounseled misdemeanor DUI conviction from being used to enhance a

subsequent sentence to a non-probationable Class 2 felony, the court granted *mandamus* and ordered the trial court to sentence the defendant in accordance with the enhanced sentencing law.

People v. Santiago, ___ Ill.2d ___, ___ N.E.2d ___ (2010) (No. 107391, 3/18/10)

1. The version of Rule 4.2 of the Illinois Rules of Professional Conduct in effect at the time this case arose provided that unless certain exceptions applied, a lawyer who is representing a client "shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter." The court concluded that Rule 4.2 did not bar prosecutors from speaking with the defendant as part of a criminal investigation concerning injuries to the defendant's infant daughter, although an attorney had been appointed to represent the defendant on a petition for adjudication of wardship and motions for temporary custody which were based on the same facts as the criminal investigation.

The court concluded that the plain language of Rule 4.2 prohibits contact with a party represented by counsel if the communication deals with the "matter" on which the party is represented. Here, the criminal investigation did not concern the same "matter" and "subject of the representation" as the child protection case on which counsel had been appointed.

2. The court noted that after this case arose, Rule 4.2 was amended (eff. 1/1/10) to clarify that the Rule 4.2 applies to a prosecutor's communication with a represented citizen even where no formal charges have been filed.

People v. Vernon, 396 Ill.App.3d 145, 919 N.E.2d 966 (2d Dist. 2009)

1. The Sixth Amendment and statutory rights to counsel apply at all "critical stages" of the prosecution. A "critical stage" is one at which the substantial rights of the accused may be affected. A hearing on a motion to dismiss is a critical stage of the proceeding, because it places the defendant in a position where he or she is likely to make admissions. The court reached this conclusion despite the fact that the hearing in question occurred on remand after defendant's original conviction was reversed due to the absence of a jury waiver.

2. Where the trial court failed to advise defendant of his right to counsel, defendant proceeded without the assistance of counsel, and there was no valid waiver, reversal was required without any showing of prejudice. In such a situation, it is irrelevant whether the issue is analyzed under the constitutional right to counsel (which applies where a prison sentence of more than six months is imposed) or the statutory right to counsel (which applies except where the authorized sentence is only a fine).

Where defendant was charged with the misdemeanor offense of unlawful display of a martial arts device on Department of Natural Resources land (a Class B misdemeanor), and represented himself at a hearing on a pretrial motion to dismiss the charge after the trial court failed to give proper admonishments concerning the right to counsel, the conviction must be reversed and the cause remanded for a new trial.

3. Defendant did not waive the right to assert issues concerning the denial of counsel although he failed to raise the issues in his post-trial motion. "[W]e have some doubt that we can apply the forfeiture doctrine to a failure to admonish of the right to counsel."

Furthermore, the fact that defendant was represented by counsel at his second trial did not waive his claim that he had not been admonished of his right to counsel for the hearing on the motion to dismiss the charge, which occurred before counsel was appointed. It is the court's responsibility to give right to counsel admonishments, not the responsibility of counsel

to see that proper admonishments were given before counsel entered the case. In addition, the failure to give the admonitions required by Rule 401(a), and the associated deprivation of counsel where the defendant was not represented by counsel at a critical stage of the proceedings, "is a classic area of plain-error review."

The court also rejected the State's request to assume that the trial court properly admonished defendant of the right to counsel before his first trial. The court concluded that the record, including a bystander's report, appeared to be complete and did not show admonishments of the right to counsel.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Linda Johnson, Elgin.)

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§13-1(b)
Right to Counsel at Various Stages of Proceeding

In re Danielle J., 2013 IL 110810 (No. 110810, 12/19/13)

1. A minor is entitled to the effective assistance of counsel in juvenile delinquency proceedings. Whether counsel is effective in a delinquency proceeding is determined under the **Strickland** standard.

2. The minor was denied the effective assistance of counsel where her attorney misunderstand the law and failed to realize that a continuance for supervision may be ordered only before an adjudication of delinquency is made. The minor rejected the State's pretrial offer of a continuance under supervision, but counsel requested such a continuance after the minor had been adjudicated delinquent, at which point a continuance was statutorily precluded.

The court concluded that counsel's actions were objectively unreasonable because he misunderstood the applicable law, and that the minor was prejudiced because she lost the opportunity to obtain a continuance under supervision.

The court remanded the cause for a new first-phase hearing at which the minor is to be properly advised that if she proceeds to trial and is unsuccessful, a continuance of supervision will be subject to the State's Attorney's approval. The minor will then be in a position to make an informed and knowing decision whether to accept the pretrial offer of a continuance under supervision, if that offer is reinstated. If she elects to go to trial, the minor will be able to request a continuance under supervision before the adjudication is announced.

People v. Black, ___ Ill.App.3d ___, ___ N.E.2d ___ (5th Dist. 2010) (No. 5-08-0089, revised op. 6/8/11)

Defendant's convictions for multiple counts of possession and delivery of controlled substances were reversed because the trial court failed to comply with Supreme Court Rule 401 before allowing defendant to represent himself at the preliminary hearing.

1. The 6th Amendment right to the assistance of counsel attaches when judicial proceedings commence, whether by arraignment or preliminary hearing. A criminal defendant may represent himself only if he voluntarily, knowingly, and intelligently waives the right to counsel. Under Supreme Court Rule 401, a defendant may waive counsel on an offense punishable by imprisonment only if he is fully admonished of the nature of the charge, the

minimum and maximum sentences, that he has the right to counsel, and that counsel will be appointed if he is indigent.

Under **People v. Bolden**, 59 Ill.App.3d 32, 374 N.E.2d 1307 (1978), reversal is required where the trial court fails to give Rule 401 admonitions before permitting a defendant to waive counsel at a preliminary hearing. **Bolden** stated that counsel's role at a preliminary hearing is not merely to assist in a claim that probable cause is lacking; counsel may also assist the defendant in discovering the strengths and weaknesses of the State's case, preserving favorable evidence, and strengthening the defendant's claim for bail and for suppression of illegally seized evidence. Thus, the failure to provide counsel at a preliminary hearing is not cured because the defendant is represented by counsel at trial.

2. In two situations, substantial compliance with Rule 401 may be sufficient. First, reversal is unnecessary where the defendant was not prevented by the incomplete admonitions from giving a knowing and intelligent waiver. Second, reversal is unnecessary where the defendant's legal sophistication or knowledge excuses the lack of admonition. Although a defendant's criminal history may "[enhance] otherwise substantial compliance in the form and frequency of admonitions," the mere fact that a defendant has a prior record cannot justify a complete lack of admonitions under Rule 401.

Here, the trial court failed to give any Rule 401 admonishments before the preliminary hearing. Furthermore, letters which defendant sent before the hearing stating that he would represent himself and requesting research materials did not establish substantial compliance with Rule 401, because those letters showed no knowledge of the matters covered by Rule 401 or that defendant had a high degree of legal sophistication. Nor did defendant's attempt to represent himself at the preliminary hearing "indicate a high degree of legal sophistication"; in fact, at the close of the hearing the trial court appointed counsel for trial after agreeing with defendant's statement that his performance had been "not very good." Under these circumstances, there was no substantial compliance with Rule 401.

3. Because the right to counsel is fundamental, the court reached the failure to give Rule 401 admonitions as plain error.

(Defendant was represented by Assistant Defender Robert Burke, Mt. Vernon.)

People v. Coleman, 391 Ill.App.3d 963, 909 N.E.2d 952 (4th Dist. 2009)

Although defense counsel may not waive the defendant's right to be personally present during communication between the trial court and the jury, reversal is required only if prejudice resulted. The State carried its burden to prove that the error was harmless beyond a reasonable doubt where the jury's only request was for a definition of the term "abate," and after conferring with counsel the trial court responded with an accurate definition. The court stressed that defendant's presence would have had no substantial relationship to his opportunity to defend against the charge.

(Defendant was represented by Assistant Defender Allen Andrews, Supreme Court Unit.)

People v. Lewis, 2015 IL App (1st) 130171 (No. 1-13-0171, 5/12/15)

1. Defendant's Sixth Amendment right to counsel did not attach when he was arrested and arraigned for extradition proceedings in Nevada pursuant to an Illinois arrest warrant. Extradition is a summary ministerial procedure designed to return a fugitive to another State so he may stand trial. An extradition hearing does not commence adversary proceedings and is not a critical stage for Sixth Amendment purposes.

The Court rejected defendant's argument that the extradition hearing was a critical

stage because the State at that point committed itself to prosecution. Although defendant was brought before a judicial officer during the hearing, the State had not yet charged him with a crime. The only purpose of the hearing was to transfer defendant to Illinois pursuant to an arrest warrant. Because defendant was not formally charged until he was returned to Illinois and identified in a lineup, the extradition hearing did not entail adversary proceedings against him.

The denial of the motion to suppress lineup identification was affirmed.

2. Trial counsel's closing argument fell below an objective standard of reasonableness under the first prong of **Strickland** where he compared the reasonable doubt standard to a football game. Counsel first stated that in a civil case, with a preponderance of the evidence standard "they have to take it past the 50 yard line." But in a criminal case, "it's beyond a reasonable doubt, so it's beyond the 50 yard line. You have to take it to the opponents 20, the red zone. You got to get it in the red zone for beyond a reasonable doubt."

But defendant suffered no prejudice because there was overwhelming evidence of guilt and the jury instructions following closing arguments cured any potential confusion regarding the meaning of reasonable doubt.

Defendant's conviction was affirmed.

People v. Merriweather, 2013 IL App (1st) 113789 (1-11-3789, 10/15/13)

1. Defendant argued that because the 30-day period following a guilty plea is a "critical stage" of the criminal process during which the defendant has a constitutional right to counsel, the trial court must appoint counsel when a defendant who pleaded guilty files any *pro se* document requesting the appointment of counsel. Defendant entered a negotiated guilty plea, and subsequently filed a *pro se* notice of appeal without filing a motion to withdraw the plea. Supreme Court Rule 604(d) requires that a defendant who wishes to appeal from a negotiated guilty plea must first file a motion to withdraw the plea. Under Rule 604(d), if the defendant is indigent counsel is to be appointed upon the filing of the motion to withdraw the plea.

The court rejected the argument, noting that defendant was represented by counsel at both his guilty plea and sentencing and properly admonished by the trial court concerning the requirement that he move to withdraw his plea. The court stated that under Rule 604(d), filing a motion to withdraw a negotiated plea is a "condition precedent" to taking an appeal and triggers the right to counsel on appeal.

2. The court also rejected the argument that constitutional questions would be raised concerning Supreme Court Rule 606(a), which governs the perfection of appeals, unless counsel is appointed whenever a *pro se* guilty plea defendant files a notice of appeal. Defendant argued that Rule 606(a) permits a defendant to file a *pro se* notice of appeal without filing a motion to withdraw the plea, and that a defendant might unintentionally waive his right to an appeal because he does not have the assistance of counsel in filing a motion to withdraw the plea and perfecting the appeal.

The court acknowledged that Rule 606(a) permits a defendant to file a *pro se* notice of appeal. However, without fully explaining its holding, the court found that a guilty plea defendant who defaults on the Rule 604(d) requirement to file a motion to withdraw the plea is not constitutionally entitled to the appointment of counsel for appeal. The court also noted that although defendant's direct appeal must be dismissed due to the failure to comply with Rule 604(d), defendant is not barred from raising constitutional claims in post-conviction proceedings.

(Defendant was represented by Assistant Defender Ginger Leigh Odom, Chicago.)

People v. Stephens, 2012 IL App (1st) 110296 (No. 1-11-0296, 10/26/12)

The federal constitution provides no right to appointed counsel to obtain discretionary appellate review. Therefore, even if counsel's performance in preparing an application for discretionary review falls below minimum standards of performance, there is no deprivation of the constitutional right to counsel because there is no right to counsel in filing the application.

An appeal to the Illinois Supreme Court from the judgment of the Appellate Court by a petition for leave to appeal is generally a discretionary appeal and not one as of right. Therefore, defendant cannot complain that his counsel was ineffective in failing to preserve all of his claims in a petition asking the court for leave to appeal.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Vernon, 396 Ill.App.3d 145, 919 N.E.2d 966 (2d Dist. 2009)

1. The Sixth Amendment and statutory rights to counsel apply at all "critical stages" of the prosecution. A "critical stage" is one at which the substantial rights of the accused may be affected. A hearing on a motion to dismiss is a critical stage of the proceeding, because it places the defendant in a position where he or she is likely to make admissions. The court reached this conclusion despite the fact that the hearing in question occurred on remand after defendant's original conviction was reversed due to the absence of a jury waiver.

2. Where the trial court failed to advise defendant of his right to counsel, defendant proceeded without the assistance of counsel, and there was no valid waiver, reversal was required without any showing of prejudice. In such a situation, it is irrelevant whether the issue is analyzed under the constitutional right to counsel (which applies where a prison sentence of more than six months is imposed) or the statutory right to counsel (which applies except where the authorized sentence is only a fine).

Where defendant was charged with the misdemeanor offense of unlawful display of a martial arts device on Department of Natural Resources land (a Class B misdemeanor), and represented himself at a hearing on a pretrial motion to dismiss the charge after the trial court failed to give proper admonishments concerning the right to counsel, the conviction must be reversed and the cause remanded for a new trial.

3. Defendant did not waive the right to assert issues concerning the denial of counsel although he failed to raise the issues in his post-trial motion. "[W]e have some doubt that we can apply the forfeiture doctrine to a failure to admonish of the right to counsel."

Furthermore, the fact that defendant was represented by counsel at his second trial did not waive his claim that he had not been admonished of his right to counsel for the hearing on the motion to dismiss the charge, which occurred before counsel was appointed. It is the court's responsibility to give right to counsel admonishments, not the responsibility of counsel to see that proper admonishments were given before counsel entered the case. In addition, the failure to give the admonitions required by Rule 401(a), and the associated deprivation of counsel where the defendant was not represented by counsel at a critical stage of the proceedings, "is a classic area of plain-error review."

The court also rejected the State's request to assume that the trial court properly admonished defendant of the right to counsel before his first trial. The court concluded that the record, including a bystander's report, appeared to be complete and did not show admonishments of the right to counsel.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Linda Johnson, Elgin.)

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§13-1(c)
Counsel of Choice

People v. Baez, 241 Ill.2d 44, 946 N.E.2d 359, 2011 WL 681798 (2011)

1. Both the federal and state constitutions guarantee the defendant the right to counsel, which encompasses the right to counsel of choice. The right to counsel of choice is not absolute, however. A defendant may not insist on representation by an advocate who is not a member of the bar. Nor may a defendant insist on representation by an attorney whom he cannot afford or who declines to represent him. A court has the discretion to remove counsel in some circumstances such as where counsel is intoxicated or his performance is so inadequate that the defendant is not receiving the level of assistance of counsel guaranteed by the constitution. The court also has wide latitude in balancing the right to counsel of choice against the needs of fairness and the demands of its calendar.

The court did not abuse its discretion in removing private counsel whom it had appointed to represent defendant because counsel was not prepared to represent the defendant. Counsel asked that substitute counsel be appointed to represent defendant as he was leaving the country for an extended period, belying his claim that he was ready, willing, and able to represent defendant. The court found counsel's representation that he would share responsibility for the case with substitute counsel while out of the country to lack credibility. Counsel never provided the court with the dates that he would be out of the country, as the court requested, and counsel was uncertain how long he would be gone or even if he would return.

2. A defendant has the constitutional right to represent himself. Any waiver of counsel must be clear and unequivocal and not ambiguous. A defendant waives his right to self-representation unless he articulately and unmistakably demands to proceed *pro se*. The purpose of this requirement is to prevent the defendant from: (1) appealing the denial of his right of self-representation or the denial of his right to counsel, and (2) manipulating or abusing the system by going back and forth between his request for counsel and wish to proceed *pro se*. A defendant may acquiesce in representation by counsel even after asserting his desire to proceed *pro se*.

Defendant did not make a clear and unequivocal request to waive counsel. After the defendant stated he would like to proceed *pro se*, the court advised defendant of the dangers and disadvantages of self-representation, and defendant acceded to the court's request that before making his final decision, he confer with his appointed counsel after counsel had the opportunity to review all of the discovery materials. The court made it clear to defendant that it was not denying defendant's request to represent himself and would grant the request after defendant had the opportunity to meaningfully confer with counsel. At his next court appearance, without any prompting from the court, defendant expressly agreed to have counsel represent him, and made no further request to proceed *pro se*. Also, at his guilty plea hearing defendant indicated his satisfaction with counsel's performance.

(Defendant was represented by Assistant Defender Kim Fawcett, Supreme Court Unit.)

People v. Brisco, 2012 IL App (1st) 101612 (No. 1-10-1612, 3/29/12)

1. The Sixth Amendment right to counsel includes the right to counsel of choice. However, the right to counsel of choice may be restricted due to the trial court's interests in

trying cases with diligence and conducting an orderly judicial process. In considering a motion to substitute counsel, the trial court may consider the defendant's reasons for seeking new counsel, whether the request is an attempt to thwart effective prosecution, the degree to which defendant has cooperated with current counsel, and the length of the current attorney's representation of the defendant.

The trial court's decision on a motion to substitute counsel is subject to review for abuse of discretion. The trial court does not abuse its discretion by denying a motion to substitute counsel if the new attorney is not specifically identified or is not ready, willing and able to enter an appearance.

2. The trial court erred by denying defendant's motion to substitute new counsel for the purpose of filing post-trial motions. Although the new attorney was present in court and ready to file an appearance, he asked for time to investigate and prepare the motions. The trial judge noted that he intended to retire from the bench in less than a month, and that the new attorney was scheduled to have surgery in three weeks. The court offered counsel a continuance for two weeks if he could do all necessary investigation and preparation within that time, although the court noted that it would be impossible to obtain a transcript that quickly.

In light of the court's ruling, the new attorney withdrew his motion to enter an appearance. The post-trial proceedings were conducted by the attorney who had represented defendant at trial.

The Appellate Court concluded that by offering only a short continuance which would not have allowed for a transcript to be prepared, the trial court in effect denied the motion to substitute. The court rejected the argument it was proper to deny the motion for continuance because the trial judge was about to retire; although there is a "well established" preference for the judge who presided over the trial to also decide post-trial motions and impose sentence, this preference is limited to situations where the judge remains sitting as a judge. "The State cites no case recognizing a trial court's interest in being available to rule on post-trial motions as greater than defendant's right to counsel of his choice, particularly where . . . the trial court made no finding that defendant's request was dilatory or lacking in good faith."

Furthermore, the fact that the defense attorney was scheduled to undergo surgery does not establish that he was unwilling or unable to enter an appearance. The mere fact that counsel requires a continuance has never been deemed to indicate an inability or unwillingness to appear. Not only was defense counsel present and ready to file an appearance, but the record shows that defendant had made no previous motions for continuance.

In addition, the date on which the new attorney appeared was the first time the case had been called for post-trial motions. Because the trial had been completed only one month earlier, and defendant had been incarcerated since the trial, the fact that the motion to enter an appearance was filed on the day the matter was set to be heard did not show a lack of diligence in obtaining new counsel.

The court also noted that defendant had previously expressed dissatisfaction with his court appointed counsel because he felt she had not kept him informed concerning the case. However, defendant continued to cooperate with counsel throughout the trial and until he obtained substitute counsel.

Finally, the fact that substitute counsel needs time to become prepared is not, in and of itself, sufficient to deny a continuance. The court noted that the trial court made no attempt to determine the length of continuance counsel would need to become familiar with the case.

Because the trial court abused its discretion by denying substitute counsel's motion to

enter an appearance, the sentence was vacated and the cause remanded for new post-trial proceedings.

(Defendant was represented by Assistant Defender Alison Shah, Chicago.)

People v. Koen, 2014 IL App (1st) 113082 (1-11-3082, 2/7/14)

1. The Sixth Amendment affords a criminal defendant the right to counsel of choice. However, the essential aim of the Sixth Amendment is to guarantee an effective advocate for the defendant, not to ensure that the defendant will necessarily be represented by the attorney he or she prefers. Thus, the right of counsel of choice is not absolute.

The advocate-witness rule precludes an attorney from acting as both an advocate and a witness in the same case. An inherent conflict of interest exists where an attorney serves as both counsel and witness, because an attorney acting as counsel "may not be a fully objective witness [and] may cause harm to the client's cause." In addition, a trier of fact may give undue weight to counsel's testimony and thereby unfairly disadvantage the opposing party.

For these reasons, the trial court is afforded substantial latitude to refuse to allow a defendant to waive his chosen counsel's actual or potential conflict of interest. A reviewing court will not set aside a trial court's decision to disqualify a defendant's chosen counsel unless there has been a clear abuse of discretion. The trial court abuses its discretion when its decision is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it.

In determining whether counsel of choice should be disqualified under the advocate-witness rule, the relevant inquiry is whether the attorney had a professional obligation to withdraw as counsel under Illinois Rule of Professional Conduct 3.7. At the time of the trial, Rule 3.7 provided that an attorney should not accept or continue employment in litigation if he knows or reasonably should know that he may be called as a witness, unless: (1) the testimony relates to an uncontested matter, the nature and value of legal services rendered by the attorney, or a formal matter concerning which no substantial evidence will be offered in opposition, or (2) refusing to accept or continue the employment would work a substantial hardship on the client. The fact that the attorney was not called as a witness is irrelevant to whether the trial court abused its discretion by disqualifying counsel before trial.

2. The trial court did not abuse its discretion by disqualifying defendant's counsel of choice. Defendant was charged with theft and forgery arising from his actions relating to reinstating a defunct unit of the United Way and acquiring control of a building owned by that unit. Defendant's counsel of choice was involved in the purported acquisition of the building when he corresponded with United Way and the tenants of the building and directed the latter to pay their rent to defendant's organization. Because counsel's correspondence with the tenants and United Way were important pieces of evidence, the attorney should have reasonably known that he was likely to be called as a witness by the State. Under these circumstances, the trial court did not err by disqualifying counsel although the State ultimately chose not to call counsel as a witness at trial.

(Defendant was represented by Assistant Defender Charles Hoffman, Chicago.)

People v. Nevarez, 2012 IL App (1st) 093414 (No. 1-09-3414, 3/30/12)

1. The Sixth Amendment guarantees both the right to effective representation by competent counsel and the right to be represented by counsel of choice. The right to counsel of choice is not absolute, however. The trial court has discretion to disqualify defendant's counsel of choice where there is an actual conflict of interest or a serious potential for a conflict of interest.

Although there is a presumption in favor of defendant's counsel of choice, the presumption may be overcome by a conflict or potential conflict of interest. Factors to be considered in determining whether the presumption has been overcome include: (1) the defendant's right to the undivided loyalty of his attorney, (2) the State's right to a fair trial in which defense counsel acts ethically and does not use confidential information to attack a State's witness, (3) the appearance of impropriety should the jury learn of the conflict, and (4) the probability that representation by counsel of choice will provide grounds to overturn a conviction. Here, the trial court considered an additional factor - whether the State legitimately needed to call the father and brother or was attempting to manufacture a conflict to prevent the defendant from being represented by counsel of choice.

The trial court's decision to disqualify counsel of choice will not be overturned unless there has been a clear abuse of discretion.

2. Defendant was represented by two attorneys on first degree murder charges. Before trial, a third attorney sought leave to also file an appearance. The third attorney disclosed that at some time in the previous year-and-a-half, he had represented defendant's father when the father was interviewed by the State's Attorney's office concerning the offense for which the defendant was charged. The father signed a waiver of any conflict of interest which might arise from the attorney's representation of both the father and of the defendant.

In a motion to disqualify the third attorney, the State noted that the attorney appeared with the father during an interview by the State's Attorney's office, negotiated a "use immunity agreement" concerning the information which the father provided, and attended the entire interview.

The State asserted that the third attorney also represented defendant's brother during interviews by the State's Attorney's office concerning the offense with which defendant was charged. According to the State, the attorney negotiated a "use immunity agreement" for any information provided by the brother, and was present for the interview.

The State also asserted that it intended to call the father as a witness at the defendant's trial, and that it might call the brother as a rebuttal witness. The names of both the father and the brother were on the list of witnesses which the State had tendered in discovery.

The Appellate Court concluded that a reasonable person could conclude that there would be a substantial appearance of impropriety if the jury learned that one of the defendant's attorneys had also represented two prosecution witnesses in connection with the same case. Therefore, the trial court did not abuse its discretion by disqualifying the third attorney from entering the case.

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§13-1(d)
Indigency

People ex rel. Glasgow v. Kinney, 2012 IL 113197 (No. 113197, 5/24/12)

In **Scott v. Illinois**, 440 U.S. 367 (1979), the United States Supreme Court held that if no prison sentence is imposed, the appointment of counsel is not constitutionally required for a defendant charged with a misdemeanor. One year after **Scott**, a majority of the court held that a prior uncounseled misdemeanor conviction, although constitutional under **Scott** because no prison term was imposed, cannot be used to enhance a subsequent misdemeanor

conviction to a felony. **Baldasar v. Illinois**, 446 U.S. 222 (1980).

In **People v. Finley**, 209 Ill. App. 3d 968, 568 N.E.2d 412 (3rd Dist. 1991), the Illinois Appellate Court applied **Baldasar** to find that a prior uncounseled misdemeanor conviction may not be used to enhance a subsequent misdemeanor to a felony. In **Nichols v. U.S.**, 511 U.S. 738 (1994), however, the United States Supreme Court overruled **Baldasar** and held that an uncounseled conviction that is valid under **Scott** may be relied upon to enhance the sentence for a subsequent offense.

Here, the Illinois Supreme Court concluded that because **Finley** was based solely on **Baldasar**, which was subsequently expressly overruled by the United States Supreme Court, **Finley** should be overturned as well. Thus, an uncounseled misdemeanor conviction which is valid under **Scott** because no prison term was imposed may be used to enhance the punishment for a subsequent conviction.

Where the trial court erroneously believed that it was compelled by **Finley** to exclude defendant's prior uncounseled misdemeanor DUI conviction from being used to enhance a subsequent sentence to a non-probationable Class 2 felony, the court granted *mandamus* and ordered the trial court to sentence the defendant in accordance with the enhanced sentencing law.

People v. Abernathy, 399 Ill.App.3d 420, 926 N.E.2d 435 (2d Dist. 2010)

1. An indigent defendant has the right to appointed counsel when charged with a crime which could result in imprisonment. Whether a particular defendant is indigent is left to the trial court's discretion based on the particular circumstances of the case. The court's determination should be based on as complete a picture of the defendant's finances as possible.

A person need not be entirely without funds in order to be found indigent; a person qualifies for appointed counsel if "on a practical basis" he lacks sufficient financial resources to retain counsel. The fact that a defendant is able to obtain funds from others does not in itself establish that he or she is not indigent.

In a close case, trial courts should favor the appointment of counsel. Where the defendant requests appointed counsel, the failure to make an indigence determination requires reversal and remand with directions to ascertain the defendant's financial status and to appoint counsel if appropriate.

2. Defendant was represented throughout trial by a private attorney who had been paid by defendant's family. After trial but before sentencing, defendant expressed dissatisfaction with the private attorney and asked that the public defender be appointed. Defendant stated several times that his family could not afford to pay another attorney.

The court concluded that the trial judge erred by failing to determine whether the defendant was indigent and whether the appointment of counsel was appropriate. The court stressed that the trial judge erred by assuming that defendant was not indigent merely because he had previously been able to obtain private counsel with his family's help, and by treating the case as if defendant was alleging ineffective assistance of the private attorney rather than making a first request for appointed counsel.

The conviction was reversed and the cause remanded for the trial court to determine whether defendant was indigent and whether counsel should be appointed.

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

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§13-1(e)
Right to Self-Representation

People v. Baez, 241 Ill.2d 44, 946 N.E.2d 359, 2011 WL 681798 (2011)

1. Both the federal and state constitutions guarantee the defendant the right to counsel, which encompasses the right to counsel of choice. The right to counsel of choice is not absolute, however. A defendant may not insist on representation by an advocate who is not a member of the bar. Nor may a defendant insist on representation by an attorney whom he cannot afford or who declines to represent him. A court has the discretion to remove counsel in some circumstances such as where counsel is intoxicated or his performance is so inadequate that the defendant is not receiving the level of assistance of counsel guaranteed by the constitution. The court also has wide latitude in balancing the right to counsel of choice against the needs of fairness and the demands of its calendar.

The court did not abuse its discretion in removing private counsel whom it had appointed to represent defendant because counsel was not prepared to represent the defendant. Counsel asked that substitute counsel be appointed to represent defendant as he was leaving the country for an extended period, belying his claim that he was ready, willing, and able to represent defendant. The court found counsel's representation that he would share responsibility for the case with substitute counsel while out of the country to lack credibility. Counsel never provided the court with the dates that he would be out of the country, as the court requested, and counsel was uncertain how long he would be gone or even if he would return.

2. A defendant has the constitutional right to represent himself. Any waiver of counsel must be clear and unequivocal and not ambiguous. A defendant waives his right to self-representation unless he articulately and unmistakably demands to proceed *pro se*. The purpose of this requirement is to prevent the defendant from: (1) appealing the denial of his right of self-representation or the denial of his right to counsel, and (2) manipulating or abusing the system by going back and forth between his request for counsel and wish to proceed *pro se*. A defendant may acquiesce in representation by counsel even after asserting his desire to proceed *pro se*.

Defendant did not make a clear and unequivocal request to waive counsel. After the defendant stated he would like to proceed *pro se*, the court advised defendant of the dangers and disadvantages of self-representation, and defendant acceded to the court's request that before making his final decision, he confer with his appointed counsel after counsel had the opportunity to review all of the discovery materials. The court made it clear to defendant that it was not denying defendant's request to represent himself and would grant the request after defendant had the opportunity to meaningfully confer with counsel. At his next court appearance, without any prompting from the court, defendant expressly agreed to have counsel represent him, and made no further request to proceed *pro se*. Also, at his guilty plea hearing defendant indicated his satisfaction with counsel's performance.

(Defendant was represented by Assistant Defender Kim Fawcett, Supreme Court Unit.)

People v. Brzowski, 2015 IL App (3rd) 120376 (No. 3-12-0376, 3-12-0477, 5/18/15)

1. A criminal defendant has the right to representation by counsel at every critical stage of the proceeding. In addition, an indigent defendant has the right to have counsel appointed. A defendant has the right to represent himself, but only if he voluntarily, knowingly and intelligently waives counsel.

Supreme Court Rule 401(a) requires that any waiver of counsel occur in open court and

be preceded by trial court admonishments concerning the nature of the charge, the minimum and maximum sentences, and the rights to representation by counsel and to have counsel appointed if indigent. Only substantial compliance with Rule 401(a) is required.

Requiring a *pro se* defendant to accept standby counsel does not constitute a wavier under Rule 401(a). Thus, Rule 401(a) admonitions are not required where standby counsel is present at all times during the trial. However, Rule 401(a) admonitions must be given if standby counsel is absent at any critical stage of the proceeding.

2. Defendant chose to proceed *pro se* at the first of two trials for separate violations of a protective order, but the trial court appointed standby counsel who was then dismissed before jury deliberations. As a matter of plain error, the court found that once standby counsel was dismissed, defendant lacked counsel during a critical stage of his trial. At that point, Rule 401(a) admonitions were required.

The court also concluded that the trial court abused its discretion by dismissing defendant's standby counsel before the trial was concluded. A trial judge has discretion to appoint standby counsel for a *pro se* defendant, and also has discretion to decide the nature and extent of standby counsel's involvement. However, the court "may not place a new restriction or limitation on standby counsel that was not set out from the beginning of the trial." The trial court abuses its discretion and causes prejudice if it allows a defendant to represent himself with the assistance of standby counsel, but at crucial phases of the trial refuses reasonable requests for standby counsel's assistance.

3. At the trial for the second of the alleged violations, defendant asked to be represented by the Assistant Public Defender who had acted as standby counsel at the first trial. The trial court denied this request, stating that the Public Defender's Office refused to have anything to do with defendant's case. In fact, the Public Defender had no objection to being appointed if defendant accepted representation by the attorney who had acted as standby counsel.

One week later, defendant renewed his request for representation by the Public Defender's Office and was again refused. Defendant was told that he could represent himself, hire counsel, or find an attorney who would represent him for free. Defendant represented himself at the second trial without the assistance of counsel. No Rule 401(a) admonitions were given at any time during the second trial.

The Appellate Court concluded that the trial court erred by failing to give Rule 401(a) admonishments before the second trial. The court rejected the State's argument that there was substantial compliance with Rule 401(a) because defendant's responses during a pretrial fitness evaluation showed that he understood the charges and the sentence he could receive if convicted.

First, the questions during the fitness evaluation were asked by a psychiatrist. Under Rule 401(a), any waiver of the right to counsel must take place in open court.

Second, the questions asked during the fitness evaluation were designed only to determine fitness to stand trial. Where the defendant seeks to waive counsel, the trial court must determine whether the waiver is knowing and voluntary.

Third, one purpose of Rule 401(a) is to notify defendant of the possible dangers of self-representation. The questions asked during the fitness examination were not designed to serve this purpose.

Fourth, Rule 401(a) requires that the defendant be admonished that he has the right to counsel and to appointed counsel if he is indigent. Defendant was never given such information here, and in fact was erroneously told by the trial court he was not entitled to appointed counsel. Under these circumstances, plain error occurred because defendant was

allowed to represent himself at the second trial without receiving Rule 401(a) admonitions.

(Defendant was represented by Assistant Defender Jeffrey Svehla, Chicago.)

People v. Fisher, 407 Ill.App.3d 585, 944 N.E.2d 485 (4th Dist. 2011)

1. A request to waive counsel and proceed *pro se* must be clear and unequivocal. While a trial court may advise a defendant of the disadvantages of self-representation and emphasize the advantages of having an attorney, a knowing and intelligent request to appear *pro se* must be honored.

The trial court's ruling on a motion for self-representation is reviewed for abuse of discretion. Denial of the constitutional right to self-representation constitutes structural error and requires reversal.

2. The trial court abused its discretion by denying defendant's motion to represent himself. Defendant wanted to represent himself because he was dissatisfied with counsel's failure to move to dismiss based on evidence that another person committed the crime. After admonishing the defendant that a pretrial motion to dismiss would not lie because there was evidence of innocence, the judge found that defendant did not know the law and needed an attorney.

The court rejected the State's argument that defendant's request was ambiguous because defendant responded "okay" and "all right" when the trial court warned him of the dangers of self-representation. Nothing defendant said could be reasonably interpreted as a withdrawal of the written request for self-representation. Furthermore, even if defendant appeared to accept the trial court's belief that he was ill-qualified to represent himself, that would not have been a withdrawal of the unequivocal request.

The court added that after warning the defendant of the perils of self-representation, the judge could have clarified whether defendant persisted in his desire to represent himself. However, the court could not deny the request in the belief that defendant needed to have an attorney.

The conviction for criminal drug conspiracy was reversed, and the cause was remanded for a new trial.

(Defendant was represented by Assistant Defender Molly Corrigan, Springfield.)

People v. Sheley, 2012 IL App (3d) 090933 (No. 3-09-0933, 1/5/12)

1. Under **Faretta v. California**, 422 U.S. 806 (1975), the Sixth and Fourteenth Amendments include a criminal defendant's right to proceed without counsel where the decision to do so is voluntary and intelligent. Even where the defendant is fit to stand trial, however, the right to self-representation can be limited based on a lack of mental competency. "[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (**Indiana v. Edwards**, 554 U.S. 164 (2008)).

2. The trial court erred by denying defendant's request to represent himself where there was no evidence that defendant suffered from a "severe mental illness" that would affect his competency to conduct a defense. Although two experts testified that defendant had a history of cocaine-induced hallucinations and exhibited antisocial behavior, neither believed that he had a severe mental illness. One expert specifically found the defendant did not suffer from any mental impairment that would affect his fitness to stand trial or ability to represent himself, and the second, although believing that defendant was incapable of self-representation, believed that defendant was of average intelligence and within the normal

range of function. The second expert also declined to diagnose the defendant as suffering from a specific mental illness.

In addition, defendant's demeanor demonstrated that he had the ability to represent himself. Defendant actively participated in defense counsel's arguments and motions, asked the court not to hold counsel's untimely actions against defendant, and filed a well-written and logical motion to proceed *pro se*. The court acknowledged that defendant showed a lack of control after his request to proceed *pro se* was denied, but found that defendant's outburst was an isolated incident and did not indicate a lack of ability to represent himself.

Defendant's convictions were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

People v. Ware, 407 Ill.App.3d 315, 943 N.E.2d 1194 (1st Dist. 2011)

1. Before a court can find that a defendant has waived his right to counsel, the court must substantially comply with Supreme Court Rule 401(a), which requires that the court inform defendant and determine that he understands: (1) the nature of the charge; (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and (3) that he has a right to counsel, and, if he is indigent, to have counsel appointed for him by the court. In determining whether Rule 401(a) has been substantially complied with, the court should consider: (1) the record as a whole; (2) whether any flaw in the admonishments prejudiced the defendant; and (3) defendant's conduct, as he should not be permitted to frustrate a trial court's efforts to conduct a fair, orderly and expedient trial.

Defendant was represented by four different public defenders in the two years leading up to his trial. He was dissatisfied with them all. Two were reappointed and again discharged by defendant. He was also offered appointment of four different private attorneys, but rejected them, although he did allow one attorney to represent him briefly immediately before trial began. During this two-year period, he proceeded *pro se* on seven different occasions. Two different judges admonished defendant four separate times of the nature of the charges and the possible sentence.

In these circumstances, there was no error where the court did not again admonish defendant in accordance with Rule 401(a) before requiring him to proceed *pro se* at trial. Defendant had been properly admonished when he earlier proceeded *pro se*. He was clearly aware of his right to counsel as he referenced that right multiple times when he addressed the court. He knew the nature of the charges he faced and the possible penalties. He was provided that information no less than four times. There is absolutely no indication that had defendant been admonished again that his actions would have been any different, as he had been repeatedly admonished and none of those admonitions changed defendant's decision to repeatedly reject his appointed counsel. The court made repeated attempts to accommodate defendant, while defendant continually found fault with his attorneys, but insisted that he did not want to represent himself. Defendant could not be permitted to engage in conduct designed to frustrate the court's efforts to conduct a fair and orderly trial, and then benefit from an alleged error by the court that he invited through his own conduct.

2. A *pro se* defendant does not have the right to standby counsel, but such appointment is within the trial court's discretion. If it can be determined that the refusal to appoint standby counsel would not have been an abuse of discretion, the cause will not be remanded for further proceedings solely on the ground that the court refused to exercise its discretion.

The court found no plain error in the trial court's refusal to appoint standby counsel for defendant. When the trial court admonished defendant in accordance with Rule 401(a), it

informed defendant that he would not have a lawyer to assist him, and stated that it was exercising its discretion not to appoint counsel. Even had the court not exercised its discretion, defendant was not prejudiced because it would not have been an abuse of discretion to deny defendant standby counsel. Although the charge of attempt murder was serious, the facts and the law involved in the charge were not. Defendant claimed self-defense. The witnesses were primarily the complainant, his wife, the police, and defendant. There were no expert witnesses or scientific evidence. Defendant was over 40 and no stranger to criminal proceedings. Defendant cross-examined witnesses, gave an opening and closing statement, testified on his own behalf, participated in jury selection, and indicated his familiarity with legal concepts through his interactions with the trial judge, who told defendant he was doing a good job of representing himself. Despite defendant's argument that he was hindered in presentation of evidence and additional instructions by the absence of standby counsel, proof of guilt was overwhelming and there is no showing that additional jury instructions or the medical records of the complainant would have made a difference in the case.

(Defendant was represented by Assistant Defender Christofer Bendik, Chicago.)

People v. Woodson, ___ Ill.App.3d ___, ___ N.E.2d ___ (4th Dist. 2011) (No. 4-10-0223, 6/30/11)

A defendant has the constitutional right to self-representation. To exercise that right, defendant need only knowingly and intentionally relinquish his parallel right to counsel. Although it may be unwise for a defendant to represent himself, he may not be denied that right on that basis. If his decision to represent himself is freely, knowingly and intelligently made, it must be accepted.

The only exceptions to this rule are where: (1) defendant's request comes so late in the proceedings that to grant it would be disruptive of the orderly schedule of proceedings, unless he makes no request for additional time to prepare; (2) defendant engages in serious and obstructionist misconduct; and (3) defendant is unable to reach the level of appreciation needed for a knowing and intelligent waiver.

Defendant made repeated requests to represent himself. The court denied these requests, finding that defendant did not have "the legal knowledge and ability to represent [him]self." The defendant refused to cooperate with counsel and asked to be removed from the courtroom when the court denied his requests to proceed *pro se*. Defendant's first trial ended in a mistrial when the jury was deadlocked. He was convicted in a second trial.

The court abused its discretion in denying defendant's request to represent himself on the legally erroneous basis that he did not have the legal knowledge and ability to represent himself. Although it is important that a defendant who wants to proceed *pro se* be made aware of the potential pitfalls of self-representation, such pitfalls may not be the basis for the court to deny defendant his right to self-representation.

Although defendant had contentious exchanges with the court after it denied his requests to represent himself, the defendant's repeated requests to proceed *pro se* were not sufficient to forfeit his right to self-representation. Nor did defendant's failure to renew his motion to represent himself prior to his second trial constitute acquiescence to appointed counsel. "A more accurate interpretation of the record in this case is that defendant overzealously asserted his constitutional right to self-representation when confronted with the court's intransigence on this point and later – albeit begrudgingly – accepted the court's ruling and proceeded to trial with appointed counsel."

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

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§13-2
Waiver of Counsel

People v. Ames, 2012 IL App (4th) 110513 (No. 4-11-0513, 10/31/12)

1. The right to counsel may be relinquished in three ways: (1) waiver, (2) forfeiture, and (3) waiver by conduct.

A. Waiver is an intentional relinquishment of a known right. A trial court may allow a defendant to waive his right to counsel only after the court has admonished the defendant in accordance with Supreme Court Rule 401(a), by addressing him personally in open court and informing him of and determining that he understands the following: (1) the nature of the charge; (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which he may be subjected because of prior convictions or consecutive sentences; and (3) that he has a right to counsel and, if indigent, to have counsel appointed for him by the court.

B. Forfeiture occurs when the trial court determines in its discretion that misconduct by the defendant is so severe that he has forfeited his right to counsel even though he has not been warned of the consequence of his conduct or received Rule 401(a) admonitions.

C. Waiver by conduct is a hybrid situation that combines elements of waiver and forfeiture. The defendant has not affirmatively requested to proceed *pro se,* but the court has warned him of the consequences of his behavior and provided Rule 401(a) admonitions. An example of waiver by conduct is a defendant who fails to appear with counsel although he is not indigent and has been given a reasonable period of time to retain counsel, and does not show reasonable cause why he was unable to do so.

2. Defendant did not waive his right to counsel. The court initially appointed two different attorneys for defendant but allowed each leave to withdraw. Although defendant stated that he was going to try to hire counsel, he never rejected the idea of the trial court appointing counsel for him, and the court did not admonish defendant in accordance with Rule 401(a).

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Bahrs, 2013 IL App (4th) 110903 (No. 4-11-0903, 4/30/13)

Supreme Court Rule 401(a) provides that the court shall not permit a waiver by a person accused of an offense punishable by imprisonment without informing him and determining that he understands: (1) the nature of the charge; (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and (3) that he has the right to counsel and, if indigent, to have counsel appointed for him by the court. Whether a court complied with this rule is reviewed *de novo*.

When defendant expressed a desire to represent himself at sentencing, the circuit court allowed defendant to waive his right to counsel after advising him of the sentences prescribed by law for each of his offenses, including that he faced a maximum sentence of 30 years. But the court did not advise him that it could also impose a consecutive sentence, which could result in an aggregate sentence in excess of 30 years. Defendant was sentenced to consecutive terms totaling 33 years.

The court's failure to inform defendant that he was subject to consecutive sentences was contrary to Rule 401(a)(2). A defendant's waiver of his right to counsel can never be valid

when he receives a sentence in excess of the maximum he was informed he could receive when he waived counsel. Because defendant did not exhibit a high degree of legal sophistication and did not have standby counsel, there exists no reason to depart from this rule. Defendant has no burden to establish prejudice by demonstrating that he would have decided against self-representation had he been correctly admonished. To impose such a requirement would conflict with the very purpose of Rule 401(a), which is to proactively impart to the defendant the requisite knowledge for a valid waiver of counsel.

The Appellate Court reversed and remanded for a new sentencing hearing.

(Defendant was represented by Assistant Defender Marty Ryan, Springfield.)

People v. Bartholomew, 2015 IL App (4th) 130575 (No. 4-13-0575, 7/7/15)

The Appellate Court found that defendant's waiver of counsel was ineffective because the trial court failed to substantially comply with Supreme Court Rule 401(a).

1. Rule 401(a) provides that any waiver of counsel must be made in open court. Before a waiver can be accepted, the trial court must address the defendant and determine that he understands the nature of the charge, the minimum and maximum sentences, and that he has the right to counsel and to appointed counsel if he is indigent. The purpose of Rule 401(a) is to ensure that a waiver of counsel is knowingly and intelligently made.

Rule 401(a) admonishments must be provided when the court learns that the defendant wishes to waive counsel so that defendant can consider the ramifications of his decision. Prior admonishments, if any, are insufficient to comply with Rule 401(a).

2. At his jury trial, defendant was represented by an assistant public defender. After the State rested, defendant announced that he wanted to proceed *pro se*. The trial court stated that it was required to determine whether defendant was capable of making a knowing and intelligent waiver of his right to counsel, and asked a series of question regarding defendant's age, education level, mental health, and experience with legal proceedings. The court also informed defendant that he would be held to the same standards as an attorney. Defendant then represented himself for the rest of the trial.

The court concluded that because the trial judge failed to address any of the three elements required by Rule 401(a) before allowing the defendant to proceed *pro se*, the waiver was invalid. The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

People v. Black, ___ Ill.App.3d ___, ___ N.E.2d ___ (5th Dist. 2010) (No. 5-08-0089, revised op. 6/8/11)

Defendant's convictions for multiple counts of possession and delivery of controlled substances were reversed because the trial court failed to comply with Supreme Court Rule 401 before allowing defendant to represent himself at the preliminary hearing.

1. The 6th Amendment right to the assistance of counsel attaches when judicial proceedings commence, whether by arraignment or preliminary hearing. A criminal defendant may represent himself only if he voluntarily, knowingly, and intelligently waives the right to counsel. Under Supreme Court Rule 401, a defendant may waive counsel on an offense punishable by imprisonment only if he is fully admonished of the nature of the charge, the minimum and maximum sentences, that he has the right to counsel, and that counsel will be appointed if he is indigent.

Under **People v. Bolden**, 59 Ill.App.3d 32, 374 N.E.2d 1307 (1978), reversal is required where the trial court fails to give Rule 401 admonitions before permitting a defendant to waive counsel at a preliminary hearing. **Bolden** stated that counsel's role at a preliminary

hearing is not merely to assist in a claim that probable cause is lacking; counsel may also assist the defendant in discovering the strengths and weaknesses of the State's case, preserving favorable evidence, and strengthening the defendant's claim for bail and for suppression of illegally seized evidence. Thus, the failure to provide counsel at a preliminary hearing is not cured because the defendant is represented by counsel at trial.

2. In two situations, substantial compliance with Rule 401 may be sufficient. First, reversal is unnecessary where the defendant was not prevented by the incomplete admonitions from giving a knowing and intelligent waiver. Second, reversal is unnecessary where the defendant's legal sophistication or knowledge excuses the lack of admonition. Although a defendant's criminal history may "[enhance] otherwise substantial compliance in the form and frequency of admonitions," the mere fact that a defendant has a prior record cannot justify a complete lack of admonitions under Rule 401.

Here, the trial court failed to give any Rule 401 admonishments before the preliminary hearing. Furthermore, letters which defendant sent before the hearing stating that he would represent himself and requesting research materials did not establish substantial compliance with Rule 401, because those letters showed no knowledge of the matters covered by Rule 401 or that defendant had a high degree of legal sophistication. Nor did defendant's attempt to represent himself at the preliminary hearing "indicate a high degree of legal sophistication"; in fact, at the close of the hearing the trial court appointed counsel for trial after agreeing with defendant's statement that his performance had been "not very good." Under these circumstances, there was no substantial compliance with Rule 401.

3. Because the right to counsel is fundamental, the court reached the failure to give Rule 401 admonitions as plain error.

(Defendant was represented by Assistant Defender Robert Burke, Mt. Vernon.)

People v. Brzowski, 2015 IL App (3rd) 120376 (No. 3-12-0376, 3-12-0477, 5/18/15)

1. A criminal defendant has the right to representation by counsel at every critical stage of the proceeding. In addition, an indigent defendant has the right to have counsel appointed. A defendant has the right to represent himself, but only if he voluntarily, knowingly and intelligently waives counsel.

Supreme Court Rule 401(a) requires that any waiver of counsel occur in open court and be preceded by trial court admonishments concerning the nature of the charge, the minimum and maximum sentences, and the rights to representation by counsel and to have counsel appointed if indigent. Only substantial compliance with Rule 401(a) is required.

Requiring a *pro se* defendant to accept standby counsel does not constitute a wavier under Rule 401(a). Thus, Rule 401(a) admonitions are not required where standby counsel is present at all times during the trial. However, Rule 401(a) admonitions must be given if standby counsel is absent at any critical stage of the proceeding.

2. Defendant chose to proceed *pro se* at the first of two trials for separate violations of a protective order, but the trial court appointed standby counsel who was then dismissed before jury deliberations. As a matter of plain error, the court found that once standby counsel was dismissed, defendant lacked counsel during a critical stage of his trial. At that point, Rule 401(a) admonitions were required.

The court also concluded that the trial court abused its discretion by dismissing defendant's standby counsel before the trial was concluded. A trial judge has discretion to appoint standby counsel for a *pro se* defendant, and also has discretion to decide the nature and extent of standby counsel's involvement. However, the court "may not place a new restriction or limitation on standby counsel that was not set out from the beginning of the

trial." The trial court abuses its discretion and causes prejudice if it allows a defendant to represent himself with the assistance of standby counsel, but at crucial phases of the trial refuses reasonable requests for standby counsel's assistance.

3. At the trial for the second of the alleged violations, defendant asked to be represented by the Assistant Public Defender who had acted as standby counsel at the first trial. The trial court denied this request, stating that the Public Defender's Office refused to have anything to do with defendant's case. In fact, the Public Defender had no objection to being appointed if defendant accepted representation by the attorney who had acted as standby counsel.

One week later, defendant renewed his request for representation by the Public Defender's Office and was again refused. Defendant was told that he could represent himself, hire counsel, or find an attorney who would represent him for free. Defendant represented himself at the second trial without the assistance of counsel. No Rule 401(a) admonitions were given at any time during the second trial.

The Appellate Court concluded that the trial court erred by failing to give Rule 401(a) admonishments before the second trial. The court rejected the State's argument that there was substantial compliance with Rule 401(a) because defendant's responses during a pretrial fitness evaluation showed that he understood the charges and the sentence he could receive if convicted.

First, the questions during the fitness evaluation were asked by a psychiatrist. Under Rule 401(a), any waiver of the right to counsel must take place in open court.

Second, the questions asked during the fitness evaluation were designed only to determine fitness to stand trial. Where the defendant seeks to waive counsel, the trial court must determine whether the waiver is knowing and voluntary.

Third, one purpose of Rule 401(a) is to notify defendant of the possible dangers of self-representation. The questions asked during the fitness examination were not designed to serve this purpose.

Fourth, Rule 401(a) requires that the defendant be admonished that he has the right to counsel and to appointed counsel if he is indigent. Defendant was never given such information here, and in fact was erroneously told by the trial court he was not entitled to appointed counsel. Under these circumstances, plain error occurred because defendant was allowed to represent himself at the second trial without receiving Rule 401(a) admonitions.

(Defendant was represented by Assistant Defender Jeffrey Svehla, Chicago.)

People v. Cleveland, 393 Ill.App.3d 700, 913 N.E.2d 646 (1st Dist. 2009)

Generally, a waiver of the right to counsel continues throughout the proceedings, including any post-trial stages, unless the defendant later requests counsel or other circumstances suggest that the waiver was limited to a particular stage of the proceedings. Where the defendant waived counsel before trial, requested counsel for the post-trial motion and sentencing stages, but again waived counsel and represented himself at sentencing, the trial court was required to readmonish under Rule 402(a) and obtain a new waiver for the sentencing stage. The court rejected the State's argument that the trial court's original, pretrial admonishments "carried over" to a second waiver made after counsel had been appointed.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Gillespie, 2012 IL App (4th) 110151 (No. 4-11-0151, 8/29/12)

Supreme Court Rule 401(a) requires that the court admonish defendant of the following

at the time that it accepts defendant's waiver of his right to counsel: (1) the nature of the charge; (2) the minimum and the maximum sentence prescribed by law, including when applicable the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and (3) that he has a right to counsel and, if indigent, to have counsel appointed for him by the court. Admonishments given several months earlier, when the defendant was not asking to waive counsel, do not satisfy Rule 401(a).

Because the court failed to admonish defendant of the penalties he faced at the time that he waived his right to counsel at his post-trial hearing and sentencing, the Appellate Court remanded for a new post-trial hearing and sentencing, with directions that the court fully comply with Rule 401(a).

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Jamison, 2014 IL App (5th) 130150 (No. 5-13-0150, 12/3/14)

Illinois Supreme Court Rule 401(b) requires that whenever defendant waives counsel, the open-court admonishments mandated by Rule 401(a) must be "taken verbatim" and made part of the record. Trial courts must strictly comply with Rule 401(b).

Here the trial court entered a written order stating that defendant wanted to waive counsel, gave proper admonishments pursuant to Rule 401(a), and accepted the waiver after determining that defendant knowingly and voluntarily waived his right to counsel.

The Appellate Court held that the trial court committed reversible error and failed to strictly comply with Rule 401(b) by not transcribing or otherwise recording verbatim the proceedings where defendant waived counsel. Defendant's conviction was thus reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Richard Whitney, Mt. Vernon.)

People v. LeFlore, 2013 IL App (2d) 100659 (No. 2-10-0659, 9/17/13)

Rule 401(a) provides that before a court may permit a waiver of counsel by a person accused of an offense punishable by imprisonment, the court must inform the defendant and determine that he understands, *inter alia*, the "minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences." Substantial compliance is required for an effective waiver of counsel. To constitute substantial compliance, any deficiencies in the admonishments must not prejudice the defendant either because he was already aware of the omitted information, or because his degree of legal sophistication made it evident that he was aware of the information.

The court admonished defendant that he could be sentenced to between four and 15 years in prison if convicted of the most serious charge that he faced. In fact, defendant was eligible to be sentenced as a Class X offender due to his criminal record and faced six to 30 years. The court sentenced him to 20 years. Noticing the defect in the admonition as plain error because it concerned the deprivation of a fundamental right, the Appellate Court held that defendant had not validly waived counsel due to noncompliance with Rule 401(a).

The prosecution later informed defendant that it "believed" that he was Class X mandatory based on his prior history. This communication was insufficient to comply with Rule 401(a), which requires that defendant be admonished *before* waiving counsel. The court also rejected the State's argument that defendant's criminal history demonstrated a high degree of legal sophistication that cured the defect.

Defendant's criminal background did not provide evidence that he was aware of the penalty he faced in this case. Defendant did have a prior Class X conviction, but it occurred

more than 21 years in the past, and resulted in a sentence less than the maximum sentence regarding which he was admonished. "A long rap sheet is not the equivalent of a *Juris Doctorate."* Neither the circuit court nor the State appeared to have knowledge that Class X sentencing was required. The court refused to hold the defendant to a higher level of knowledge. The court also refused to rely on defendant's *pro se* performance at trial as an indication of his degree of legal knowledge. "[T]he ultimate issue is not whether the defendant can adequately cross-examine witnesses or make a decent closing argument on his behalf."

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

People v. Moore, 2014 IL App (1st) 112592 (Nos. 1-11-2592 & 1-12-0313, 5/14/14)

Under Supreme Court Rule 401, a waiver of the right to counsel must be made in open court and with a verbatim transcript. A waiver of the right to counsel is effective only if the trial court substantially complies with Supreme Court Rule 401(a), which requires the court to admonish the defendant and determine that he or she understands the nature of the charge, the minimum and maximum sentences, and the right to appointed counsel if indigent.

A defendant is entitled to reversal of a conviction without a showing of prejudice where defendant was deprived of counsel at a critical stage of the case. A critical stage of a criminal proceeding is one at which the substantial rights of the defendant may be affected.

The court concluded that the trial court failed to comply with Rule 401(a) where it failed to admonish defendant in open court of the charges or the possible sentences. The court declined to reverse the conviction, however, noting that defendant represented himself only on a *pro se* motion to quash arrest which was frivolous as a matter of law and immediately thereafter accepted the assistance of counsel for the rest of the proceedings. The filing and presentation of a frivolous motion cannot be deemed a critical stage of the proceeding, because defendant's substantial rights are not affected.

(Defendant was represented by Assistant Defender Brian McNeill, Chicago.)

People v. Vazquez, 2011 IL App (2d) 091155 (No. 2-09-1155, 9/1/11)

The trial court failed to properly admonish defendant in accordance with Supreme Court Rule 401(a) before allowing defendant to waive his right to counsel. The remedy for this violation was reversal of defendant's conviction and remand for a new trial, rather than vacatur of the conviction without remand for retrial, as in **People v. Campbell**, 224 Ill.2d 80, 862 N.E.2d 933 (2006).

In **Campbell**, the Illinois Supreme Court vacated defendant's conviction without ordering a remand, after finding defendant had not validly waived his right to counsel, where defendant was charged with a misdemeanor traffic offense and had completed service of his sentence by the time of the appellate decision. The court concluded that in those circumstances a new trial would be neither equitable nor productive.

Although defendant had fully served his sentence, a retrial would be both equitable and productive. **Campbell** involved a prosecution for driving with a suspended license, which does not inherently involve danger to the public. Defendant was charged with harboring a runaway and contributing to the delinquency of a minor, offenses that do inherently involve harm and danger, and pertain to minors, who are most vulnerable and most in need of protection. Moreover, a conviction would have value to the prosecution in the future, as it could be a factor in charges against defendant, could impact a plea agreement and the nature of a plea offer, and could be used in aggravation at sentencing. While these factors could apply to all convictions, the implications are enhanced due to the severity of the charges against defendant.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

People v. Vernon, 396 Ill.App.3d 145, 919 N.E.2d 966 (2d Dist. 2009)

1. The Sixth Amendment and statutory rights to counsel apply at all "critical stages" of the prosecution. A "critical stage" is one at which the substantial rights of the accused may be affected. A hearing on a motion to dismiss is a critical stage of the proceeding, because it places the defendant in a position where he or she is likely to make admissions. The court reached this conclusion despite the fact that the hearing in question occurred on remand after defendant's original conviction was reversed due to the absence of a jury waiver.

2. Where the trial court failed to advise defendant of his right to counsel, defendant proceeded without the assistance of counsel, and there was no valid waiver, reversal was required without any showing of prejudice. In such a situation, it is irrelevant whether the issue is analyzed under the constitutional right to counsel (which applies where a prison sentence of more than six months is imposed) or the statutory right to counsel (which applies except where the authorized sentence is only a fine).

Where defendant was charged with the misdemeanor offense of unlawful display of a martial arts device on Department of Natural Resources land (a Class B misdemeanor), and represented himself at a hearing on a pretrial motion to dismiss the charge after the trial court failed to give proper admonishments concerning the right to counsel, the conviction must be reversed and the cause remanded for a new trial.

3. Defendant did not waive the right to assert issues concerning the denial of counsel although he failed to raise the issues in his post-trial motion. "[W]e have some doubt that we can apply the forfeiture doctrine to a failure to admonish of the right to counsel."

Furthermore, the fact that defendant was represented by counsel at his second trial did not waive his claim that he had not been admonished of his right to counsel for the hearing on the motion to dismiss the charge, which occurred before counsel was appointed. It is the court's responsibility to give right to counsel admonishments, not the responsibility of counsel to see that proper admonishments were given before counsel entered the case. In addition, the failure to give the admonitions required by Rule 401(a), and the associated deprivation of counsel where the defendant was not represented by counsel at a critical stage of the proceedings, "is a classic area of plain-error review."

The court also rejected the State's request to assume that the trial court properly admonished defendant of the right to counsel before his first trial. The court concluded that the record, including a bystander's report, appeared to be complete and did not show admonishments of the right to counsel.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Linda Johnson, Elgin.)

People v. Ware, 407 Ill.App.3d 315, 943 N.E.2d 1194 (1st Dist. 2011)

1. Before a court can find that a defendant has waived his right to counsel, the court must substantially comply with Supreme Court Rule 401(a), which requires that the court inform defendant and determine that he understands: (1) the nature of the charge; (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and (3) that he has a right to counsel, and, if he is indigent, to have counsel appointed for him by the court. In determining whether Rule 401(a) has been substantially complied with, the court should consider: (1) the record as a whole; (2) whether any flaw in the admonishments prejudiced the defendant; and (3) defendant's conduct, as he should not be permitted to

frustrate a trial court's efforts to conduct a fair, orderly and expedient trial.

Defendant was represented by four different public defenders in the two years leading up to his trial. He was dissatisfied with them all. Two were reappointed and again discharged by defendant. He was also offered appointment of four different private attorneys, but rejected them, although he did allow one attorney to represent him briefly immediately before trial began. During this two-year period, he proceeded *pro se* on seven different occasions. Two different judges admonished defendant four separate times of the nature of the charges and the possible sentence.

In these circumstances, there was no error where the court did not again admonish defendant in accordance with Rule 401(a) before requiring him to proceed *pro se* at trial. Defendant had been properly admonished when he earlier proceeded *pro se*. He was clearly aware of his right to counsel as he referenced that right multiple times when he addressed the court. He knew the nature of the charges he faced and the possible penalties. He was provided that information no less than four times. There is absolutely no indication that had defendant been admonished again that his actions would have been any different, as he had been repeatedly admonished and none of those admonitions changed defendant's decision to repeatedly reject his appointed counsel. The court made repeated attempts to accommodate defendant, while defendant continually found fault with his attorneys, but insisted that he did not want to represent himself. Defendant could not be permitted to engage in conduct designed to frustrate the court's efforts to conduct a fair and orderly trial, and then benefit from an alleged error by the court that he invited through his own conduct.

2. A *pro se* defendant does not have the right to standby counsel, but such appointment is within the trial court's discretion. If it can be determined that the refusal to appoint standby counsel would not have been an abuse of discretion, the cause will not be remanded for further proceedings solely on the ground that the court refused to exercise its discretion.

The court found no plain error in the trial court's refusal to appoint standby counsel for defendant. When the trial court admonished defendant in accordance with Rule 401(a), it informed defendant that he would not have a lawyer to assist him, and stated that it was exercising its discretion not to appoint counsel. Even had the court not exercised its discretion, defendant was not prejudiced because it would not have been an abuse of discretion to deny defendant standby counsel. Although the charge of attempt murder was serious, the facts and the law involved in the charge were not. Defendant claimed self-defense. The witnesses were primarily the complainant, his wife, the police, and defendant. There were no expert witnesses or scientific evidence. Defendant was over 40 and no stranger to criminal proceedings. Defendant cross-examined witnesses, gave an opening and closing statement, testified on his own behalf, participated in jury selection, and indicated his familiarity with legal concepts through his interactions with the trial judge, who told defendant he was doing a good job of representing himself. Despite defendant's argument that he was hindered in presentation of evidence and additional instructions by the absence of standby counsel, proof of guilt was overwhelming and there is no showing that additional jury instructions or the medical records of the complainant would have made a difference in the case.

(Defendant was represented by Assistant Defender Christofer Bendik, Chicago.)

People v. Wright, 2015 IL App (1st) 123496 (No. 1-12-3496, 5/21/15)

1. Under Supreme Court Rule 401(a)(2), the trial court must admonish a defendant who wishes to waive counsel about the minimum and maximum sentences he faces. Substantial compliance with Rule 401 is sufficient to effectuate a valid waiver of counsel if the record shows that the waiver was knowing and voluntary and the admonitions did not prejudice

defendant. A deficient admonishment does not prejudice a defendant where (1) the defendant already knows of the omitted information or (2) his degree of legal sophistication makes evident his awareness of the omitted information.

The Appellate Court found that the trial court failed to substantially comply with Rule 401. When defendant asked to waive counsel, the trial court admonished him that he faced a sentence of 60 years imprisonment. At sentencing, however, the State informed the trial court that because of his previous criminal history, defendant actually faced a sentence of 75 years imprisonment. Based on the "clear and unambiguous language" of Rule 401, the trial court's incorrect admonitions concerning defendant's sentence "compels the conclusion that defendant did not make a knowing and voluntary waiver of his right to counsel."

2. The Court rejected the State's argument that the trial court's improper admonitions did not prejudice defendant because he was ultimately sentenced to 50 years imprisonment, well below the 60-year sentence stated in the admonitions. The purpose of Rule 401 is to ensure that the waiver of counsel is knowing and voluntary. Regardless of the sentence actually imposed, the Court could not say for certain that defendant would have waived counsel had he known that he was facing 75 years in prison. Finding otherwise would mean that a reviewing court could speculate about whether defendant would have waived counsel, "effectively taking the decision to waive counsel out of the hands of the defendant."

Moreover, the State's position did not fall within either of the two limited exceptions where a deficiency in the admonitions does not prejudice a defendant: (1) defendant already knows of the omitted information; or (2) his degree of legal sophistication makes evident his awareness of the omitted information.

3. The Court also rejected the State's argument that defendant's legal sophistication in this case made it clear he knew of the omitted information. Although defendant appeared to possess a somewhat high degree of legal sophistication, simply because he intelligently argued his case did not mean he knew about the correct sentencing range.

The Court reversed defendant's conviction and remanded the case for a new trial.

(Defendant was represented by Assistant Defender Pete Sgro, Chicago.)

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§13-3
Attorney Fees and Costs

§13-3(a)
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§13-3(b)
Appointed Counsel Fees

People v. Somers, 2013 IL 114054 (No. 114054, 2/22/13)

725 ILCS 5/113-3.1 authorizes the trial court to order an indigent defendant to pay a reasonable sum for reimbursement of appointed counsel fees, upon a hearing conducted within

90 days after the entry of a final order disposing of the case at the trial level.

1. The trial court failed to comply with the hearing requirement of §113-3.1(a) where it asked defendant a few questions about his employment status and then imposed a reimbursement order. An adequate hearing requires that the trial court give notice that it is considering a reimbursement order and allow defendant an opportunity to present relevant evidence, including his or her ability to pay. The hearing must focus on the cost of representation, the defendant's financial circumstances, and defendant's foreseeable ability to pay. The trial court must also consider defendant's affidavit of assets and liabilities.

2. The court concluded, however, that the Appellate Court had authority to remand the cause for a proper reimbursement hearing. Section 113-3.1 requires that the hearing occur within 90 days after the entry of the final order, and the trial conducted a hearing within that time period, although the hearing was inadequate. Because a hearing was held within 90 days, the Appellate Court had jurisdiction to remand the cause for a further hearing.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Brown, 2012 IL App (2d) 110640 (No. 2-11-0640, 9/12/12)

725 ILCS 5/113-3.1 authorizes the trial court to order an indigent defendant to pay a "reasonable sum" to reimburse the county or State for the cost of representation by appointed counsel. Before ordering reimbursement, the trial court must hold a hearing concerning the defendant's ability to pay. "Such hearing shall be conducted on the court's own motion or on motion of the State's Attorney at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level." (725 ILCS 5/113-3.1(a))

The court concluded that where the reimbursement order was imposed within the 90-day period outlined by §5/113-3.1(a), but without the required hearing into the defendant's financial circumstances, a reviewing court has authority to remand the cause for the necessary hearing although more than 90 days have passed since final judgement was entered in the trial court. The court stated:

> Quite simply, the legislature could not have intended the entire appellate process to be completed in the 90 days following the final order in the trial court. . . . We also perceive no intent on the part of the legislature to limit this court's ability to order appropriate relief.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

People v. Evans, 391 Ill.App.3d 470, 907 N.E.2d 935 (4th Dist. 2009)

The court reiterated that a defendant may, as part of a negotiated plea, agree to a specified sentence credit and a public defender fee. Where the plea agreement covers those issues, the defendant may not challenge either the sentence credit or the trial court's imposition of a public defender fee without holding a hearing on the defendant's ability to pay (as mandated by 725 ILCS 5/113-3.1(a)).

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§13-3(c)
Reimbursement for Counsel Fees

People v. Gutierrez, 2012 IL 111590 (No. 111590, 1/20/12)

1. Under 725 ILCS 5/113-3.1(a), the trial court may order the defendant to pay a reasonable sum as reimbursement for the cost of appointed counsel. In determining the amount of the payment, the court must hold a hearing and consider the affidavit prepared by the defendant to obtain the appointment of counsel and any other information pertaining to the defendant's financial circumstances. "Such hearing shall be conducted on the court's own motion or on motion of the State's Attorney at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at trial level."

The court concluded that where the circuit clerk imposed a public defender fee that was not requested by either the trial court or the State's Attorney, the Appellate Court erred by remanding the cause for a hearing rather than vacating the fee outright. The court concluded that it need not determine whether the 90-day period is merely directory rather than mandatory, because the State conceded that several errors occurred concerning the fee.

First, only the trial court may assess the fee. Second, an appointed counsel fee is authorized only if sought by the trial court or the State's Attorney. Because neither of the authorized parties sought the fee, and the fee was imposed by the clerk without the trial court's authorization, the Appellate Court should have reversed outright rather than remanding the cause for another hearing.

2. The court also stated:

> [W]e must express our disappointment that, fourteen years after this court's decision in [**People v.**] **Love**, [177 Ill.2d 550, 687 N.E.2d 32 (1997)], defendants are still routinely being denied proper hearings before public defender fees are imposed. . . . In some of these cases, the fee was imposed by the circuit court without a hearing, and in some it was imposed by the circuit clerk. In the present case, . . . the fee was imposed by the Lake County circuit clerk. At oral argument, defense counsel represented that this is a particular problem in Lake County, with the circuit clerk routinely imposing the fee on its own. Even the State referred to the "rogue actions of the Lake County Circuit Clerk."
>
> We admonish the circuit clerks in general, and the Lake County circuit clerk in particular, that they may not impose public defender fees on their own. Pursuant to statute, a public defender fee may be imposed only by the circuit court after notice and a hearing on the defendant's ability to pay. We again remind the trial courts of their duty to hold such a hearing before imposing these fees, and we trust that we will not have to speak on this issue again.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Dunlap, 2013 IL App (4th) 110892 (No. 4-11-0892, 7/1/13)

725 ILCS 5/113-3.1(a) provides that an indigent defendant may be required to pay a reasonable sum as reimbursement for the cost of court-appointed counsel. A hearing on reimbursement must be conducted within 90 days after the entry of a final order disposing of the case at the trial level. At the hearing, the trial court must consider the affidavit of assets and liabilities along with "any other information pertaining to the defendant's financial circumstances which may be submitted by the parties."

Although at the reimbursement hearing the trial court failed to consider defendant's

financial affidavit, the Appellate Court concluded that defendant affirmatively waived any error when he and his counsel offered no evidence or statements when offered the opportunity to do so. The court also found that the plain error rule did not apply because plain error concerns only issues of procedural default, and not to issues which were affirmatively waived.

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

People v. Gutierrez, 405 Ill.App.3d 1000, 938 N.E.2d 619 (2d Dist. 2010)

Before a defendant can be assessed a fee for his representation by the public defender pursuant to 725 ILCS 113-3.1(a), the defendant must be provided notice of the court's intention to conduct a hearing on whether a public defender fee should be assessed, and an opportunity to present evidence and be heard. Evidence at the hearing must focus on the defendant's financial circumstances and the cost of the representation provided. The court must find an ability to pay before it may order the defendant to pay reimbursement for appointed counsel.

Because the clerk of the circuit court imposed a public defender fee without notice to defendant or a hearing before the court, the fee was vacated, but the cause was remanded for notice and hearing in the circuit court.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. McClinton, 2015 IL App (3d) 130109 (No. 3-13-0109, 3/5/15)

1. 725 ILCS 5/113-3.1(a) authorizes the trial court to order payment of a "reasonable sum" as reimbursement to the county or State for the cost of representation provided by appointed counsel. Either the State or the court may move for a hearing to determine defendant's ability to pay the reimbursement. The hearing may take place any time after the appointment of counsel but must occur no later than 90 days after entry of a final judgment disposing of the case.

Due process requires that the trial court give notice of the hearing, and defendant must be permitted an opportunity to present evidence regarding ability to pay and any other relevant circumstances. The hearing must focus on the costs of representation, the defendant's financial circumstances, and defendant's foreseeable ability to pay. The court must consider the assets and liabilities affidavit filed for appointment of counsel. The defendant does not waive his due process right to the procedural safeguards provided by §113-3.1 by failing to object when those safeguards are not met.

2. Here, the trial court erred by failing to give defendant notice of the hearing and by not affording defendant an opportunity to present evidence concerning his ability to pay. The State moved that defendant be ordered to pay $2,958 for appointed counsel services, and asserted without any supporting facts that defendant was able to pay. At sentencing, defendant stated that he was physically capable of working and hoped to take advantage of educational and training programs in prison. The trial court found that defendant could work and ordered that he pay $2,958 for appointed counsel. The court did not question defendant about his ability to pay or offer to allow him to present evidence.

The court noted that where the trial court provides "some sort of hearing" within 90 days after the entry of final judgement, the cause may be remanded for a proper hearing on appointed counsel reimbursement. **People v. Somers**, 2013 IL 114054. The court concluded that the trial judge's actions constituted "some sort of hearing" in light of the purpose of §113-3.1 to have qualified defendants reimburse the county or State for appointed counsel services, and remanded the cause for a new reimbursement hearing.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Schneider, 403 Ill.App.3d 301, 933 N.E.2d 384 (2d Dist. 2010)

Before a defendant may be ordered to reimburse the county or the State for the cost of representation by appointed counsel, a hearing must be conducted to determine the defendant's ability to pay. By statute, that hearing must be conducted "anytime after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level." 725 ILCS 5/113-3.1(a).

The court held that the circuit court erred when it failed to conduct such a hearing, but rejected the defendant's argument that the cause could not be remanded for the hearing as more than 90 days had elapsed from the date of the final judgment. The court was persuaded by the fact that the Illinois Supreme Court remanded for such a hearing in **People v. Love**, 177 Ill. 2d 550, 687 N.E.2d 32 (1997), despite the fact that more than 90 days had elapsed from the date of the final judgment.

(Defendant was represented by Assistant Defender Patrick Carmody, Elgin.)

People v. Somers, 2012 IL App (4th) 110180 (No. 4-11-0180, 6/13/12)

The court may order a defendant to reimburse the county or state for the cost of appointed counsel after the court conducts a hearing into the financial circumstances of defendant and finds an ability to pay. "Such a hearing shall be conducted on the court's own motion or on motion of the State's Attorney at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level." 725 ILCS 5/113-3.1(a).

The Appellate Court vacated the order requiring defendant to pay for the services of the public defender where the order was entered by the court within 90 days of the final order but without notice to the defendant or a hearing. The Appellate Court remanded for a hearing, rejecting the argument that a remand was barred by the 90-day requirement of the statute.

In **People v. Gutierrez**, 2012 IL 111590, the Illinois Supreme Court had declined to resolve the issue of whether the 90-day requirement precludes a remand for a hearing, while noting that Appellate Courts had routinely rejected the argument. The Supreme Court declined to remand for a hearing in **Gutierrez** because the fee had been imposed by the court clerk and neither the trial court nor the State had sought the fee. The Appellate Court distinguished **Gutierrez**, because in this case the fee was ordered by the court and the order had been entered within the 90-day period. The Appellate Court also noted that the issue of whether the 90-day requirement is mandatory or directory is now before the Supreme Court in **People v. Fitzpatrick**, 2012 IL 113449.

(Defendant was represented by Assistant Defender Molly Corrigan, Springfield.)

People v. Williams, 2013 IL App (2d) 120094 (No. 2-12-0094, 12/10/13)

1. When a criminal defendant is represented by court-appointed counsel, a trial court may order the defendant to pay a reasonable sum to reimburse the county or state. At a hearing to determine the amount of the payment, the court shall consider the defendant's affidavit of assets and liabilities and any other information relevant to defendant's financial circumstances submitted by the parties. "Such hearing shall be conducted on the court's own motion or on motion of the State's Attorney at any time after the appointment of counsel, but no later than 90 days after the entry of a final order disposing of the cause at the trial level." 725 ILCS 5/113-3.1(a).

If the court conducts some sort of hearing within the statutory time period, albeit insufficient to satisfy the requirements of §113-3.1(a), the cause may be remanded for a proper hearing. Whether the court complied with §113-3.1(a) in imposing the fee is a question of law

reviewed *de novo*. If a trial court imposes the fee without the proper procedural requirements, defendant's failure to raise the issue in the trial court will not result in forfeiture.

2. When private counsel substituted for the public defender, the court ordered the defendant to pay $750 for the services of the public defender because the public defender had represented defendant during pretrial proceedings. The only information in the record pertaining to defendant's financial circumstances at the time the fee was ordered was defendant's certificate of assets indicating that defendant was unemployed, had three children, had no assets, and was incarcerated.

A "hearing" is defined by Black's Law Dictionary as a judicial session, usually open to the public, held for the purpose of deciding issues of fact or law, sometimes with witnesses testifying. The hearing conducted by the court before setting the public defender fee met this definition as it was a judicial session open to the public, held to resolve the defendant's representation by the public defender. Although the hearing was inadequate, because the court did conduct some sort of a hearing, the cause was remanded for a new hearing in compliance with §113-3.1(a), at which the court must provide notice and consider any financial information submitted by the defendant before determining whether to impose a fee and, if so, in what amount.

Jorgensen, J., dissented. The statute requires a hearing on the defendant's ability to pay. Because no inquiry at all was made into defendant's ability to pay, no §113-3.1(a) hearing occurred. Because no hearing was conducted within 90 days, the fee must be vacated without remand.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Wynn, 2013 IL App (2d) 120575 (No. 2-12-0575, 12/26/13)

A criminal defendant for whom counsel has been appointed may be ordered to pay a reasonable sum to reimburse the county or State for the cost of appointed counsel. 725 ILCS 5/113-3.1(a). Before ordering reimbursement, the trial court must conduct a hearing concerning the defendant's financial resources and ability to pay.

Where defendant failed to appeal when he was placed on probation and ordered to pay a public defender fee, the Appellate Court lacked jurisdiction to review the public defender fee when defendant appealed after his probation was revoked. A defective order requiring a public defender fee is voidable rather than void, and may be challenged only if the defendant files a timely notice of appeal from the order imposing the fee.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

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Effective Assistance of Counsel

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Standards

Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (No. 09-587, 1/19/11)

1. The Supreme Court concluded that the Court of Appeals erred in a federal *habeas* case by finding that trial counsel was ineffective.

To satisfy **Strickland**, defendant was required to show that: (1) counsel's representation fell below an objective standard of reasonableness, and (2)there was a reasonable probability the result of the proceeding would have been different had counsel acted competently. A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceedings; counsel's errors must be so serious as to deprive the defendant of a fair trial.

In most criminal cases, there are multiple ways in which counsel could effectively represent the defendant. Only rarely will an effective defense necessarily encompass one technique or approach. Counsel is required to formulate a defense strategy that is reasonable at the time the case is being prepared and which balances limited resources in accordance with effective trial tactics and strategies. Finally, **Strickland** allows counsel to make a reasonable decision not to investigate a particular line of defense.

2. Counsel did not act unreasonably by failing to consult a forensic blood expert or offer expert testimony on blood evidence. The court concluded that it was at least arguable that a reasonable attorney could decide to forego blood evidence under the circumstances.

A. Only after trial, when forensic evidence concerning the source of blood found at the scene "emerged," could it be concluded that blood evidence was a critical issue. At trial, there were many factual differences between the parties' versions of the events. The prosecution's case did not stress blood evidence; in fact, it appeared that the prosecution decided to present blood evidence only after opening statements. Although counsel's opening statement may have been the impetus which caused the State to reconsider, the court found that strength of the prosecution's evidence "may well have been weakened by the fact that it was assembled late in the process."

The court also found that even had expert blood testimony supported the defense, a reasonable attorney might have elected not to present it. Had defense counsel chosen to rely on such evidence, the prosecution might have responded by developing its own expert evidence and possibly destroying defendant's case. Expert blood testimony might also have distracted the jury's attention or turned the case into a battle of experts. Finally, counsel had reason to doubt his client's story, and expert blood analysis might well have exposed defendant's claims as fabrications.

B. Counsel was not ineffective because he did not anticipate that the prosecution would offer expert testimony and was unprepared to offer expert testimony in response. Counsel is not required to be prepared for "any contingency" which may arise at trial; **Strickland** guarantees not perfect representation, but only a reasonably competent attorney. Although defense counsel was mistaken in his belief concerning the prosecution's intentions, representation is constitutionally deficient only if the adversarial process is undermined to the extent that the fairness of the trial is called into question. Any error by counsel in failing to anticipate the State's evidence did not rise to that level.

In any event, effective representation would not have necessarily required expert evidence in response to the State's expert. In many instances, cross-examination of the State's expert is sufficient to expose defects in the expert's presentation. In addition, where defense counsel lacks a solid case, challenging the sufficiency of the State's case may be a more effective defense than presenting evidence. Here, defense counsel conducted a skillful cross-examination, elicited concessions from the State's experts, and drew attention to weaknesses in their conclusions. Because a State court could have decided that counsel acted reasonably

by electing to not present expert evidence, there was no basis on which to grant *habeas* relief.

3. The court also concluded that the Court of Appeals erred in applying the "prejudice" requirement of **Strickland**. "Prejudice" does not exist under **Strickland** merely because a different result would have been possible had counsel acted reasonably. Instead, it must be "reasonably likely" that a different result would have occurred.

The State court could reasonably have concluded that defendant failed to show that a different outcome was likely where the expert evidence developed by the defense was no more than a theoretical possibility, counsel had elicited a concession along the same line from the State's expert, there was no evidence challenging many of the conclusions by the State's experts, and the non-scientific evidence of guilt was strong.

Because it could not be said that the State court applied **Strickland** unreasonably, *habeas* relief was not warranted.

Hinton v. Alabama, ____ U.S. ____, ____ S.Ct. ____, ____ L.E2d ____ (2014) (13-6440, 2/24/14)

1. Under **Strickland v. Washington**, 466 U.S. 668 (1984), to establish ineffective assistance of counsel the defendant must show that counsel's representation was objectively unreasonable and that prejudice resulted. Prejudice occurs where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome of the proceeding.

2. Here, the essence of the State's case consisted of forensic evidence which identified six bullets found at the scenes of three offenses as having been fired from a handgun which belonged to defendant's mother. The court concluded that defense counsel acted unreasonably when he presented the testimony of a firearms and toolmark expert whom he believed to be unconvincing, where counsel presented the witness solely because he believed State law limited expert witness fees to $1,000 and he was unable to find other experts who were willing to work for that amount.

Counsel was unaware that more than a year before defendant's arrest, State law had been amended to authorize reimbursement for "any" defense expenses that were "reasonably incurred" and approved in advance by the trial court. In addition, although the trial court also appeared to erroneously believe that expert witness fees were limited to $1,000, it invited defense counsel to request additional funding if he found that $1,000 was insufficient.

The Supreme Court noted that counsel's failure to seek additional funding was based not on a strategic calculation, but on the mistaken belief that expert witness fees were limited by State law. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under **Strickland**."

The court stressed that its holding did not concern the strategic decision whether to hire a particular expert. Instead, the issue involved counsel's decision to present what he believed to be inadequate expert testimony solely because he did not understand the applicable law concerning permissible expert witness fees.

3. The court rejected the argument that defendant was not prejudiced in light of the expert's testimony that the gun barrel was so corroded that an expert opinion concerning the bullets was not possible. The expert was "badly discredited" on cross-examination, and the court found that a more credible expert may well have created a reasonable doubt in the jury's mind concerning the testimony of the State's experts that the bullets had been fired from the mother's weapon. The court stated:

> Prosecution experts, of course, can sometimes make mistakes. .

> . . This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law.

Because the lower courts did not apply the proper prejudice inquiry to the facts of this case, the cause was remanded for further proceedings.

In re Danielle J., 2013 IL 110810 (No. 110810, 12/19/13)

1. A minor is entitled to the effective assistance of counsel in juvenile delinquency proceedings. Whether counsel is effective in a delinquency proceeding is determined under the **Strickland** standard.

2. The minor was denied the effective assistance of counsel where her attorney misunderstand the law and failed to realize that a continuance for supervision may be ordered only before an adjudication of delinquency is made. The minor rejected the State's pretrial offer of a continuance under supervision, but counsel requested such a continuance after the minor had been adjudicated delinquent, at which point a continuance was statutorily precluded.

The court concluded that counsel's actions were objectively unreasonable because he misunderstood the applicable law, and that the minor was prejudiced because she lost the opportunity to obtain a continuance under supervision.

The court remanded the cause for a new first-phase hearing at which the minor is to be properly advised that if she proceeds to trial and is unsuccessful, a continuance of supervision will be subject to the State's Attorney's approval. The minor will then be in a position to make an informed and knowing decision whether to accept the pretrial offer of a continuance under supervision, if that offer is reinstated. If she elects to go to trial, the minor will be able to request a continuance under supervision before the adjudication is announced.

People v. English, 2013 IL 112890 (No. 112890, 1/25/13)

To establish that appellate counsel was ineffective, defendant must satisfy the standard set forth in **Strickland v. Washington**, 466 U.S. 668 (1984). Defendant must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful. Appellate counsel is not obligated to raise every conceivable issue on appeal, but is expected to exercise professional judgment to select from the many potential claims of error that might be asserted on appeal.

Appellate counsel's assessment of the merits of an issue depends on the state of the law at the time of the direct appeal. Representation based on the law prevailing at the time of appeal is adequate, and counsel is not incompetent for failing to accurately predict that existing law will change. Appellate counsel is not required to raise issues that he reasonably determines are not meritorious.

Because the basis on which defendant sought to invalidate his conviction was not supported by precedent at the time of his direct appeal, it was reasonable for appellate counsel to conclude that the issue was unlikely to succeed. Appellate counsel was not deficient in failing to predict a subsequent change in the law. Counsel proceeded on other challenges, one of which was ultimately successful. Therefore, appellate counsel's forfeiture of the issue on appeal is not excused based on ineffective assistance of appellate counsel.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Henderson, 2013 IL 114040 (No. 114040, 5/23/13)

Acknowledging a conflict in Illinois precedent, the Supreme Court held that where a claim of ineffective assistance of counsel is based on the failure to file a suppression motion, the prejudice element of **Strickland** requires defendant to show that: (1) a suppression motion would have been meritorious, and (2) there is a reasonable probability the trial outcome would have been different had the evidence been suppressed. The court declined to follow precedent holding that where a claim of ineffectiveness is based on the failure to file a suppression motion, the prejudice requirement of **Strickland** is satisfied upon a showing of: (1) a reasonable probability that the motion would have been granted, and (2) a reasonable probability that the result of the trial would have been different had the evidence been suppressed.

The court concluded that because there were no grounds on which a motion to suppress would have been granted, defense counsel was not ineffective for failing to file such a motion.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Manning, 241 Ill.2d 319, 948 N.E.2d 542 (2011)

1. Under **Strickland v. Washington**, 466 U.S. 668 (1984), a defendant who claims that he was denied the constitutional right to effective assistance of counsel must show both that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. To establish the first prong, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. To establish prejudice, the defendant need not show that the result of the trial would have been different had counsel been competent. Instead, counsel's deficient performance is deemed prejudicial if it rendered the result of the trial unreliable or the proceeding fundamentally unfair.

The failure to meet either prong of **Strickland** precludes a finding of ineffective assistance of counsel.

2. At defendant's trial for delivery of a controlled substance, defense counsel did not act in an objectively unreasonable manner by failing to peremptorily challenge a juror who stated that he could not be fair in light of defendant's status as a convicted sex offender. The court stressed that counsel's decisions during jury selection are matters of trial strategy and are virtually unchallengeable. Although the juror stated that he believed sex offenders should be "locked up for life" and said four times that he could not give the defendant a fair trial, the court noted that before making these statements he said he did not think that defendant's background would influence his decision. Thus, his answers did not unequivocally indicate that he would be biased.

Furthermore, the court believed that trial counsel was sensitive to the effect of defendant's status on the jurors, as he exercised peremptory challenges against some (but not all) veniremembers who expressed similar misgivings. Thus, counsel could have decided the juror was not clearly biased, or may have wanted him on the jury because he was an immigrant and had prior encounters with law enforcement officers (in connection with speeding tickets). "Attorneys consider many factors in making their decisions about which jurors to challenge and which to accept."

Finally, the court noted that when the juror was questioned, defense counsel had only two remaining peremptory challenges with three juror slots remaining to be filled. Given the juror's equivocal answers, counsel could have reasonably decided to reserve the remaining peremptory challenges.

3. *In dicta*, a plurality of the court (Justices Garman, Thomas and Theis) rejected defendant's argument that the seating of a biased juror is structural error which is presumed to be prejudicial under **Strickland**. The court acknowledged that courts in other jurisdictions have found structural error under such circumstances, but declined to reconsider Illinois precedent holding that a defendant who raises such a challenge must satisfy **Strickland's** prejudice requirement.

4. In a concurring opinion, Justice Karmeier criticized the plurality for discussing the prejudice component of **Strickland** after finding that defense counsel's actions were not objectively unreasonable. In a concurring opinion, Justices Kilbride concluded that the plurality should have limited its holding to the prejudice prong in order to provide guidance to the bench and bar and because the plurality had failed to explain how seating a biased juror could be a reasonable trial strategy.

In a dissenting opinion, Justices Freeman and Burke noted that although it is presumed that counsel's decisions are based on strategy, that trial strategy must itself be objectively reasonable in order to satisfy **Strickland**. The dissenters concluded that the juror's answers clearly indicated that he was biased, and that the failure to remove him from the jury should be presumed to have been prejudicial.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People v. Bowens, 2013 IL App (4th) 120860 (No. 4-12-0860, 11/19/13)

Under **Strickland**, a defendant establishes that his attorney was ineffective where counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced the defense. A post-conviction petition alleging ineffective assistance may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness and arguable that the defendant was prejudiced.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Bryant, 391 Ill.App.3d 228, 907 N.E.2d 862 (5th Dist. 2009)

1. To establish ineffective assistance of counsel, the defendant must show both that counsel's performance was objectively unreasonable and that prejudice resulted. Prejudice is shown where there is a reasonable probability that had counsel been competent, the result of the trial would have been different.

Deciding not to present a particular witness is generally a matter of trial strategy. A defendant attempting to show that counsel was ineffective must overcome the presumption that the challenged action might have been sound trial strategy; that presumption is rebutted where counsel's decision is so irrational and unreasonable that no reasonably effective defense attorney would have pursued such a strategy under the circumstances.

Counsel may be found ineffective for failing to present known exculpatory evidence, or for failing to call a witness after promising during opening statements to do so. In addition, failing to present known evidence to support an uncorroborated defense may constitute ineffectiveness.

2. Here, counsel's decision not to call any witnesses in support of the defense was clearly a matter of trial strategy. However, that the strategy was unsound and caused prejudice to the defendant.

After unsuccessfully attempting to introduce defense evidence through cross-examination of State's witnesses, counsel said repeatedly in the presence of the jury that he would recall certain State's witnesses when the defense presented its case. However, defense counsel elected to present no evidence, stating in closing argument that "I thought we've had

enough."

Abandoning or changing a defense during trial can be a plausible strategic decision; in this case, however, the defense was consistent throughout the trial but unsupported by any evidence. Counsel's post-trial explanations for not presenting any evidence – that he had been able to raise the defense theory of the case through cross-examination of the State's witnesses – was unreasonable because even if the cross-examination made the jury aware of the defense theory, there was no evidence to support it.

Similarly, it was unreasonable for defense counsel to fail to call either of the defendants to testify, after promising in opening statements that both would testify and setting forth in detail their anticipated testimony. Counsel's subsequent claim that he decided not to call the defendants so he could shield them from cross-examination and avoid the possibility that the State would elicit damaging rebuttal evidence was not persuasive; it is unreasonable to conclude that "rather than support the defense theory with evidence that the jury might reject, it [is] better not to support the theory at all."

The court also stressed that in the absence of any evidence to support the defense theory, the jury could not have acquitted the defendants unless it chose to ignore the trial court's instructions.

> "[T]he spectrum of sound strategy does not include failing to adduce available evidence that would support an otherwise unsupported defense in the hope that the jury would both forgive counsel's promises to present that evidence and ignore the court's instructions."

3. The defendants were clearly prejudiced by counsel's failure to present evidence. The only direct evidence in support of the State's case was the impeached testimony of an admitted addict and uncharged accomplice. Under these circumstances, the jury could not be expected to overlook the fact that counsel repeatedly promised to present several witnesses, but ultimately presented no evidence at all. Finally, by leaving the defense theory wholly unsupported, counsel allowed the State to argue to the jury that its theory of guilt was uncontradicted.

4. The trial judge did not abuse its discretion by admitting redacted recordings of videotapes showing the defendants' interrogations by police, although the defendants refused to make any statements. (See **EVIDENCE**, §19-2(b)(1)).

People v. Coleman, 2012 IL App (4th) 110463 (No. 4-11-0463, 12/24/12)

Defendant filed a post-conviction petition claiming that: (1) defense counsel was ineffective for failing to call two witnesses who would have given exculpatory testimony, (2) the State committed a **Brady** violation by failing to disclose to the defense that police officers tested only one of the 15 bags of white powder found at the scene of the arrest before emptying all the bags into one large bag for testing by the crime lab, and (3) defense counsel was ineffective for entering a stipulation that the large bag contained 926 grams of cocaine. The trial court summarily dismissed the petition as frivolous and patently without merit, finding that to show prejudice under **Strickland** defendant was required to show that had the lab analyst been called to testify, he either would not have testified or would have testified differently from what was stated in the stipulation.

In a *pro se* motion to reconsider the summary dismissal, defendant submitted an affidavit from a private investigator who had interviewed the analyst who performed the testing. The affidavit stated that the analyst said he had not performed tests to determine the purity of the cocaine in the large bag of white powder. The analyst also described the decision of police to commingle the contents of the 15 bags as "bad evidence gathering." Although

defendant did not submit an affidavit from the analyst, the investigator's affidavit stated that additional efforts to contact the analyst had been unsuccessful.

The Appellate Court reversed the order summarily dismissing the petition.

1. The court found that the petition failed to present the gist of a constitutional violation concerning counsel's failure to call two witnesses to testify, because the only affidavit attached to the petition was that of the defendant, not the witnesses themselves. Although the Post-Conviction Hearing Act requires only that the petition be supported by affidavits, the court concluded that such affidavits should concern matters to which the affiant could testify if called as a witness. Although defendant's sworn affidavit described the anticipated testimony of the two witnesses whom defense counsel failed to call, the defendant would not be competent to testify to such testimony if called as a witness. Thus, the defendant's affidavit was insufficient to withstand summary dismissal, at least in the absence of an explanation why affidavits from the witnesses themselves were unavailable.

2. However, the court concluded that the petition showed an arguable case of ineffective assistance concerning counsel's agreement to the stipulation that the entire large bag contained cocaine. To allege the gist of a claim of ineffective assistance of counsel, the petitioner need not satisfy the **Strickland** standard of deficient performance and prejudice. Instead, at the first stage of proceedings a claim of ineffective assistance is sufficient if counsel's performance was arguably unreasonable and defendant was arguably prejudiced. An arguable allegation of prejudice exists if it could be reasonably argued that confidence in the outcome of the trial was undermined by counsel's deficient performance.

Here, defense counsel's stipulation relieved the State of a potentially serious problem. In order to aggregate the contents of the 15 bags and obtain a conviction for the cumulative weight, the State was required to prove beyond a reasonable doubt that each of the 15 bags contained cocaine. Because only one bag had been tested before the bags were commingled, the State would have been unable to carry this burden. By stipulating that the entire weight of the large bag's contents was cocaine, counsel's performance was arguably deficient and arguably undermined confidence in the outcome of the trial, especially in light of the investigator's affidavit that no purity test had been conducted.

The court noted that it need not resolve at this stage whether counsel was ineffective. Because the claim was arguable, it was clearly not frivolous or patently without merit. Thus, the petition should not have been summarily dismissed.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Dupree, 2014 IL App (1st) 111872 (No. 1-11-1872, 7/30/14)

1. To prevail on a claim of ineffective assistance of counsel, defendant must show both that counsel's representation fell below an objective standard of reasonableness and a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

To show that trial counsel's performance was deficient, defendant must overcome the strong presumption that the questioned action or inaction was the result of sound trial strategy. A reviewing court is highly deferential to trial counsel on matters of strategy and must view counsel's performance at the time it occurred rather than in hindsight.

2. A prior consistent statement may not be introduced on direct examination to enhance the credibility of a witness's testimony. Even when a witness is impeached by means of a prior inconsistent statement, a prior consistent statement is inadmissible unless it disproves or explains the making of the inconsistent statement.

However, where there is a charge or inference of recent fabrication, a prior consistent statement is admissible to show that the witness told the same story before the alleged fabrication. Merely questioning a witness about whether the witness rehearsed his testimony with opposing counsel does not constitute a charge of recent fabrication.

3. The Appellate Court held that trial counsel was ineffective for opening the door for the State to admit an otherwise inadmissible prior consistent statement from a prosecution witness, failing to object when the State introduced the evidence and repeatedly argued it as substantive evidence, and failing to request that the jury be given a limiting instruction.

The witness made two statements to police - one on October 31, and one on November 1. During cross-examination, defense counsel impeached the witness with the first statement, which was inconsistent with the witness's trial testimony. After pointing out discrepancies between the first statement and the trial testimony, counsel asked the witness whether his "enhanced memory had just come to his mind in the last week."

On redirect, the witness testified that he had not told the truth in his first statement to police, that he returned to the station on the following day because he wanted to tell the truth, and that he remembered the second statement because it was the truth. The prosecutor made several references to the fact that the witness's second statement was truthful. The prosecutor also read several questions and answers from the second statement that were consistent with the witness's trial testimony and asked the witness to confirm that he had made such statements in the second statement. Defense counsel did not object to any of this testimony.

A. The court found that counsel's representation was objectively unreasonable because his cross-examination allowed the State to introduce the prior consistent second statement. Had counsel merely cross-examined the witness about the inconsistencies between his first statement and his trial testimony, the State would have been unable to introduce the second, consistent statement. Although counsel undoubtedly knew of the second statement, he alleged that the witness's trial testimony was a recent fabrication. By doing so, he opened the door for admission of the second statement.

The court rejected the State's argument that defense counsel's strategy was to demonstrate that the witness had given inconsistent statements from the beginning and argue that the second statement and the trial testimony were intended to frame defendant. Defense counsel took several actions that were inconsistent with such a strategy, including not introducing the second statement himself, eventually objecting to its introduction, and objecting to the introduction of a video of the statement. The court concluded that counsel's strategy was to cast doubt on the witness's credibility by referring to his inconsistent statements, and noted that such a strategy did not require counsel to open the door to admission of the second statement.

Furthermore, counsel compounded his error by failing to object to the State's use of the second statement as substantive evidence and failing to request a limiting instruction. Finally, although counsel was successful in a sidebar in excluding part of the content of the second statement when it was subsequently presented through a police detective's testimony, counsel inexplicably failed to request that the jury be instructed to disregard the evidence.

B. Defendant was prejudiced by counsel's errors because the result of the trial was unreliable. Prior consistent statements are prohibited because they are likely to unfairly enhance a witness's credibility simply because a statement has been repeated. Improperly bolstering a witness's credibility constitutes reversible error when the trial testimony of that witness is crucial and the jury's verdict may have been influenced. Improperly bolstering a witness's credibility is especially prejudicial if the witness's statement relates to guilt and

innocence.

The evidence against defendant was far from compelling, as there was no physical evidence linking him to the shooting, his fingerprints were not found in the car from which the shots were fired or on the shell casings which were recovered, and no weapon was recovered. Furthermore, although defendant had not been involved in any prior altercations with the victims, both of the witnesses who implicated defendant as the shooter had prior problems with the victims. In addition, those witnesses provided conflicting accounts about the incident. Finally, the prior inconsistent statement related to defendant's guilt or innocence. Under these circumstances, counsel's unreasonable actions clearly caused prejudice.

Defendant's convictions for first degree murder and attempt first degree murder were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Fillyaw and Parker, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011)

Counsel is ineffective where his performance is deficient and defendant suffers prejudice as a result of counsel's deficient performance. Although there is a presumption that counsel's conduct constitutes sound trial strategy, this presumption may be overcome where no reasonably effective criminal defense attorney, confronting the circumstances of defendant's trial, would engage in similar conduct. The constitutional guarantee of effective assistance of counsel requires a criminal defense attorney to use the applicable rules of evidence to shield his client from a trial based upon unreliable evidence. To establish prejudice, defendant need only show that it is plausible that the result of the trial could have been different absent counsel's errors. He need not show that the evidence not attributable to counsel's errors would have been insufficient to sustain the conviction.

Counsel's performance was deficient where he did not understand that 725 ILCS 5/115-10.1(c)(2) addresses only the admission of prior inconsistent statements as substantive evidence, not as impeachment, and bars the admission of statements made to a testifying witness by the defendant describing events of which the witness had no firsthand knowledge. As a result, counsel did not make proper objections that would have prevented admission of hearsay evidence that Fillyaw admitted that he had kicked in a door and shot three people.

Counsel's unprofessional error prejudiced Fillyaw. The principal evidence against Fillyaw was the testimony of Graham who claimed that he knew Fillyaw and Parker and saw them at the scene. The identification of Parker was corroborated by the discovery of Parker's cell phone near the scene and the identification of Parker's jacket as the jacket worn by one of the offenders. But that evidence did not increase the probability that the identification of Fillyaw was accurate absent evidence linking Fillyaw to Parker and the crime scene. Graham's credibility was questionable because he testified that the offenders wore no masks and he saw their faces, whereas another eyewitness testified that the offenders were masked. Graham had an extensive criminal history. He did not name defendant as the shooters until following his surgery, while he was on morphine, and after he had talked to his family. He also named a third person as an offender, but later retracted this identification. Another witness, Deshae R., identified defendants out of court, but could not identify them in court and acknowledged she did not get a good look at the offenders. The prejudicial effect of the hearsay evidence was magnified by the State's repeated characterization of the evidence as an admission by Fillyaw in its argument to the jury, the fact that a copy of Graham's prior statement accompanied the jury during its deliberations, and the court's instruction that the jury could consider the statement as substantive evidence of guilt. Therefore, a reasonable probability existed that the result of Fillyaw's trial would have been different without the

inadmissible evidence.

(Defendant Fillyaw was represented by Assistant Defender Kathleen Hamill, Elgin and Defendant Parker was represented by Assistant Defender Yasaman Navai, Chicago.)

People v. Gamino, 2012 IL App (1st) 101077 (No. 1-10-1077, 6/21/12)

The performance of an attorney subject to disciplinary proceedings while engaged in the representation of a criminal defendant is evaluated under the standards of **Strickland v. Washington**, 466 U.S. 668 (1984).

A suspended or disbarred attorney stands in stark contrast to an attorney who is merely under investigation. For constitutional purposes, the term "counsel" means a duly licensed and qualified attorney. One who practices law without a license is engaged in a crime, and is not free from fear that a vigorous defense might lead a prosecutor or a judge to inquire into his background and discover his lack of credentials. A **Strickland** analysis is therefore not appropriate where defendant is represented by an attorney who is not licensed.

Defects in licensing that are merely technical are distinguishable from those that call into question an individual's ability to represent clients, such as where an attorney is suspended or disbarred based on a pattern of dishonest behavior that reflects a lack of moral character. A criminal defendant who is unknowingly represented by an individual who has been disbarred or suspended from the practice of law for any reason related to lack of legal ability or moral character suffers from a *per se* violation of his sixth amendment right to the effective assistance of counsel.

(Defendant was represented by Assistant Defender Manny Serritos, Chicago.)

People v. Guzman, 2014 IL App (3d) 090464 (Nos. 3-09-0464 & 3-10-0802, 1/23/14)

1. Claims of ineffectiveness arising from the plea bargaining process are analyzed under **Strickland**, which requires the defendant to show that his attorney's performance was deficient and caused prejudice. For a decision to accept or reject a plea offer to be voluntary and knowing, defense counsel must fully inform the defendant of the facts and law related to the State's offer and give candid advice concerning all aspects of the case, including the direct consequences of accepting or rejecting the offer.

Where an immigration action may result from a conviction, **Padilla v. Kentucky**, 559 U.S. 356 (2010) requires that defense counsel advise the client of the risk of adverse immigration consequences. The failure to do so shows deficient performance under **Strickland**. The prejudice requirement is satisfied if there is a reasonable probability that without counsel's error, defendant would have entered a not guilty plea and gone to trial. One factor to be considered in this regard is whether a decision to reject the plea bargain would have been rational under the circumstances.

2. The court concluded that counsel's failure to advise defendant of the potential immigration consequences of his guilty plea constituted ineffective assistance. First, counsel's performance was deficient where the record did not contradict defendant's claim that counsel failed to advise him that there might be immigration consequences if he accepted the plea offer. Second, prejudice was shown because under the circumstances, it would have been reasonable for defendant to go to trial. It was not certain that the State would prevail at trial, as the factual basis showed that defendant and two other people had been found in the presence of stolen firearms and defendant may have had a plausible defense. In addition, defendant had family living in the United States.

The order denying defendant leave to withdraw his plea was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

People v. McCarter, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-2864, 6/24/11)

To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) the deficiency in counsel's performance was prejudicial to the defense.

Claims of plain error and ineffective assistance of counsel to obtain review of unpreserved trial errors overlap. A defendant who is able to establish that trial counsel rendered constitutionally deficient representation has proved plain error under the second-prong of the plain error rule because defendant has suffered a substantial impairment of a fundamental right.

Counsel was ineffective in failing to object to inadmissible evidence that provided the only evidence that defendants committed an armed robbery. Therefore, the second prong of the plain-error rule was satisfied. "Based on plain error [the court] exercised [its] duty to set aside the armed robbery conviction where reasonable doubt remains of defendant's guilt."

(Defendant was represented by Assistant Defender Jessica Fortier, Chicago.)

People v. Stanford, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-09-0420, 6/16/11)

Generally, in order to prevail on a claim of ineffective assistance of counsel, defendant must satisfy the two-prong test of **Strickland v. Washington**, 466 U.S. 668 (1984).

There are some circumstances so likely to prejudice the accused that prejudice need not be demonstrated under the second prong of **Strickland**, but can be presumed. Situations warranting a presumption of prejudice include cases in which: (1) there is a complete denial of counsel at a critical stage of the proceedings; or (2) counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.

A more limited presumption of prejudice exists where counsel has a genuine conflict of interest. Prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his counsel's performance.

Defendant was not excused from the requirement of showing prejudice based on his complaint that communication had eroded between him and his appointed counsel to the point that they were engaged in an irreconcilable conflict. Defendant was not denied counsel at any critical stage of the proceedings and counsel had not failed to subject the State's case to meaningful adversarial testing. Bickering between defendant and his counsel did not amount to an actual conflict of interest. Defendant articulated no legitimate reason for his conflict with counsel, and the court did not summarily dismiss defendant's complaints about counsel, but appointed independent counsel to investigate, who concluded that nothing alleged by defendant rose to the level of ineffective assistance of counsel.

(Defendant was represented by Assistant Defender Kathleen Weck, Elgin.)

People v. Woods, 2011 IL App (1st) 092908 (No. 1-09-2908, 11/22/11)

Defendant was convicted of armed robbery and first degree murder. The latter conviction was based on felony murder; the decedent was a co-participant with the defendant in the armed robbery, and was killed by police officers who were responding to the offense. There was a dispute in the evidence whether the co-participant was armed. On appeal, defendant claimed that trial counsel was ineffective when he conceded defendant's guilt of armed robbery in opening statements, thereby also conceding his guilt of felony murder.

1. To prevail on an ineffective assistance of counsel claim, the defendant must normally meet the **Strickland** standard, which requires showing that counsel's performance was objectively unreasonable and that there is a reasonable probability that with competent representation the result of the proceeding would have been different. However, if counsel entirely failed to subject the State's case to meaningful adversarial testing, the latter showing is unnecessary.

The Appellate Court held that **Strickland** applied here, as counsel did not fail to subject the State's case to meaningful adversarial testing. Although counsel conceded defendant's guilt of armed robbery, he continued to act as defendant's advocate, developed a theory of defense in opening and closing arguments, cross-examined witnesses, presented witnesses on defendant's behalf, and moved for a directed verdict.

2. The court concluded that defendant could not show that defense counsel acted unreasonably. The evidence that defendant committed an armed robbery was overwhelming, and a person who commits a felony is responsible for deaths that are the direct and foreseeable result of his actions. A felon is responsible for the death of a co-felon at the hands of police if the officers' actions were in direct response to an offense that was set in motion by the defendant and did not break the causal chain between defendant's acts and the co-felon's death.

Although counsel conceded defendant's guilt of armed robbery, for which there was overwhelming evidence, he argued that the death of the co-participant was not foreseeable where the police acted irrationally by firing 41 shots at a felon who was arguably unarmed and outnumbered by several officers. Counsel argued that it would be unfair to hold the defendant responsible for a co-felon's death caused by unforeseeable police misconduct.

Although "this appeal to the jury's sense of justice had no legal basis as a defense," courts have held that reliance on such arguments is not necessarily ineffective where the defendant insists on pleading not guilty in the face of overwhelming evidence of guilt. Where no other defenses are available, it is not necessarily ineffective to argue nonlegal defenses such as jury nullification or to appeal to the jury's sympathy.

The court also noted that defendant agreed on the record to defense counsel's strategy, and there was no evidence that his consent was based on any misunderstanding or that counsel misunderstood the applicable law.

3. Furthermore, defendant could not show prejudice under **Strickland**. In light of the overwhelming evidence of guilt, there was no reasonable probability that different tactics would have led to a different result. Although defendant claimed that he could have argued that he had withdrawn from the felony before the co-defendant was killed, he did not specify any evidence to support that defense. In addition, had defendant testified in support of a withdrawal defense, the State would have introduced defendant's videotaped statement contradicting that defense. Given the overwhelming evidence of guilt, there is little likelihood that such a strategy would have resulted in a different outcome at trial.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

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§13-4(a)(2)
Counsel's Control of Case & Strategic Decisions

Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (No. 09-587, 1/19/11)

1. The Supreme Court concluded that the Court of Appeals erred in a federal *habeas* case by finding that trial counsel was ineffective.

To satisfy **Strickland**, defendant was required to show that: (1) counsel's representation fell below an objective standard of reasonableness, and (2)there was a reasonable probability the result of the proceeding would have been different had counsel acted competently. A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceedings; counsel's errors must be so serious as to deprive the defendant of a fair trial.

In most criminal cases, there are multiple ways in which counsel could effectively represent the defendant. Only rarely will an effective defense necessarily encompass one technique or approach. Counsel is required to formulate a defense strategy that is reasonable at the time the case is being prepared and which balances limited resources in accordance with effective trial tactics and strategies. Finally, **Strickland** allows counsel to make a reasonable decision not to investigate a particular line of defense.

2. Counsel did not act unreasonably by failing to consult a forensic blood expert or offer expert testimony on blood evidence. The court concluded that it was at least arguable that a reasonable attorney could decide to forego blood evidence under the circumstances.

A. Only after trial, when forensic evidence concerning the source of blood found at the scene "emerged," could it be concluded that blood evidence was a critical issue. At trial, there were many factual differences between the parties' versions of the events. The prosecution's case did not stress blood evidence; in fact, it appeared that the prosecution decided to present blood evidence only after opening statements. Although counsel's opening statement may have been the impetus which caused the State to reconsider, the court found that strength of the prosecution's evidence "may well have been weakened by the fact that it was assembled late in the process."

The court also found that even had expert blood testimony supported the defense, a reasonable attorney might have elected not to present it. Had defense counsel chosen to rely on such evidence, the prosecution might have responded by developing its own expert evidence and possibly destroying defendant's case. Expert blood testimony might also have distracted the jury's attention or turned the case into a battle of experts. Finally, counsel had reason to doubt his client's story, and expert blood analysis might well have exposed defendant's claims as fabrications.

B. Counsel was not ineffective because he did not anticipate that the prosecution would offer expert testimony and was unprepared to offer expert testimony in response. Counsel is not required to be prepared for "any contingency" which may arise at trial; **Strickland** guarantees not perfect representation, but only a reasonably competent attorney. Although defense counsel was mistaken in his belief concerning the prosecution's intentions, representation is constitutionally deficient only if the adversarial process is undermined to the extent that the fairness of the trial is called into question. Any error by counsel in failing to anticipate the State's evidence did not rise to that level.

In any event, effective representation would not have necessarily required expert evidence in response to the State's expert. In many instances, cross-examination of the State's expert is sufficient to expose defects in the expert's presentation. In addition, where defense counsel lacks a solid case, challenging the sufficiency of the State's case may be a more effective defense than presenting evidence. Here, defense counsel conducted a skillful cross-

examination, elicited concessions from the State's experts, and drew attention to weaknesses in their conclusions. Because a State court could have decided that counsel acted reasonably by electing to not present expert evidence, there was no basis on which to grant *habeas* relief.

3. The court also concluded that the Court of Appeals erred in applying the "prejudice" requirement of **Strickland**. "Prejudice" does not exist under **Strickland** merely because a different result would have been possible had counsel acted reasonably. Instead, it must be "reasonably likely" that a different result would have occurred.

The State court could reasonably have concluded that defendant failed to show that a different outcome was likely where the expert evidence developed by the defense was no more than a theoretical possibility, counsel had elicited a concession along the same line from the State's expert, there was no evidence challenging many of the conclusions by the State's experts, and the non-scientific evidence of guilt was strong.

Because it could not be said that the State court applied **Strickland** unreasonably, *habeas* relief was not warranted.

Hinton v. Alabama, ____ U.S. ____, ____ S.Ct. ____, ____ L.E2d ____ (2014) (13-6440, 2/24/14)

1. Under **Strickland v. Washington**, 466 U.S. 668 (1984), to establish ineffective assistance of counsel the defendant must show that counsel's representation was objectively unreasonable and that prejudice resulted. Prejudice occurs where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome of the proceeding.

2. Here, the essence of the State's case consisted of forensic evidence which identified six bullets found at the scenes of three offenses as having been fired from a handgun which belonged to defendant's mother. The court concluded that defense counsel acted unreasonably when he presented the testimony of a firearms and toolmark expert whom he believed to be unconvincing, where counsel presented the witness solely because he believed State law limited expert witness fees to $1,000 and he was unable to find other experts who were willing to work for that amount.

Counsel was unaware that more than a year before defendant's arrest, State law had been amended to authorize reimbursement for "any" defense expenses that were "reasonably incurred" and approved in advance by the trial court. In addition, although the trial court also appeared to erroneously believe that expert witness fees were limited to $1,000, it invited defense counsel to request additional funding if he found that $1,000 was insufficient.

The Supreme Court noted that counsel's failure to seek additional funding was based not on a strategic calculation, but on the mistaken belief that expert witness fees were limited by State law. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under **Strickland**."

The court stressed that its holding did not concern the strategic decision whether to hire a particular expert. Instead, the issue involved counsel's decision to present what he believed to be inadequate expert testimony solely because he did not understand the applicable law concerning permissible expert witness fees.

3. The court rejected the argument that defendant was not prejudiced in light of the expert's testimony that the gun barrel was so corroded that an expert opinion concerning the bullets was not possible. The expert was "badly discredited" on cross-examination, and the court found that a more credible expert may well have created a reasonable doubt in the jury's mind concerning the testimony of the State's experts that the bullets had been fired from the

mother's weapon. The court stated:

> Prosecution experts, of course, can sometimes make mistakes. . . . This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law.

Because the lower courts did not apply the proper prejudice inquiry to the facts of this case, the cause was remanded for further proceedings.

People v. Clendenin, 238 Ill.2d 302, 939 N.E.2d 310 (2010)

Because the decision whether to waive the right of confrontation is not among those decisions that ultimately belong to the defendant, defense counsel may waive the defendant's right of confrontation by entering into an evidentiary stipulation where two elements are met: (1) defendant does not object; and (2) the decision to stipulate is a matter of trial tactics and strategy. The exception to this general rule exists where the stipulation is the equivalent of a guilty plea, because defendant's constitutional right to plead not guilty is implicated. A stipulation is the equivalent of a guilty plea where either (1) the State's entire case is presented by stipulation and the defendant fails to present or preserve a defense; or (2) the stipulation concedes the sufficiency of the evidence to support the conviction. Only in those limited circumstances must the trial court personally admonish defendant about the stipulation and obtain defendant's agreement to the stipulation. No other restriction exists on defense counsel's authority to stipulate to the admission of evidence. **People v. Campbell**, 208 Ill.2d 203, 802 N.E.2d 1205 (2003); **People v. Phillips**, 217 Ill.2d 270, 840 N.E.2d 1194 (2005).

After denial of defendant's motion to suppress, the case proceeded by stipulated bench trial. The stipulation included the disclaimer that defendant stipulated to the sufficiency of the evidence to convict. It also preserved defendant's objection to the admission of the evidence that was the subject of his motion to suppress. The court asked defendant if he wished to be bound by the stipulation and defendant responded affirmatively. After the court found him guilty, defendant retained new counsel and an evidentiary hearing was conducted on his claim that his attorney had been ineffective in advising him to proceed by stipulation. Defendant testified that defense counsel had not explained the option of a stipulated bench trial to him "thoroughly," that his memory of the court asking him about the stipulation was vague, and that defense counsel had not shown him the stipulation and he did not want to be bound by it.

The Appellate Court concluded that implicit in **Campbell** and **Phillips** was the requirement that defendant be apprised of the content of the stipulation to allow him a meaningful opportunity to object. Because defendant was provided no opportunity to review the stipulation, the Appellate Court reversed.

The Illinois Supreme Court found that defendant's efforts to disavow the stipulation were unavailing. Not only did the defendant not object to the stipulation, he expressed no disapproval of the stipulation when addressed by the trial judge, who had no duty to admonish defendant in any respect regarding the stipulation. The decision to proceed by stipulation was a matter of trial tactic and strategy by defense counsel who decided to seek suppression of the evidence, and the stipulation preserving the suppression issue was part of that strategy. The stipulation was not tantamount to a guilty plea. By its terms it did not concede the sufficiency of the evidence of guilt. It also preserved a defense because by it terms it contested the correctness of the court's ruling on the motion to suppress. The Appellate Court incorrectly

found a restriction on defense counsel's authority to stipulate that is not found in either **Campbell** or **Phillips**.

People v. English, 2013 IL 112890 (No. 112890, 1/25/13)

To establish that appellate counsel was ineffective, defendant must satisfy the standard set forth in **Strickland v. Washington**, 466 U.S. 668 (1984). Defendant must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful. Appellate counsel is not obligated to raise every conceivable issue on appeal, but is expected to exercise professional judgment to select from the many potential claims of error that might be asserted on appeal.

Appellate counsel's assessment of the merits of an issue depends on the state of the law at the time of the direct appeal. Representation based on the law prevailing at the time of appeal is adequate, and counsel is not incompetent for failing to accurately predict that existing law will change. Appellate counsel is not required to raise issues that he reasonably determines are not meritorious.

Because the basis on which defendant sought to invalidate his conviction was not supported by precedent at the time of his direct appeal, it was reasonable for appellate counsel to conclude that the issue was unlikely to succeed. Appellate counsel was not deficient in failing to predict a subsequent change in the law. Counsel proceeded on other challenges, one of which was ultimately successful. Therefore, appellate counsel's forfeiture of the issue on appeal is not excused based on ineffective assistance of appellate counsel.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Holt, 2014 IL 116989 (No. 116989, 11/20/14)

Where the record clearly showed that defendant was unfit to stand trial, defense counsel did not provide ineffective assistance by failing to oppose the State's request to find defendant unfit, even though defendant personally wanted counsel to oppose the State's request by arguing that she was fit.

Prior to trial, the State expressed doubt about defendant's fitness and requested a court-ordered fitness evaluation. Defense counsel had no objection. The evaluation concluded that defendant was not fit to stand trial. At a subsequent fitness hearing held before a jury, the State took the position that it would be unable to prove that defendant was fit. At the end of the hearing, the court granted defense counsel's motion for a directed verdict of unfitness.

On appeal, defendant argued that trial counsel was constitutionally obligated to argue for a finding of fitness in deference to defendant's wishes. The court rejected this argument, holding that no plausible interpretation of the right to counsel would require counsel to argue for an outcome that would violate due process by subjecting an unfit defendant to trial.

The court took issue with defendant's suggestion that counsel did not believe defendant was unfit since the State was the first party to raise the issue of defendant's fitness. Based on the substantial evidence of defendant's unfitness, the mere fact that the State made the request first "signifies nothing in our opinion." By contrast, the record strongly indicated that defense counsel shared the belief of the State and the court that defendant was unfit.

Defendant's position on appeal would require trial counsel to oppose the State no matter what position it took so long as an incompetent defendant so desired. The court characterized this position "as simply absurd." A defendant who is unfit to stand trial does not have the ability to knowingly or intelligently waive her right to have the court determine her fitness. Similarly, an unfit defendant does not have the capacity to direct her counsel to do so either.

The first duty of a criminal defense attorney should be to assess whether the defendant is fit to stand trial, irrespective of the State's position. By doing so, and by taking appropriate actions upon that assessment, defense counsel affords his client competent representation.

The court emphasized that its holding was limited to situations where the evidence clearly showed that defendant was unfit to stand trial, but defendant contended she was fit. In these circumstances, defense counsel is not obligated to adopt defendant's position and argue for a finding of fitness. "In fact, by doing so, defense counsel would be violating his duty to the client and suborning a violation of due process."

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Manning, 241 Ill.2d 319, 948 N.E.2d 542 (2011)

1. Under **Strickland v. Washington**, 466 U.S. 668 (1984), a defendant who claims that he was denied the constitutional right to effective assistance of counsel must show both that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. To establish the first prong, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. To establish prejudice, the defendant need not show that the result of the trial would have been different had counsel been competent. Instead, counsel's deficient performance is deemed prejudicial if it rendered the result of the trial unreliable or the proceeding fundamentally unfair.

The failure to meet either prong of **Strickland** precludes a finding of ineffective assistance of counsel.

2. At defendant's trial for delivery of a controlled substance, defense counsel did not act in an objectively unreasonable manner by failing to peremptorily challenge a juror who stated that he could not be fair in light of defendant's status as a convicted sex offender. The court stressed that counsel's decisions during jury selection are matters of trial strategy and are virtually unchallengeable. Although the juror stated that he believed sex offenders should be "locked up for life" and said four times that he could not give the defendant a fair trial, the court noted that before making these statements he said he did not think that defendant's background would influence his decision. Thus, his answers did not unequivocally indicate that he would be biased.

Furthermore, the court believed that trial counsel was sensitive to the effect of defendant's status on the jurors, as he exercised peremptory challenges against some (but not all) veniremembers who expressed similar misgivings. Thus, counsel could have decided the juror was not clearly biased, or may have wanted him on the jury because he was an immigrant and had prior encounters with law enforcement officers (in connection with speeding tickets). "Attorneys consider many factors in making their decisions about which jurors to challenge and which to accept."

Finally, the court noted that when the juror was questioned, defense counsel had only two remaining peremptory challenges with three juror slots remaining to be filled. Given the juror's equivocal answers, counsel could have reasonably decided to reserve the remaining peremptory challenges.

3. *In dicta*, a plurality of the court (Justices Garman, Thomas and Theis) rejected defendant's argument that the seating of a biased juror is structural error which is presumed to be prejudicial under **Strickland**. The court acknowledged that courts in other jurisdictions have found structural error under such circumstances, but declined to reconsider Illinois precedent holding that a defendant who raises such a challenge must satisfy **Strickland's**

prejudice requirement.

4. In a concurring opinion, Justice Karmeier criticized the plurality for discussing the prejudice component of **Strickland** after finding that defense counsel's actions were not objectively unreasonable. In a concurring opinion, Justices Kilbride concluded that the plurality should have limited its holding to the prejudice prong in order to provide guidance to the bench and bar and because the plurality had failed to explain how seating a biased juror could be a reasonable trial strategy.

In a dissenting opinion, Justices Freeman and Burke noted that although it is presumed that counsel's decisions are based on strategy, that trial strategy must itself be objectively reasonable in order to satisfy **Strickland**. The dissenters concluded that the juror's answers clearly indicated that he was biased, and that the failure to remove him from the jury should be presumed to have been prejudicial.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People v. Barkes, 399 Ill.App.3d 980, 928 N.E.2d 102 (2d Dist. 2010)

1. Because a criminal defendant has a constitutional right to decide whether to waive a jury trial, the decision to request a bench or jury trial is left to the defendant. A post-conviction petitioner made a sufficient allegation of ineffective assistance to obtain a third-stage evidentiary hearing where he alleged that he told counsel he wanted a bench trial, but was told that counsel "was running the show [and defendant] was getting a jury trial." (See **COLLATERAL REMEDIES**, §§9-1(f), (g)).

2. Although a defendant has no constitutional right to plea bargain, if the State chooses to bargain there is a right to the effective assistance of counsel during the negotiations. To make a knowing and voluntary decision whether to accept or reject a plea offer, defendant must be fully informed by counsel concerning the consequences of accepting or rejecting the plea offer, including any sentencing consequences. (See also **COLLATERAL REMEDIES**, §§9-1(f), (g)).

(Defendant was represented by Assistant Defender Kim DeWitt, Elgin.)

People v. Calhoun, 404 Ill.App.3d 362, 935 N.E.2d 663 (1st Dist. 2010)

To demonstrate that counsel failed the performance prong of **Strickland v. Washington**, 466 U.S. 668 (1984), defendant must overcome a strong presumption that the challenged action or inaction of trial counsel was valid trial strategy. The reasonableness of the conduct must be evaluated from counsel's perspective at the time of the alleged error, and without hindsight, in light of the totality of circumstances, and not just on the basis of isolated acts. Because effective assistance refers to competent and not perfect representation, mere mistakes in trial strategy or judgment will not render the representation incompetent.

The court concluded that counsel had a valid strategic reason not to ask for special verdict forms distinguishing intentional or knowing murder from felony murder. Counsel could conclude that a special verdict form would make it easier for the jury to convict, as there was overwhelming evidence of defendant's participation in the kidnaping underlying the felony murder charge. On the other hand, a general verdict form would give the jury more latitude to reach a more lenient verdict, particularly where counsel hoped the jury would sympathize with the fact that defendant was provoked by her sincere belief that the deceased had raped her infant daughter.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

People v. Clendenin, ___ Ill.App.3d ___, 913 N.E.2d 1179 (2d Dist. 2009)

1. Under **People v. Campbell**, 208 Ill.2d 203, 802 N.E.2d 1205 (2003) and **People v. Phillips**, 217 Ill.2d 270, 840 N.E.2d 1194 (2005), defense counsel may waive the defendant's right to confrontation by agreeing to a stipulation, so long as the defendant does not object and the decision to stipulate is a matter of trial tactics and strategy. However, the defendant must personally waive the right to confrontation if the stipulation contains a statement that the evidence is sufficient to convict, or if the State's entire case is to be presented by stipulation and a defense is neither presented nor preserved. In addition, the trial court is required to give guilty plea admonishments if a stipulation is tantamount to a guilty plea.

The Appellate Court found that the **Campbell/Phillips** rule implicitly requires that the defendant be informed of the specific content of a stipulation, either directly by the court or defense counsel or by having the stipulation read into the record. The court noted, however, that procedural admonishments are not required where the stipulation is a matter of sound trial tactics or strategy, and that the defendant need not affirmatively accept the stipulation so long as he fails to object once he has knowledge of its content.

Because the record showed that the defendant was unaware of the specific content of the stipulation on which his conviction rested, his failure to object cannot be construed as the informed acquiescence required by **Campbell/Phillips**. The court also found that defense counsel failed to handle the stipulations in a reasonable manner, and therefore did not adequately waive defendant's right to confrontation. The conviction was reversed and the cause remanded for a new trial.

2. In *dicta*, the court warned of the dangers inherent in the **Campbell/Phillips** rule for both defendants and defense counsel. The court urged the legislature to authorize the use of "conditional pleas," which allow the defendant to plead guilty while preserving certain pretrial issues for appeal. The court also concluded that the stipulation in this case was not a matter of sound trial tactics and strategy in the context of the entire trial, because the stipulation contained evidence which assured defendant's conviction without providing either a strategic advantage or a basis on which defense counsel could argue that defendant was innocent. Thus, reversal would be required even if not necessitated by the failure to advise defendant of the content of the stipulation.

People v. Dupree, 397 Ill.App.3d 719, 922 N.E.2d 503 (2d Dist. 2010)

1. Under **People v. Brocksmith**, 162 Ill.2d 224, 642 N.E.2d 1230 (1994), a defendant has a personal right to decide whether to tender an instruction on a lesser included offense. The court questioned whether an alleged **Brocksmith** violation is itself a constitutional violation which can be raised in a post-conviction petition, or whether the issue may be raised on post-conviction only by a claim of ineffective assistance of counsel. The court declined to resolve this question, because the petition raised the issue in terms of ineffective assistance.

2. The court concluded that **Brocksmith** applies to the decision whether to tender second degree murder instructions, although second degree murder is technically not a lesser included offense of first degree murder. The court concluded that the rationale underlying **Brocksmith** – that a defendant who tenders an instruction on a lesser included offense risks exposure to conviction on an uncharged offense – applies equally to second degree murder.

3. Defendant's post-conviction petition raised the gist of an issue of ineffective assistance of counsel where defendant's affidavit indicated that counsel, rather than the defendant, decided not to request second degree murder instructions. The court found that there was an adequate basis in the evidence on which second degree instructions could have been given. Furthermore, where the defendant argued that he acted in self-defense during a confrontation between members of rival gangs, it was arguable that a second degree murder

instruction would have changed the result of the trial.

The order summarily dismissing the post-conviction petition was reversed.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Dupree, 2014 IL App (1st) 111872 (No. 1-11-1872, 7/30/14)

1. To prevail on a claim of ineffective assistance of counsel, defendant must show both that counsel's representation fell below an objective standard of reasonableness and a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

To show that trial counsel's performance was deficient, defendant must overcome the strong presumption that the questioned action or inaction was the result of sound trial strategy. A reviewing court is highly deferential to trial counsel on matters of strategy and must view counsel's performance at the time it occurred rather than in hindsight.

2. A prior consistent statement may not be introduced on direct examination to enhance the credibility of a witness's testimony. Even when a witness is impeached by means of a prior inconsistent statement, a prior consistent statement is inadmissible unless it disproves or explains the making of the inconsistent statement.

However, where there is a charge or inference of recent fabrication, a prior consistent statement is admissible to show that the witness told the same story before the alleged fabrication. Merely questioning a witness about whether the witness rehearsed his testimony with opposing counsel does not constitute a charge of recent fabrication.

3. The Appellate Court held that trial counsel was ineffective for opening the door for the State to admit an otherwise inadmissible prior consistent statement from a prosecution witness, failing to object when the State introduced the evidence and repeatedly argued it as substantive evidence, and failing to request that the jury be given a limiting instruction.

The witness made two statements to police - one on October 31, and one on November 1. During cross-examination, defense counsel impeached the witness with the first statement, which was inconsistent with the witness's trial testimony. After pointing out discrepancies between the first statement and the trial testimony, counsel asked the witness whether his "enhanced memory had just come to his mind in the last week."

On redirect, the witness testified that he had not told the truth in his first statement to police, that he returned to the station on the following day because he wanted to tell the truth, and that he remembered the second statement because it was the truth. The prosecutor made several references to the fact that the witness's second statement was truthful. The prosecutor also read several questions and answers from the second statement that were consistent with the witness's trial testimony and asked the witness to confirm that he had made such statements in the second statement. Defense counsel did not object to any of this testimony.

A. The court found that counsel's representation was objectively unreasonable because his cross-examination allowed the State to introduce the prior consistent second statement. Had counsel merely cross-examined the witness about the inconsistencies between his first statement and his trial testimony, the State would have been unable to introduce the second, consistent statement. Although counsel undoubtedly knew of the second statement, he alleged that the witness's trial testimony was a recent fabrication. By doing so, he opened the door for admission of the second statement.

The court rejected the State's argument that defense counsel's strategy was to demonstrate that the witness had given inconsistent statements from the beginning and argue

that the second statement and the trial testimony were intended to frame defendant. Defense counsel took several actions that were inconsistent with such a strategy, including not introducing the second statement himself, eventually objecting to its introduction, and objecting to the introduction of a video of the statement. The court concluded that counsel's strategy was to cast doubt on the witness's credibility by referring to his inconsistent statements, and noted that such a strategy did not require counsel to open the door to admission of the second statement.

Furthermore, counsel compounded his error by failing to object to the State's use of the second statement as substantive evidence and failing to request a limiting instruction. Finally, although counsel was successful in a sidebar in excluding part of the content of the second statement when it was subsequently presented through a police detective's testimony, counsel inexplicably failed to request that the jury be instructed to disregard the evidence.

B. Defendant was prejudiced by counsel's errors because the result of the trial was unreliable. Prior consistent statements are prohibited because they are likely to unfairly enhance a witness's credibility simply because a statement has been repeated. Improperly bolstering a witness's credibility constitutes reversible error when the trial testimony of that witness is crucial and the jury's verdict may have been influenced. Improperly bolstering a witness's credibility is especially prejudicial if the witness's statement relates to guilt and innocence.

The evidence against defendant was far from compelling, as there was no physical evidence linking him to the shooting, his fingerprints were not found in the car from which the shots were fired or on the shell casings which were recovered, and no weapon was recovered. Furthermore, although defendant had not been involved in any prior altercations with the victims, both of the witnesses who implicated defendant as the shooter had prior problems with the victims. In addition, those witnesses provided conflicting accounts about the incident. Finally, the prior inconsistent statement related to defendant's guilt or innocence. Under these circumstances, counsel's unreasonable actions clearly caused prejudice.

Defendant's convictions for first degree murder and attempt first degree murder were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Gonzalez, 407 Ill.App.3d 1026, 944 N.E.2d 834 (2d Dist. 2011) (No. 2-09-0088, 2/24/11)

Whether to present a particular witness is one of the strategic choices generally left to counsel, and is not subject to challenge as ineffective assistance of counsel. The Appellate Court affirmed the trial court's rejection of a post-conviction petition alleging that defense counsel was ineffective for failing to call defendant's girlfriend as an alibi witness.

At the evidentiary hearing, defense counsel testified that the girlfriend had not been called because she had "some baggage" which would not be balanced by her expected testimony. The attorney also testified that the defense attorneys concluded that the alibi evidence was weak and was not as likely to be successful as challenging the sufficiency of the State's evidence. The court also concluded that in view of her relationship to the defendant, the girlfriend would not have been a credible witness.

Because the record demonstrated that the decision to not call the girlfriend was a matter of reasonable trial strategy, the counsel was not ineffective.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Hill, 2014 IL App (2d) 120506 (No. 2-12-0506, 3/31/14)

Defense counsel was not ineffective for failing to request separate verdicts concerning the State's three theories of first-degree murder: intentional murder, knowing murder and felony murder.

1. The defendant is presumed to have been convicted of the least serious offense where the jury returns a general verdict after the trial court denies a defense request for specific verdicts on multiple counts of first degree murder which carry sentencing and "one-act, one-crime" ramifications. (**People v. Smith**, 233 Ill. 2d 1, 906 N.E.2d 529 (2009)). Thus, where the jury returned a general verdict after the trial court refused a request for specific verdict forms, and a consecutive sentence would be required for the predicate of felony murder if the conviction was for intentional or knowing murder, the trial court must vacate the conviction for the predicate of felony murder.

2. The court noted that **Smith** has been limited to situations in which the trial court refuses a defense request for separate verdict forms. Thus, the failure to request separate verdicts cannot form the basis for a finding of ineffective assistance.

In addition, defendant could not overcome the presumption that counsel's failure to ask for specific verdict forms was based on sound strategy. At trial, defendant's theory was that he did not commit the offense of murder in any of its forms. Under these circumstances, counsel's decision not to separate felony murder from the other offenses was presumably a tactical decision based on "sensible trial strategy."

Defendant's convictions for first degree murder and aggravated arson were affirmed.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Hobson, 2014 IL App (1st) 110585 (No. 1-11-0585, 3/12/14)

After defendant's conviction for murder was affirmed on direct appeal, defendant filed a post-conviction petition which the trial court dismissed at the second stage. The Appellate Court found that defendant made a substantial showing that defense counsel was ineffective and remanded the cause for a third-stage evidentiary hearing.

1. First, defendant made a substantial showing that his attorney acted unreasonably by failing to object to the prosecution's use of prior inconsistent statements. At trial, the judge admitted statements which two witnesses had signed and grand jury testimony that was consistent with those statements. The statements claimed that the witnesses overheard statements concerning a shooting that was the basis of the charges. At trial, the witnesses testified that they knew nothing about the shooting and that the prior statements were untrue.

Under 725 ILCS 5/115-10.1(c)(2), a prior inconsistent statement that was not made under oath in a legal proceeding constitutes hearsay and is inadmissible as substantive evidence unless it describes an event or condition of which the declarant had personal knowledge. Because neither of the witnesses saw the shooting, they lacked the personal knowledge required to make their prior statements admissible as substantive evidence under §10.1(c)(2).

The court concluded that counsel acted unreasonably by failing to object, and that there was no valid strategic reason for not objecting.

2. Defendant also made a substantial showing that counsel acted unreasonably by failing to discover and present evidence that two witnesses were promised leniency on pending cases in return for testifying falsely before the grand jury. The testimony of both witnesses in other proceedings indicated that they would have been disclosed the promises of leniency and their false testimony had defense counsel interviewed them.

3. Defendant also made a substantial showing that counsel acted unreasonably by

failing to impeach a police officer who testified that when he questioned one witness who was subsequently promised leniency, he did not know that the witness had an outstanding warrant. Evidence submitted in support of the post-conviction petition and in other proceedings indicated that the officer did know of the warrant, and had the officer been impeached his entire testimony would have been cast in doubt.

4. Defendant also showed a reasonable probability that trial counsel's actions affected the outcome of the trial and were therefore prejudicial. The written statements bolstered the witness's grand jury testimony and cast doubts on their trial testimony, which favored the defense. The failure to introduce the promises of leniency made the witnesses' grand jury testimony seem more credible, and impeaching the officer would have substantially undercut his testimony at trial. Had counsel acted reasonably, "the balance of credibility" could have shifted enough to cause the trier of fact to conclude that the State had failed to satisfy the reasonable doubt standard.

The cause was remanded for a third-stage evidentiary hearing.

(Defendant was represented by Assistant Defender Autumn Fincher, Chicago.)

People v. Holt, 2013 IL App (2nd) 120476 (No. 2–12–0476, 10/29/13)

Defense counsel was not ineffective at a fitness hearing where he moved for a directed verdict after the State conceded that it could not meet its burden of showing that defendant was fit. Defendant contended that she was fit, and argued that counsel should have presented an argument that she was fit to stand trial.

As a matter of first impression, the court found that a person about whom there is a *bona fide* doubt of fitness is not entitled to require her attorney to assert that she is fit. The court concluded that counsel has a duty to protect the due process right not to be tried while unfit, and that counsel who believes his client to be unfit may assume that the client is incapable of acting in her own best interests.

The court rejected the argument that the **Cronic** test rather than the **Strickland** standard applied here, because **Cronic** applies where counsel entirely fails to subject the State's case to meaningful adversarial testing. The court concluded that counsel subjected the State's case to meaningful adversarial testing by successfully arguing that the State had failed to meet its burden of proof and obtaining a directed verdict.

In *dicta,* the court also noted that under Illinois precedent, an attorney need not assist a client who is competent to stand trial in an attempt to feign a mental condition for the purpose of obtaining a finding that he or she is unfit.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Pacheco, 2013 IL App (4th) 110409 (No. 4-11-0409, 6/24/13)

The court rejected the argument that trial counsel was ineffective because he conceded to the jury that a minor tried as an adult was likely guilty of robbery, which under the law of accountability also made her guilty of felony murder.

In **People v. Chandler**, 129 Ill.2d 233, 543 N.E.2d 1290 (1989), the Supreme Court held that trial counsel cannot concede his client's guilt unless the record affirmatively shows that the attorney did so for legitimate strategic reasons and with the client's knowing consent. However, in **People v. Shatner**, 174 Ill.2d 133, 673 N.E.2d 258 (1996), the Supreme Court distinguished **Chandler** and stated that claims of ineffective assistance depend on a case-by-case analysis of the reasonableness of counsel's conduct under the facts of the particular case. The court noted that in light of the overwhelming evidence of guilt, "it is difficult to conceive of a legitimate trial strategy counsel could have implemented on defendant's behalf other than

the one he attempted," which was to attempt to keep defendant's incarceration to a minimum by conceding "the obvious in the hopes the jury would believe that defendant did not know [her accomplice] intended to kill [the decedent]. Regardless of the legal validity of the argument, this was defendant's best chance of acquittal on the murder charges."

The court also noted that unlike **Chandler**, the defendant testified and in her testimony conceded her guilt to robbery and possession of a stolen vehicle. "We are not going to reverse a defendant's conviction based on a concession made by her attorney when she essentially made the same concessions in her own testimony."

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Poole, 2012 IL App (4th) 101017 (No. 4-10-1017, 7/17/12)

To establish that he was denied effective assistance of counsel, defendant must show both that his counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In considering whether counsel's performance was deficient, a court must indulge a strong presumption that the challenged action or inaction was the result of sound trial strategy.

Generally, a defense decision not to seek a severance of charges, although it may prove unwise in hindsight, is regarded as a matter of trial strategy. A major disadvantage of severance is that it gives the prosecution two bites at the apple. An evidentiary deficiency at the first trial can perhaps be cured in the second. Counsel may conclude that it makes sense to try for an acquittal of both charges in one proceeding, because the impact of an additional conviction would not be significant.

Defendant was convicted of aggravated battery with a firearm and unlawful possession of a firearm by a felon in a joint trial. He claimed on appeal that his counsel's failure to seek severance of the charges was professionally unreasonable, citing **People v. Edwards**,63 Ill. 2d 134, 345 N.E.2d 496 (1976), for the proposition that he was entitled to severance because there was a strong probability that he would be prejudiced in his defense of the battery charge where the weapons charge required proof of his previous conviction. Notwithstanding **Edwards**, the Appellate Court concluded that defendant could not satisfy the performance prong of an ineffective-assistance-of-counsel claim because "[a] potential trial strategy is apparent here, even if counsel should choose to deny it."

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

People v. Stanford, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-09-0420, 6/16/11)

Generally, in order to prevail on a claim of ineffective assistance of counsel, defendant must satisfy the two-prong test of **Strickland v. Washington**, 466 U.S. 668 (1984).

There are some circumstances so likely to prejudice the accused that prejudice need not be demonstrated under the second prong of **Strickland**, but can be presumed. Situations warranting a presumption of prejudice include cases in which: (1) there is a complete denial of counsel at a critical stage of the proceedings; or (2) counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.

A more limited presumption of prejudice exists where counsel has a genuine conflict of interest. Prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his counsel's performance.

Defendant was not excused from the requirement of showing prejudice based on his complaint that communication had eroded between him and his appointed counsel to the point

that they were engaged in an irreconcilable conflict. Defendant was not denied counsel at any critical stage of the proceedings and counsel had not failed to subject the State's case to meaningful adversarial testing. Bickering between defendant and his counsel did not amount to an actual conflict of interest. Defendant articulated no legitimate reason for his conflict with counsel, and the court did not summarily dismiss defendant's complaints about counsel, but appointed independent counsel to investigate, who concluded that nothing alleged by defendant rose to the level of ineffective assistance of counsel.

(Defendant was represented by Assistant Defender Kathleen Weck, Elgin.)

People v. Watson, 2012 IL App (2d) 091328 (No. 2-09-1328, 1/25/12)

Counsel is ineffective where her performance falls below an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different.

Defendant was convicted of residential burglary based solely on the opinion of a state police forensic scientist that defendant could not be excluded as the contributor to a 7-loci DNA profile derived from small hairs found at the point of entry. Generally, 13 loci are typed to create a profile, but the expert was unable to obtain a full profile from the hairs. The expert identified six locations on the hair profile where there was a match with defendant's profile, and a seventh location where defendant's profile was consistent with the hair profile. He testified that the odds of finding that DNA profile in the general population were 1 in 1.4 billion blacks, 1 in 103 million whites, and 1 in 170 million Hispanics. Defense counsel's cross-examination was limited to clarifying that those statistics took into consideration only persons unrelated to defendant.

1. The Appellate Court concluded that defense counsel's performance was deficient in two respects. First, counsel failed to challenge the reliability of a partial-profile comparison. Counsel should have adduced evidence that if defendant's DNA matched the hair DNA at seven loci, but did not match at the remaining six, defendant would be excluded as the source of the crime-scene DNA. Counsel also did not highlight that the expert could not claim a match at one of the seven loci, and therefore defendant could only not be excluded as a contributor, rather than that there was a match. Instead, in argument to the jury, counsel stated that seven loci were a match to the defendant, never developing that the missing loci could be critical and, in fact, exculpatory.

Second, counsel did not probe the accuracy of the expert's testimony regarding the statistical probabilities of finding another profile similar to the defendant's in the general population such that it would match the hair DNA at seven loci. The statistical probability of finding a DNA profile in the general population is a critical step in DNA analysis. The court noted that studies of various states' databases collecting offenders' DNA profiles have led legal scholars and mathematicians to doubt the alleged low probability of encountering a random, partial-profile match in the general population, as studies have uncovered large numbers of nine- and ten-loci matches. Legal scholars and scientists have also questioned whether the extraordinarily large figures used in court to estimate the probability of a random match in the general population are "no better than alchemy," and have characterized them as "total nonsense," and a "damned lie."

2. The court rejected the argument that counsel did not perform unreasonably because the expert's methods and statistical analyses had been found reliable in other cases, and convictions have been upheld on matches fewer than seven loci. The issue of counsel's effectiveness concerns advocacy, not admissibility. The court clarified that it expressed no opinion on whether a conviction based on a seven-loci match is sustainable, or whether the

expert's methods were reliable. It only expressed the view that a reasonably effective defense attorney would have argued that a DNA comparison based on fewer than 13 loci might be unreliable or that the partial profile might not be uncommon.

3. Trial strategy cannot be the basis for finding counsel ineffective. The presumption that counsel's challenged action or inaction was the product of sound trial strategy may be overcome where no reasonably effective defense attorney, faced with the circumstances of defendant's trial, would engage in similar conduct, such as where the chosen strategy is so unsound that counsel failed to conduct any meaningful adversarial testing. Because the DNA evidence was the only evidence linking defendant to the crime, the circumstances required that counsel subject that evidence to adversarial testing. Her failure to do so cannot be dismissed as sound trial strategy.

4. Defendant was prejudiced by counsel's deficient performance. DNA evidence is often assumed to have a special aura of certainty and mystic infallibility. There was a basis to challenge the DNA evidence portrayed as a match, but that argument and evidence was not developed. Because the DNA was the only evidence of guilt, there is a reasonable probability that counsel might have raised a reasonable doubt as to defendant's guilt had she effectively explained and argued to the jury the potential weaknesses of the evidence.

5. The prejudice was not cured by closing argument. Defense counsel accurately recounted that the expert testified only that defendant could not be excluded as contributing to the hair profile, but then repeatedly referred to the seven-loci identification as a "match." Therefore, counsel's argument did not serve to erase the prejudice caused by counsel's deficient performance.

6. The court also rejected the argument that there was no prejudice because defendant admitted his guilt. A judicial confession is a voluntary acknowledgment of guilt during a judicial proceedings such as a plea of guilty, testimony at trial, or testimony at some other hearing. To constitute a judicial confession, the statement must directly acknowledge guilt, or directly and necessarily imply guilt.

Defendant's statements in allocution may be read to suggest his guilt, but may also be read as an expression of remorse for his life of crime generally, and not specifically to this offense. Therefore, they are too vague to be considered a judicial confession.

Statements made by defendant in his examination of witnesses at a hearing on his post-trial motion challenging the competency of his counsel did not qualify as judicial confessions. Defendant offered no guilty plea or personal testimony at that hearing. The evidence at that hearing revealed that defendant and his counsel disagreed about whether defendant should adopt the trial strategy of making a judicial confession at trial, and established that defendant entertained pleading guilty. But defendant ultimately did not make a judicial confession or plead guilty.

(Defendant was represented by Assistant Defender Linda Johnson, Elgin.)

People v. Wood, 2014 IL App (1st) 121408 (No. 1-12-1408, 7/23/14)

1. Under Illinois law, a defendant must first raise an insanity defense to be eligible for a finding of guilty but mentally ill (GBMI). When a defendant raises an insanity defense, the court may find defendant GBMI if the State has proved defendant guilty of the offense beyond a reasonable doubt, the defendant has failed to prove insanity, but the defendant has proved by a preponderance of the evidence that he was mentally ill at the time of the offense.

Defendant argued that trial counsel provided ineffective assistance by requesting a finding of GBMI without first presenting an insanity defense and by failing to call his expert to testify that defendant suffered from paranoid schizophrenia.

To establish ineffective assistance, a defendant must show that his counsel's representation fell below an objective standard of reasonableness (the performance prong) and that there is a reasonable probability that but for counsel's errors the result of the proceedings would have been different (the prejudice prong).

2. The Appellate Court first found that defendant established that he had been prejudiced by counsel's actions. If counsel had raised an insanity defense and presented the testimony of an expert witness about defendant's lengthy history of mental illness, the evidence here would have been sufficient to prove by a preponderance of the evidence that defendant was mentally ill at the time of the offense.

The court specifically rejected the State's argument that no prejudice occurred because a finding of GBMI would provide no benefit to defendant. Although a GBMI finding would not necessarily result in a lower sentence, it does require the Department of Corrections to take certain actions to provide treatment for defendant's mental illness.

3. Counsel's performance, however, was not deficient. Although counsel mistakenly believed a GBMI finding was permissible without first raising an insanity defense, counsel also reasonably believed he had no good-faith basis for raising an insanity defense. Defendant's own expert concluded that defendant was not insane at the time of the offense, and his conclusion was supported by trial evidence showing that defendant appreciated the criminality of his conduct.

The court noted that an attorney has an ethical obligation to not raise any issue or defense that is frivolous. Here, it would have been an ethical violation for defense counsel to assert an insanity defense which lacked a factual and legal basis. Counsel therefore did not provide ineffective assistance.

(Defendant was represented by Assistant Defender Robert Markfield, Chicago.)

Top

§13-4(a)(3)
Other

In re Danielle J., 2013 IL 110810 (No. 110810, 12/19/13)

1. A minor is entitled to the effective assistance of counsel in juvenile delinquency proceedings. Whether counsel is effective in a delinquency proceeding is determined under the **Strickland** standard.

2. The minor was denied the effective assistance of counsel where her attorney misunderstand the law and failed to realize that a continuance for supervision may be ordered only before an adjudication of delinquency is made. The minor rejected the State's pretrial offer of a continuance under supervision, but counsel requested such a continuance after the minor had been adjudicated delinquent, at which point a continuance was statutorily precluded.

The court concluded that counsel's actions were objectively unreasonable because he misunderstood the applicable law, and that the minor was prejudiced because she lost the opportunity to obtain a continuance under supervision.

The court remanded the cause for a new first-phase hearing at which the minor is to be properly advised that if she proceeds to trial and is unsuccessful, a continuance of supervision will be subject to the State's Attorney's approval. The minor will then be in a position to make an informed and knowing decision whether to accept the pretrial offer of a

continuance under supervision, if that offer is reinstated. If she elects to go to trial, the minor will be able to request a continuance under supervision before the adjudication is announced.

People v. Austin M., 2012 IL 111194 (No. 111194, 8/30/12)

1. In abuse and neglect cases, the trial court is required to appoint a guardian *ad litem*, who serves as an arm of the court. In an abuse and neglect proceeding, the guardian *ad litem* is required to meet with the minor, assess the circumstances, determine what disposition might be in the minor's best interests, and report back to the court. A guardian *ad litem* represents the best interests of the minor and does not function as the attorney for the ward.

Under 705 ILCS 405/1-5(1), when a guardian *ad litem* in an abuse and neglect proceeding is also an attorney, separate counsel need not be appointed to represent the minor "unless the court finds that the minor's interests are in conflict with what the guardian *ad litem* determines to be in the best interest of the minor."

2. There is no requirement that a guardian *ad litem* be appointed in delinquency proceedings; however, a guardian *ad litem* may be appointed if the minor has no interested parent or guardian, if the interests of the parents differ from that of the minor, or if counsel believes that the minor is unable to act in his or her own best interests. (705 ILCS 405/2-17(3)) Just as in abuse and neglect cases, in delinquency proceedings the guardian *ad litem* focuses on the best interests of the minor rather than act as the minor's attorney.

An alleged delinquent minor is statutorily and constitutionally entitled to representation by a defense attorney, and is not permitted to waive representation and proceed without the assistance of counsel. (705 ILCS 405/5-170(b)) Such representation can be rendered only by an attorney "whose singular loyalty is to the defense of the juvenile." Where a single attorney attempts to fulfill the role of guardian *ad litem* as well as defense counsel, "the risk that the minor's constitutional and statutory right to counsel will be diluted, if not denied altogether, is too great." Thus, in a delinquency proceeding a single attorney cannot function both as defense counsel and as guardian *ad litem*.

3. A *per se* conflict of interest exists where the minor's counsel in a delinquency proceeding simultaneously functions as both defense counsel and guardian *ad litem*. A *per se* conflict of interest occurs where certain facts about a defense attorney's status engender, in and of themselves, a disabling conflict. If a *per se* conflict is established, reversal of the adjudication is required even if it cannot be shown that the conflict affected the attorney's actual performance.

4. The court concluded that defense counsel suffered from a *per se* conflict of interest, although he was hired by the parents of two minor respondents to act as defense counsel and not appointed as a guardian *ad litem*, where he mistakenly perceived his role as to provide "hybrid" representation encompassing both representation as defense counsel and focusing on the "best interests" of the minors. Defense counsel made several statements indicating his belief that his role was "seeking the truth" and acting in the minors' best interests. In addition, counsel failed to correct the trial court's explanation of counsel's role as a "classic description of a guardian *ad litem*."

The court also noted that counsel made no effort to suppress the alleged admission of the only minor who was found guilty, even though the trial court found the admission to be the only credible evidence of guilt. Finally, in closing argument counsel failed to emphasize the contradictory evidence concerning whether the statement had been made or to urge the trial court to discount the alleged statement, giving further credence to the notion that he believed his role to be advancing the minor's best interests rather than to seek an acquittal.

The delinquency adjudication was reversed and the cause remanded for further

proceedings.

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Phipps, 238 Ill.2d 54, 933 N.E.2d 1186 (2010)

1. Waiver is an intentional relinquishment or abandonment of a known right.

After defendant filed a motion to withdraw his guilty plea, defense counsel informed the court that defendant might want to claim counsel's ineffectiveness. The court appointed new counsel to determine whether defendant wanted to pursue a claim of ineffective assistance of counsel. At the next hearing date, plea counsel informed the court that defendant had mentioned a mechanical problem that he thought should have explored at sentencing. Appointed counsel stated that he had consulted with defendant, gone over the issues, and spoken with plea counsel, and defendant did not want to raise any ineffectiveness claim, but wanted to proceed on his motion with plea counsel. The court allowed defendant to proceed on his motion with plea counsel, and no challenge was made until appeal to plea counsel's effectiveness.

The Supreme Court concluded that defendant had not waived any claim of ineffective assistance of counsel other than the one claim specifically mention by plea counsel. Appointed counsel's statement could not be construed as a general waiver of any ineffectiveness claim due to the context in which it was made. Any ambiguity in appointed counsel's statement must be interpreted narrowly as waiver principles are construed liberally in favor of the defendant.

2. To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate that his counsel's performance was deficient and that he was prejudiced by that deficient performance.

The State charged defendant with reckless homicide, but based on a version of the statute not in effect at the time of the offense. The defendant pled guilty to that offense in return for a promise of a sentence cap of 12 years. Before the defendant was sentenced, the State realized its error and moved to vacate the defendant's plea and substitute a charge of aggravated DUI. With defense counsel's agreement, the court vacated the plea, and defendant entered a guilty plea to the new charge, subject to the same 12-year cap. The court sentenced defendant to 12 years' imprisonment.

The defendant charged that his counsel was ineffective for agreeing to vacate the plea and substitute the aggravated DUI charge, which was barred by the speedy-trial term. Under the reckless homicide statute in effect at the time of the offense, defendant could be sentenced to a maximum of five years' imprisonment, whereas the maximum for aggravated DUI was 14 years. The Supreme Court rejected that argument based on its conclusion that the substitution of the aggravated DUI charge did not violate the speedy-trial statute. (See also **SPEEDY TRIAL,** §47-1(b)).

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Carballido, 2011 IL App (2d) 090340 (No. 2-09-0340, mod. op., 8/10/11)

Generally, the Post-Conviction Hearing Act limits the scope of a defendant's challenge to constitutional matters that have not been, and could not have been, previously adjudicated. Appellate counsel can work only with the record as it exists. Where the record on direct appeal is insufficient to establish ineffective assistance of counsel, defendant may bring and develop the claim in a post-conviction proceeding.

Where appellate counsel argued on direct appeal that trial counsel was ineffective for failing to litigate a motion to suppress statements based on the inadequacy of **Miranda** warnings, but did not have the benefit of a complete record concerning counsel's failure to

litigate a suppression motion based on the involuntariness of the statements, the latter issue was not waived for post- conviction purposes. Therefore, the defendant was not required to allege ineffectiveness by appellate counsel in order to raise the issue on post-conviction.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

People v. Carballido, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-09-0340, 3/17/11)

Generally, a claim of ineffective assistance of counsel need not be raised on direct appeal in order to avoid forfeiture in post-conviction proceedings. Because the record on ineffective assistance counsel issues is usually not complete on direct review, claims that trial counsel was ineffective are preferably raised through collateral review, after the parties have an opportunity to develop the record.

Where appellate counsel argued on direct appeal that trial counsel was ineffective for failing to litigate a motion to suppress statements based on the inadequacy of **Miranda** warnings, but did not have the benefit of a complete record concerning counsel's failure to litigate a suppression motion based on the involuntariness of the statements, the latter issue was not waived for post-conviction purposes. Therefore, the defendant was not required to allege ineffectiveness by appellate counsel in order to raise the issue on post-conviction.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

People v. Flemming, 2014 IL App (1st) 111925 (No. 1-11-1925, 8/15/2014)

When a defendant alleges his counsel's ineffectiveness in a *pro se* motion for a new trial, the court should conduct a **Krankel** hearing to examine the factual matters underlying defendant's claim to determine whether new counsel should be appointed. **People v. Krankel**, 102 Ill. 2d 181 (1984); **People v. Nitz**, 143 Ill. 2d 82 (1991).

The operative concern in a **Krankel** hearing is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations. If the court determines that the claims lack merit it does not need to appoint new counsel. If the court finds that the claims show possible neglect, the case proceeds to the second step in a **Krankel** hearing, an adversarial proceeding in which new counsel must be appointed to represent defendant on his claim of ineffectiveness.

Here, defendant made an oral *pro se* motion alleging that his counsel was ineffective for failing to present evidence supporting his theory of defense. After hearing defendant's allegations, the court did not directly question or otherwise interact with defense counsel. Instead, the court directed the prosecutor to question defense counsel about defendant's allegations. After hearing defense counsel's answers, the court denied defendant's motion.

On appeal, defendant argued that the trial court failed to conduct a proper judicial inquiry "one-on-one style" with defendant and counsel, and instead conducted a full-blown adversarial hearing where defendant had no representation. Defendant argued that the trial court improperly compressed the two steps in a **Krankel** hearing but failed to properly execute either of them.

The Appellate Court rejected this argument. It held that the prosecutor's questioning of defense counsel was not a full-blown second-stage adversarial hearing. Instead, the questioning was conducted at the court's direction, was very brief, and directed solely at answering defendant's allegations. Such questioning was clearly a preliminary inquiry designed to give the court information about defendant's claims in order to decide whether new counsel should be appointed.

The fact that the trial court did not personally question defense counsel did not make

this an improper hearing. There is no set format for conducting the initial inquiry in a **Krankel** hearing. Some interchange between the court and counsel is permissible and usually necessary, but the trial court's method of inquiry is somewhat flexible. Moreover, the State's participation here was *de minimis* and was not enough to turn this into an adversarial proceeding.

The trial court's decision not to appoint new counsel was affirmed.

(Defendant was represented by Assistant Defender Chris Gehrke, Chicago.)

People v. Flemming, 2015 IL App (1st) 111925-B (No. 1-11-1925, 5/1/2015)

1. When a defendant alleges his counsel's ineffectiveness in a *pro se* motion for a new trial, the court should conduct a **Krankel** hearing to examine the factual matters underlying defendant's claim to determine whether new counsel should be appointed. **People v. Krankel**, 102 Ill. 2d 181 (1984); **People v. Nitz**, 143 Ill. 2d 82 (1991).

The operative concern in a **Krankel** hearing is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations. If the court determines that the claims lack merit it does not need to appoint new counsel. If the court finds that the claims show possible neglect, the case proceeds to the second step in a **Krankel** hearing, an adversarial proceeding in which new counsel must be appointed to represent defendant on his claim of ineffectiveness.

2. Here, defendant made an oral *pro se* motion alleging that his counsel was ineffective for failing to present evidence supporting his theory of defense. After hearing defendant's allegations, the court did not directly question or otherwise interact with defense counsel. Instead, the court directed the prosecutor to question defense counsel about defendant's allegations. After hearing defense counsel's answers, the court denied defendant's motion.

On appeal, defendant argued that the trial court failed to conduct a proper judicial inquiry "one-on-one style" with defendant and counsel, and instead conducted a full-blown adversarial hearing where defendant had no representation. Defendant argued that the trial court improperly compressed the two steps in a **Krankel** hearing but failed to properly execute either of them.

3. The Appellate Court rejected defendant's argument that the prosecutor's questioning of defense counsel was a full-blown second-stage adversarial hearing. The questioning was conducted at the court's direction, was very brief, and directed solely at answering defendant's allegations. Such questioning was clearly a preliminary inquiry designed to give the court information about defendant's claims in order to decide whether new counsel should be appointed.

Additionally, the fact that the trial court did not personally question defense counsel did not make this an improper hearing. There is no set format for conducting the initial inquiry in a **Krankel** hearing. Some interchange between the court and counsel is permissible and usually necessary, but the trial court's method of inquiry is somewhat flexible.

4. But, if the State's participation during the preliminary inquiry is anything more than *de minimis*, there is an unacceptable risk that the inquiry will become an improper adversarial proceeding with both the State and trial counsel opposing defendant. The purpose of **Krankel** is best served by having a neutral trier of fact evaluate the claims without the State's adversarial participation. When the State questions defendant's trial counsel in a manner contrary to defendant's allegations, the State's participation is not *de minimis* and is reversible error. **People v. Jolly**, 2014 IL 117142.

Here, although the State's participation was minimal, its questioning of defense counsel tended to counter defendant's allegations. Such questioning was contrary to the intent of a

preliminary **Krankel** inquiry and was reversible error.

The case was remanded for a new preliminary **Krankel** hearing before a different trial judge and without the State's adversarial participation.

(Defendant was represented by Assistant Defender Chris Gehrke, Chicago.)

People v. Gilbert, 2013 IL App (1st) 103055 (No. 1-10-3055, 3/19/13)

1. Within 21 days after the entry of a final order of disbarment or suspension for more than six months, an attorney must notify his or her clients about the discipline and the client's right to retain another attorney. (Supreme Court Rule 764). On the other hand, an attorney who merely faces a possible suspension of his license due to a recommendation by the ARDC remains a licensed attorney and is qualified to represent clients until the Supreme Court acts on the recommendation. Attorneys are permitted to practice law until they are actually suspended or disbarred, and no *per se* rule grants a new trial to a criminal defendant merely because their attorney faces potential suspension or disbarment.

Although defense counsel was facing possible suspension due to an ARDC hearing board's recommendation, he was under no duty to inform defendant of the potential suspension until the Illinois Supreme Court acted on the recommendation. Thus, where no action had been taken at the time of trial and the Supreme Court did not enter a suspension order until six months after trial, counsel was not ineffective for failing to advise defendant that he might be suspended.

2. The court rejected defendant's argument that trial counsel was ineffective because he suffered from dementia during the trial. Although defendant claimed that the records of the ARDC hearing board indicated that counsel suffered from "significant mental health problems," those records were not part of the record on appeal. Furthermore, psychological evaluations relied upon by the ARDC were conducted some two years before defendant's trial. The court also noted that the trial judge conducted a hearing on counsel's post-trial motion, and that the transcript of that hearing gave no indication that counsel suffered from dementia.

3. The court rejected defendant's argument that counsel committed several errors at trial which rendered his representation ineffective, including that counsel relied on an argument of jury nullification rather than compulsion or coercion. An attorney is not necessarily ineffective for relying on a defense that is unsupported by the evidence. Where the evidence of guilt is overwhelming, the defendant persists in pleading not guilty, and the circumstances of the case render other defensive strategies unavailable, counsel may reasonably elect to present a nonlegal defense. Although counsel may not argue that the jury should ignore the law, an attempt to invoke the empathy, compassion, understanding or sympathy of the jurors may create the possibility of jury nullification.

Because the evidence of guilt was overwhelming and there was no viable defense, counsel's trial strategy of arguing jury nullification was reasonable under the circumstances. Furthermore, even if counsel did act unreasonably, in light of the overwhelming evidence it is unlikely that defendant can satisfy the prejudice requirement of **Strickland.**

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Holt, 2013 IL App (2nd) 120476 (No. 2–12–0476, 10/29/13)

Defense counsel was not ineffective at a fitness hearing where he moved for a directed verdict after the State conceded that it could not meet its burden of showing that defendant was fit. Defendant contended that she was fit, and argued that counsel should have presented an argument that she was fit to stand trial.

As a matter of first impression, the court found that a person about whom there is a

bona fide doubt of fitness is not entitled to require her attorney to assert that she is fit. The court concluded that counsel has a duty to protect the due process right not to be tried while unfit, and that counsel who believes his client to be unfit may assume that the client is incapable of acting in her own best interests.

The court rejected the argument that the **Cronic** test rather than the **Strickland** standard applied here, because **Cronic** applies where counsel entirely fails to subject the State's case to meaningful adversarial testing. The court concluded that counsel subjected the State's case to meaningful adversarial testing by successfully arguing that the State had failed to meet its burden of proof and obtaining a directed verdict.

In *dicta,* the court also noted that under Illinois precedent, an attorney need not assist a client who is competent to stand trial in an attempt to feign a mental condition for the purpose of obtaining a finding that he or she is unfit.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Robinson, 2015 IL App (1st) 130837 (No. 1-13-0837, 6/26/15)

1. When a defendant makes a post-trial claim of ineffective assistance of counsel, the trial court must conduct a **Krankel** inquiry to examine the factual basis of the claim. The **Krankel** inquiry may include trial counsel's answers and explanations and a brief discussion between the court and defendant.

In **People v. Jolly**, 2014 IL 117142, the Illinois Supreme Court held that a **Krankel** hearing "should operate as a neutral and nonadversarial proceeding." Where the State's participation is "anything more than *de minimis*," there is an unacceptable risk that the hearing will be turned into an adversarial proceeding, where both the State and trial counsel oppose the defendant. It is reversible error if the State is allowed to participate in an adversarial manner.

2. Although the **Krankel** hearing in the present case occurred before the **Jolly** decision, the Appellate Court held that **Jolly** applied retroactively since it did not announce a new rule of criminal procedure, but instead simply applied a well-established principle to Jolly's case.

3. Here the trial court committed reversible error by allowing the State to take an adversarial position against defendant. The trial court asked for the State's comments, and the State argued directly against defendant's claims. By doing so, the State's participation changed the "hearing from an objective or neutral inquiry into and adversarial inquiry."

Where the State has been allowed to take an adversarial position, the appropriate remedy under **Jolly** is to remand for a new hearing before a different judge.

(Defendant was represented by Assistant Defender Kristen Mueller, Chicago.)

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Examples

§13-4(b)(1)
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Generally

Porter v. McCollum, ___ U.S. ___, 130 S.Ct. 447, ___ L.Ed.2d ___ (2009) (No. 08-10537, 11/30/09)

1. Counsel is ineffective where his or her representation falls below an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Defense counsel has an obligation to conduct a thorough investigation of the defendant's background as part of the preparation for a capital sentencing hearing.

2. Here, counsel failed to conduct a reasonable investigation into defendant's background. Although defendant represented himself at trial and counsel acted merely as standby, after defendant pleaded guilty counsel was appointed for sentencing. During the one-month delay between the trial and sentencing, counsel met only briefly with defendant on only one occasion. In addition, counsel failed to obtain defendant's school, medical, or military service records. Counsel did not interview members of the defendant's family, and ignored avenues of investigation disclosed by court-ordered competency evaluations which were in the record.

The court concluded that counsel did not make a reasonable professional decision to end his investigation; even where a death penalty defendant is "fatalistic or uncooperative, . . . that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation."

3. There was a reasonable probability that had defendant been represented by competent counsel, the result of the death hearing would have been different. At sentencing, counsel presented almost no evidence which would have "humanized" the defendant. An adequate investigation would have disclosed ample mitigating evidence, including the defendant's "heroic military service in two of the most critical – and horrific – battles of the Korean War," defendant's struggles to "regain normality" upon his return home, defendant's childhood history of physical abuse, and defendant's brain abnormalities, difficulties in reading and writing, and limited schooling. The court concluded that such evidence would have created a reasonable probability that a non-death sentence would have been imposed.

The court also criticized the state courts for discounting the mitigating value of defendant's military service because he had gone AWOL on more than one occasion. Not only is there "a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines," but defendant's extensive combat service was relevant not only because he served honorably under extreme hardship, but because the intense stress and mental and emotional toll of his experiences constituted a reason to impose a sentence other than death. The fact that defendant went AWOL was consistent with such a theory of relevance, and did not diminish the value of the evidence. (See also **COLLATERAL REMEDIES**, §9-5(a)).

The order denying *habeas* relief was reversed and the cause remanded for further proceedings.

Sears v. Upton, ___ U.S. ___, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010)

Under **Strickland**, defense counsel is ineffective where: (1) he or she engages in objectively unreasonable actions, and (2) there is a reasonable likelihood that the outcome of the trial would have been different had counsel acted competently. Here, the Georgia state court held that counsel failed to make a reasonable investigation into mitigating evidence for the death hearing. Because counsel presented some mitigating evidence, however, the court concluded that it would be improper to "speculate" whether a different outcome would have been likely had the jury heard the extensive mitigating evidence which would have been disclosed by an adequate investigation.

The court criticized the State court's holding on two grounds. First, unless a reasonable investigation has been made, counsel's subsequent tactical decisions cannot be deemed to be "reasonable." Thus, the lower court erred by assuming that counsel's choice of a theory of mitigation was entitled to deference where there had not been a complete investigation.

Second, the fact that defense counsel mounts some defense does not foreclose inquiry into whether the defendant was prejudiced by an inadequate investigation. "We have never limited the prejudice inquiry under **Strickland** to cases in which there was 'little or no mitigation evidence' presented."

Because the state post-conviction proceeding showed that counsel failed to discover defendant's extreme psychological problems, the cause was remanded for the State court to determine in the first instance whether the **Strickland** standard has been satisfied.

People v. Domagala, 2013 IL 113688 (No. 113688, 4/18/13)

1. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance resulted in prejudice. Trial counsel has a duty to conduct a reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary. The duty to investigate includes the obligation to independently investigate any possible defenses.

Counsel's failure to investigate is judged against a standard of reasonableness under the circumstances, applying a heavy measure of deference to counsel's judgments. Where the record establishes that counsel had an objective reason to know that a possible defense was available, the failure to fully investigate can constitute ineffective assistance.

2. Illinois courts have held that an intervening cause completely unrelated to the acts of the defendant will relieve the defendant of criminal responsibility for an offense. Gross negligence or intentional medical maltreatment constitutes such an intervening cause, and therefore may constitute a valid defense to a murder charge.

At the second stage of a post-conviction proceeding, the petitioner's expert submitted an affidavit stating that tests performed at the hospital were unreliable, and that inserting a feeding tube based on the results of those tests constituted gross negligence. Taking those facts as true, as is required at a second stage post-conviction proceeding, there was a viable defense that the decedent's death was caused not by the actions of the defendant in committing a battery, but by the gross negligence of the medical staff which treated the decedent's injuries. Because a reasonable attorney would have investigated and pursued such a defense, counsel's representation was deficient where he failed to do so.

3. Prejudice resulted from counsel's deficient performance. Under **Strickland**, prejudice is shown if there is a reasonable probability that had the defense been presented, the outcome of the trial would have been different. The court rejected the Appellate Court's holding that the testimony of the petitioner's post-conviction expert would have been cumulative to expert testimony which was admitted at trial, noting that the trial testimony stated only that there were problems with the testing, not that the testing and resulting treatment constituted "gross medical negligence." Furthermore, any conflicts between the testimony of the post-conviction expert and that of the treating doctors could not be resolved at second-stage proceedings, where all well-pleaded facts must be taken as true. Instead, such conflicts could only be resolved at the third-stage hearing.

The trial court order dismissing the petition at the second stage was reversed, and the cause was remanded for a third stage evidentiary hearing.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

People v. Hodges, 234 Ill.2d 1, 912 N.E.2d 1204 (2009)

A post-conviction petition made a sufficient allegation of ineffective assistance of counsel to survive summary dismissal where it alleged that defense counsel failed to investigate the testimony of three witnesses whose testimony was described in affidavits attached to the petition. (See **COLLATERAL REMEDIES**, §§9-1(e)(1),(2)).

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

Griffin v. Pierce, 622 F.3d 831 , 2010 WL 3655899 (7th Cir. 2010)

Defendant is prejudiced by his attorney's deficient performance where there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different.

The state court unreasonably concluded that defendant was not prejudiced by his attorney's failure to conduct any investigation into mitigation in preparation for defendant's capital sentencing hearing. Had the attorney conducted the investigation, the sentencing court would have learned about aspects of defendant's background that the Supreme Court has declared relevant in assessing a defendant's moral culpability: his father's alcoholism and abusiveness; his mother's absence from the home and the circumstances of her death, as well as how it affected him, including increasing mental abuse from his father; his diagnosis of schizophrenic reaction chronic undifferentiated type with suicidal tendencies; details of his mental health and drug addition; his suicide attempts and attempts at self-mutilation; and his good acts of caring for dying and ill family members, including his father.

The state Supreme Court concluded that there was no reasonable probability that the mitigating evidence would have persuaded the sentencing court not to impose the death penalty. It was unclear how much weight that court gave to the sentencing court's statement that the mitigating evidence would not have changed the sentence, but the sentencing court's statement is not conclusive. The question is not whether a particular judge would have imposed a different sentence, but whether there is a reasonable probability that the sentence would have been different, based on an objective evaluation of the evidence.

The state Supreme Court also failed to evaluate the totality of the mitigating evidence against the aggravation, focusing only on the seriousness of the offense, the corroboration of the confession, and defendant's lengthy criminal history. The Supreme Court's assessment that the mitigating evidence was not inherently mitigating and cumulative of the pre-sentence investigation report, which was incomplete and misleading, was unreasonable.

(Defendant was represented by Staff Attorney Gregory Swygert, Capital Post-Conviction Unit.)

People v. Hobson, 2014 IL App (1st) 110585 (No. 1-11-0585, 3/12/14)

After defendant's conviction for murder was affirmed on direct appeal, defendant filed a post-conviction petition which the trial court dismissed at the second stage. The Appellate Court found that defendant made a substantial showing that defense counsel was ineffective and remanded the cause for a third-stage evidentiary hearing.

1. First, defendant made a substantial showing that his attorney acted unreasonably by failing to object to the prosecution's use of prior inconsistent statements. At trial, the judge admitted statements which two witnesses had signed and grand jury testimony that was consistent with those statements. The statements claimed that the witnesses overheard statements concerning a shooting that was the basis of the charges. At trial, the witnesses testified that they knew nothing about the shooting and that the prior statements were untrue.

Under 725 ILCS 5/115-10.1(c)(2), a prior inconsistent statement that was not made under oath in a legal proceeding constitutes hearsay and is inadmissible as substantive evidence unless it describes an event or condition of which the declarant had personal knowledge. Because neither of the witnesses saw the shooting, they lacked the personal knowledge required to make their prior statements admissible as substantive evidence under §10.1(c)(2).

The court concluded that counsel acted unreasonably by failing to object, and that there was no valid strategic reason for not objecting.

2. Defendant also made a substantial showing that counsel acted unreasonably by failing to discover and present evidence that two witnesses were promised leniency on pending cases in return for testifying falsely before the grand jury. The testimony of both witnesses in other proceedings indicated that they would have been disclosed the promises of leniency and their false testimony had defense counsel interviewed them.

3. Defendant also made a substantial showing that counsel acted unreasonably by failing to impeach a police officer who testified that when he questioned one witness who was subsequently promised leniency, he did not know that the witness had an outstanding warrant. Evidence submitted in support of the post-conviction petition and in other proceedings indicated that the officer did know of the warrant, and had the officer been impeached his entire testimony would have been cast in doubt.

4. Defendant also showed a reasonable probability that trial counsel's actions affected the outcome of the trial and were therefore prejudicial. The written statements bolstered the witness's grand jury testimony and cast doubts on their trial testimony, which favored the defense. The failure to introduce the promises of leniency made the witnesses' grand jury testimony seem more credible, and impeaching the officer would have substantially undercut his testimony at trial. Had counsel acted reasonably, "the balance of credibility" could have shifted enough to cause the trier of fact to conclude that the State had failed to satisfy the reasonable doubt standard.

The cause was remanded for a third-stage evidentiary hearing.

(Defendant was represented by Assistant Defender Autumn Fincher, Chicago.)

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§13-4(b)(1)(b)
Counsel Not Ineffective

Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (No. 09-587, 1/19/11)

1. The Supreme Court concluded that the Court of Appeals erred in a federal *habeas* case by finding that trial counsel was ineffective.

To satisfy **Strickland**, defendant was required to show that: (1) counsel's representation fell below an objective standard of reasonableness, and (2)there was a reasonable probability the result of the proceeding would have been different had counsel acted competently. A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceedings; counsel's errors must be so serious as to deprive the defendant of a fair trial.

In most criminal cases, there are multiple ways in which counsel could effectively represent the defendant. Only rarely will an effective defense necessarily encompass one

technique or approach. Counsel is required to formulate a defense strategy that is reasonable at the time the case is being prepared and which balances limited resources in accordance with effective trial tactics and strategies. Finally, **Strickland** allows counsel to make a reasonable decision not to investigate a particular line of defense.

2. Counsel did not act unreasonably by failing to consult a forensic blood expert or offer expert testimony on blood evidence. The court concluded that it was at least arguable that a reasonable attorney could decide to forego blood evidence under the circumstances.

A. Only after trial, when forensic evidence concerning the source of blood found at the scene "emerged," could it be concluded that blood evidence was a critical issue. At trial, there were many factual differences between the parties' versions of the events. The prosecution's case did not stress blood evidence; in fact, it appeared that the prosecution decided to present blood evidence only after opening statements. Although counsel's opening statement may have been the impetus which caused the State to reconsider, the court found that strength of the prosecution's evidence "may well have been weakened by the fact that it was assembled late in the process."

The court also found that even had expert blood testimony supported the defense, a reasonable attorney might have elected not to present it. Had defense counsel chosen to rely on such evidence, the prosecution might have responded by developing its own expert evidence and possibly destroying defendant's case. Expert blood testimony might also have distracted the jury's attention or turned the case into a battle of experts. Finally, counsel had reason to doubt his client's story, and expert blood analysis might well have exposed defendant's claims as fabrications.

B. Counsel was not ineffective because he did not anticipate that the prosecution would offer expert testimony and was unprepared to offer expert testimony in response. Counsel is not required to be prepared for "any contingency" which may arise at trial; **Strickland** guarantees not perfect representation, but only a reasonably competent attorney. Although defense counsel was mistaken in his belief concerning the prosecution's intentions, representation is constitutionally deficient only if the adversarial process is undermined to the extent that the fairness of the trial is called into question. Any error by counsel in failing to anticipate the State's evidence did not rise to that level.

In any event, effective representation would not have necessarily required expert evidence in response to the State's expert. In many instances, cross-examination of the State's expert is sufficient to expose defects in the expert's presentation. In addition, where defense counsel lacks a solid case, challenging the sufficiency of the State's case may be a more effective defense than presenting evidence. Here, defense counsel conducted a skillful cross-examination, elicited concessions from the State's experts, and drew attention to weaknesses in their conclusions. Because a State court could have decided that counsel acted reasonably by electing to not present expert evidence, there was no basis on which to grant *habeas* relief.

3. The court also concluded that the Court of Appeals erred in applying the "prejudice" requirement of **Strickland**. "Prejudice" does not exist under **Strickland** merely because a different result would have been possible had counsel acted reasonably. Instead, it must be "reasonably likely" that a different result would have occurred.

The State court could reasonably have concluded that defendant failed to show that a different outcome was likely where the expert evidence developed by the defense was no more than a theoretical possibility, counsel had elicited a concession along the same line from the State's expert, there was no evidence challenging many of the conclusions by the State's experts, and the non-scientific evidence of guilt was strong.

Because it could not be said that the State court applied **Strickland** unreasonably,

habeas relief was not warranted.

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§13-4(b)(1)(c)
Counsel Ineffective

Porter v. McCollum, ___ U.S. ___, 130 S.Ct. 447, ___ L.Ed.2d ___ (2009) (No. 08-10537, 11/30/09

1. Counsel is ineffective where his or her representation falls below an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Defense counsel has an obligation to conduct a thorough investigation of the defendant's background as part of the preparation for a capital sentencing hearing.

2. Here, counsel failed to conduct a reasonable investigation into defendant's background. Although defendant represented himself at trial and counsel acted merely as standby, after defendant pleaded guilty counsel was appointed for sentencing. During the one-month delay between the trial and sentencing, counsel met only briefly with defendant on only one occasion. In addition, counsel failed to obtain defendant's school, medical, or military service records. Counsel did not interview members of the defendant's family, and ignored avenues of investigation disclosed by court-ordered competency evaluations which were in the record.

The court concluded that counsel did not make a reasonable professional decision to end his investigation; even where a death penalty defendant is "fatalistic or uncooperative, . . . that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation."

3. There was a reasonable probability that had defendant been represented by competent counsel, the result of the death hearing would have been different. At sentencing, counsel presented almost no evidence which would have "humanized" the defendant. An adequate investigation would have disclosed ample mitigating evidence, including the defendant's "heroic military service in two of the most critical – and horrific – battles of the Korean War," defendant's struggles to "regain normality" upon his return home, defendant's childhood history of physical abuse, and defendant's brain abnormalities, difficulties in reading and writing, and limited schooling. The court concluded that such evidence would have created a reasonable probability that a non-death sentence would have been imposed.

The court also criticized the state courts for discounting the mitigating value of defendant's military service because he had gone AWOL on more than one occasion. Not only is there "a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines," but defendant's extensive combat service was relevant not only because he served honorably under extreme hardship, but because the intense stress and mental and emotional toll of his experiences constituted a reason to impose a sentence other than death. The fact that defendant went AWOL was consistent with such a theory of relevance, and did not diminish the value of the evidence. (See also **COLLATERAL REMEDIES**, §9-5(a)).

The order denying *habeas* relief was reversed and the cause remanded for further proceedings.

People v. Domagala, 2013 IL 113688 (No. 113688, 4/18/13)

1. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance resulted in prejudice. Trial counsel has a duty to conduct a reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary. The duty to investigate includes the obligation to independently investigate any possible defenses.

Counsel's failure to investigate is judged against a standard of reasonableness under the circumstances, applying a heavy measure of deference to counsel's judgments. Where the record establishes that counsel had an objective reason to know that a possible defense was available, the failure to fully investigate can constitute ineffective assistance.

2. Illinois courts have held that an intervening cause completely unrelated to the acts of the defendant will relieve the defendant of criminal responsibility for an offense. Gross negligence or intentional medical maltreatment constitutes such an intervening cause, and therefore may constitute a valid defense to a murder charge.

At the second stage of a post-conviction proceeding, the petitioner's expert submitted an affidavit stating that tests performed at the hospital were unreliable, and that inserting a feeding tube based on the results of those tests constituted gross negligence. Taking those facts as true, as is required at a second stage post-conviction proceeding, there was a viable defense that the decedent's death was caused not by the actions of the defendant in committing a battery, but by the gross negligence of the medical staff which treated the decedent's injuries. Because a reasonable attorney would have investigated and pursued such a defense, counsel's representation was deficient where he failed to do so.

3. Prejudice resulted from counsel's deficient performance. Under **Strickland**, prejudice is shown if there is a reasonable probability that had the defense been presented, the outcome of the trial would have been different. The court rejected the Appellate Court's holding that the testimony of the petitioner's post-conviction expert would have been cumulative to expert testimony which was admitted at trial, noting that the trial testimony stated only that there were problems with the testing, not that the testing and resulting treatment constituted "gross medical negligence." Furthermore, any conflicts between the testimony of the post-conviction expert and that of the treating doctors could not be resolved at second-stage proceedings, where all well-pleaded facts must be taken as true. Instead, such conflicts could only be resolved at the third-stage hearing.

The trial court order dismissing the petition at the second stage was reversed, and the cause was remanded for a third stage evidentiary hearing.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

People v. Clark, 2011 IL App (2d) 100188 (No. 2-10-0188, 9/15/11)

To prevail on a claim of ineffective assistance of counsel, defendant must show both that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and that the deficient performance prejudiced him in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different.

While as a general rule, whether to present witnesses is a tactical decision that will not be reviewed and cannot support a claim of ineffective assistance of counsel, defense counsel has a legal and ethical obligation to explore and investigate a client's potential defense. This obligation necessarily requires discussion by defense counsel with the client regarding a possible defense. The failure to interview witnesses may indicate incompetence when defense counsel knows of the witnesses and their testimony may be exonerating.

To establish the prejudice prong of an ineffectiveness claim in a guilty-plea proceeding, defendant must show a reasonable probability that, absent counsel's errors, the defendant would not have pleaded guilty, and insisted on going to trial.

Defendant's post-conviction petition made a substantial showing of a claim of ineffective assistance of counsel. Defendant alleged that his attorney coerced him to plead guilty under the false impression that there were no witnesses available to testify on his behalf, and that counsel had failed to investigate a known witness who was offering to present evidence that could support an insanity defense. In a supporting affidavit, the complaining witness averred that at the time of the offense, defendant was not taking his medications, he said he heard voices telling him to stab her, she knew that he did not mean to harm her, and it was his mental condition that prompted him to do what he did. She also alleged that she had tried to contact defense counsel but her calls were not returned. These allegations made a substantial showing that defense counsel failed to investigate a witness who could have provided evidence that, as a result of a mental disease, defendant lacked substantial capacity to appreciate the criminality of his conduct. 720 ILCS 5/6-2(a). Defendant also made a substantial showing of prejudice, as he averred that he pleaded guilty only because counsel told him that there were no witnesses available to support a plausible defense.

The court rejected the State's argument that defense counsel's decision not to investigate was reasonable because the complaining witness's testimony would be insufficient to show defendant was insane at the time of the offense, and the plea agreement was favorable given the nature of the offense and defendant's background. The nature of the plea agreement is irrelevant if defendant would have had a complete defense. It is impossible for defense counsel to have determined the value of the testimony of the witness without interviewing her.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

People v. Coleman, 2015 IL App (4th) 131045 (No. 4-13-1045, 1/6/15)

Defendant was convicted of unlawfully delivering more than 900 grams of a substance containing cocaine. The cocaine was seized in 15 individual bags. After field testing one of the bags, an officer commingled the contents of all the bags into a single container for transmittal to the crime lab. Defense counsel stipulated that if the forensic scientist was called as a witness he would testify that the exhibit was "926.0 grams of cocaine."

1. The court concluded that counsel provided unreasonable representation where he stipulated that the aggregate weight of the substance was cocaine without investigating whether the contents of the 15 bags were tested separately before being combined. Counsel has a duty to make a reasonable investigation or a reasonable decision that makes a particular investigation unnecessary. Where the defendant is charged with possessing a specific amount of an illegal drug and there is a lesser included offense involving possession of a smaller amount, the weight of the substance is an essential element of the offense and must be proven beyond a reasonable doubt. Thus, where the suspected contraband was seized in separate containers, the State can carry its burden concerning the aggregate weight only if it can show that each of the packages contained the controlled substance.

The court concluded that where defendant was charged with unlawfully delivering the aggregate weight of 900 grams or more of a substance containing cocaine, counsel had a duty to make a reasonable investigation of the chemical testing to determine whether the 15 bags had been tested separately. Where the record showed no reason to believe that the bags had been separately tested, and a police report tendered to defense counsel before trial implied that the contents of the bags had been commingled before any testing by the crime lab, counsel's decision to enter a stipulation without conducting an investigation was objectively

unreasonable.

2. In order to prevail on an ineffective assistance claim, the defendant must also show a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. A reasonable probability of a different result is a probability sufficient to undermine confidence in the outcome.

Defendant showed a reasonable probability of a different outcome where, had counsel not entered the stipulation, the State would have been able to obtain a conviction for possession of the contents of just one bag. Defendant then would have been subject to a sentence of six to 30 years instead of the 30 to 60-year term which he faced for delivery of the aggregate weight.

3. The court rejected the State's argument that in the absence of a stipulation it would have presented the testimony of the chemist who tested the substance. The court noted that the chemist could have testified only that the commingled substance contained an unknown amount of cocaine, and not whether the cocaine came from one or several of the smaller bags.

The court also rejected the State's argument that it could be inferred that each of the 15 bags contained substance that had been broken off a one-kilogram block of cocaine for which wrapping material had been found at the scene of the arrest. The court concluded that the entire block could have been a lookalike substance which became mixed with preexisting cocaine residue from some other source. "In short, to prove, beyond a reasonable doubt, that each of the 15 bags contained cocaine, there was no way around [the] requirement of chemically testing the contents of each bag - unless a stipulation freed the State from that requirement. That is what the stipulation did, and it was prejudicial."

Defendant's conviction and sentence for unlawfully delivering 900 grams or more of a substance containing cocaine was vacated, and the cause was remanded with directions to sentence defendant for the lesser included offense of possession of 15 grams or more but less than 100 grams of a substance containing cocaine.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

Griffin v. Pierce, 622 F.3d 831 , 2010 WL 3655899 (7th Cir. 2010)

Defendant is prejudiced by his attorney's deficient performance where there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different.

The state court unreasonably concluded that defendant was not prejudiced by his attorney's failure to conduct any investigation into mitigation in preparation for defendant's capital sentencing hearing. Had the attorney conducted the investigation, the sentencing court would have learned about aspects of defendant's background that the Supreme Court has declared relevant in assessing a defendant's moral culpability: his father's alcoholism and abusiveness; his mother's absence from the home and the circumstances of her death, as well as how it affected him, including increasing mental abuse from his father; his diagnosis of schizophrenic reaction chronic undifferentiated type with suicidal tendencies; details of his mental health and drug addition; his suicide attempts and attempts at self-mutilation; and his good acts of caring for dying and ill family members, including his father.

The state Supreme Court concluded that there was no reasonable probability that the mitigating evidence would have persuaded the sentencing court not to impose the death penalty. It was unclear how much weight that court gave to the sentencing court's statement that the mitigating evidence would not have changed the sentence, but the sentencing court's statement is not conclusive. The question is not whether a particular judge would have imposed a different sentence, but whether there is a reasonable probability that the sentence

would have been different, based on an objective evaluation of the evidence.

The state Supreme Court also failed to evaluate the totality of the mitigating evidence against the aggravation, focusing only on the seriousness of the offense, the corroboration of the confession, and defendant's lengthy criminal history. The Supreme Court's assessment that the mitigating evidence was not inherently mitigating and cumulative of the pre-sentence investigation report, which was incomplete and misleading, was unreasonable.

(Defendant was represented by Staff Attorney Gregory Swygert, Capital Post-Conviction Unit.)

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§13-4(b)(2)
Plea Bargaining & Guilty Pleas

Lafler v. Cooper, ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___ ,2012 WL 932019 (2012) (No. 10-209, 3/21/12)

1. The Sixth Amendment right to counsel extends to the plea-bargaining process. The performance prong of **Strickland v. Washington**, 466 U.S. 668 (1984), requires a defendant to show that counsel's representation fell below an objective standard of reasonableness. To establish **Strickland** prejudice in the context of a plea, defendant must show that the outcome of the plea process would have been different with competent advice.

2. When the ineffective advice leads to the rejection of a plea offer, defendant must show that but for the ineffective advice of counsel, there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

3. The court rejected the argument that there can be no finding of **Strickland** prejudice arising from plea bargaining if the defendant is later convicted at a fair trial. The Sixth Amendment requires effective assistance at critical stages of a criminal proceeding, not just at trial. There is no rigid rule that an otherwise fair trial remedies errors not occurring at the trial itself; instead, the inquiry is whether the trial cured the particular error at issue. Even if a trial is free from error, a defendant who goes to trial instead of taking a more favorable plea may be prejudiced from a conviction on more serious counts or imposition of a more severe sentence.

There is no requirement that defendant show that ineffective assistance of counsel led to his being denied a substantive or procedural right in addition to **Strickland** prejudice. **Lockhart v. Fretell**, 506 U.S. 364 (1993), and **Nix v. Whiteside**, 475 U.S. 157 (1986), merely hold that legitimate prejudice does not exist where defendant would receive a windfall as a result of the application of an incorrect legal principle or an illegitimate defense strategy.

In a criminal justice system which is for the most part a system of pleas, the scope of the Sixth Amendment is not limited to ensuring the reliability of a conviction following a trial. The benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. In the context of plea bargaining, the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded

it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance. The fact that defendant is guilty does not mean that he was not entitled by the Sixth Amendment to effective assistance, or that he suffered no prejudice from his attorney's deficient performance during plea bargaining.

4. Any remedy for a Sixth-Amendment violation must neutralize the taint of the violation while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State invested in the prosecution. The injury to a defendant who declines a plea offer as a result of ineffective assistance may take two forms: First, a defendant who is convicted of the same charges to which he would have pleaded guilty could have received a lesser sentence under the plea. If defendant can demonstrate a reasonable probability that but for counsel's errors he would have accepted the plea, "the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between."

Resentencing may not suffice if the offer was for a plea to counts less serious than that for which defendant was convicted, or if a mandatory sentence confines a court's discretion after trial. "In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal." The court "can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed."

The court noted two factors that may inform the court's exercise of its discretion in fashioning a remedy. First, a court may take into account a defendant's earlier expressed willingness or unwillingness to accept responsibilities for his actions. Second, the court must attempt to restore the parties to the positions they occupied prior to rejection of the plea offer, without requiring the prosecution to incur the expense of a new trial.

5. Addressing the case before it, the Court concluded that the state court's adjudication was contrary to clearly-established federal law (28 U.S.C. §2254(d)) because it failed to apply **Strickland** to assess the ineffective-assistance claim. Therefore there is no statutory bar to the federal court granting relief.

Defendant satisfied **Strickland**'s two-part test. The parties agreed that counsel's performance was deficient when he advised defendant to reject a plea offer on the ground that he could not be convicted at trial. Defense counsel had told defendant that the State would be unable to establish his intent to murder because he had shot complainant below the waist, although he had also fired toward her head and had fired at her repeatedly when she fled.

Defendant showed that but for counsel's deficient performance there is a reasonable probability he would have accepted the State's plea offer to dismiss two charges and recommend a 51-to-81 month sentence. Defendant had communicated to the trial court his willingness to accept the offer. Defendant was prejudiced because as a result, he received a minimum sentence 3½ times greater than he would have received under the plea. The correct remedy is to order the State to reoffer the plea agreement. If defendant accepts, the state trial court can then exercise its discretion in determining whether to accept the plea agreement, vacate only some of the convictions and resentence defendant, or leave the convictions and sentences from trial undisturbed.

Missouri v. Frye, ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___ (2012) (No. 10-444, 3/21/12)

1. The Sixth Amendment guarantees the right to the assistance of counsel at all critical stages of the criminal process, including arraignment, post-indictment interrogations, post-indictment lineups, and entering a guilty plea. Because plea bargaining is central to the

administration of the criminal justice system and more than 90% of all cases are resolved through bargaining, "the negotiation of a plea bargain . . . is almost always the critical point for a defendant." Thus, "defense counsel have responsibilities in the plea bargain process . . . which must be met to render the adequate assistance of counsel that the Sixth Amendment requires."

2. The court acknowledged that it is difficult to define the scope of defense counsel's duties concerning plea bargaining. It was unnecessary to resolve that issue here, however, where defense counsel failed to advise defendant of two plea offers, one of which would have allowed him to plead to a lesser charge and receive a lower sentence than was ultimately imposed on his open plea to the original charge. "[A]s a general rule, defense counsel has a duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."

Because counsel failed to communicate a more favorable plea offer until after it had expired, his representation was objectively unreasonable under the first prong of **Strickland**. The court added that to prevent frivolous or fabricated claims that more advantageous plea offers were made but not communicated to defendants, the prosecution and trial courts may adopt measures such as requiring that plea offers be in writing, that the negotiation process be documented, and that formal offers be made part of the record in order to ensure that the defendant has been adequately advised.

3. To establish prejudice under the second prong of **Strickland**, a defendant who claims that a plea offer lapsed or was rejected because of counsel's deficient performance must demonstrate a reasonable probability that: (1) had counsel been effective, defendant would have accepted a plea offer which would have resulted in a more favorable outcome, and (2) the plea would have been entered without the prosecution cancelling the offer or the trial court refusing to accept the plea. Where defense counsel did not inform defendant of two plea offers before they expired, one of the plea offers would have allowed defendant to plead to a misdemeanor and serve a 90-day sentence, and defendant subsequently entered an open plea to the original felony charge and received a three-year sentence, defendant made an adequate showing that he would have accepted the plea offer had he been made aware of it. The state court erred, however, by failing to require defendant to show that the prosecution would have gone through with the plea and the judge would have accepted it. Because these questions are matters of state law, the court remanded the cause to Missouri courts to determine whether: (1) either the prosecution or trial court is authorized under Missouri law to refuse to accept a defendant's attempt to accept a plea offer, and (2) there is a reasonable probability the prosecutor and judge would have adhered to the offer in this case.

Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) (No. 08-651, 3/31/10)

1. Because immigration reforms have expanded the number of criminal convictions that will result in deportation and limited executive and judicial discretion to prevent deportation, convictions for many State criminal charges virtually guarantee that defendants who are foreign nationals will be deported. In order to provide constitutionally effective representation where the defendant is a foreign national, the defense counsel must advise the defendant of the immigration consequences of his plea, at least where it is clear that deportation will result.

Here, defense counsel could have easily determined that a guilty plea to drug distribution charges would have resulted in the defendant's deportation. Instead, counsel told the defendant that he would not have to worry about being deported as a result of the guilty plea. Thus, defendant made a sufficient allegation in post-conviction proceedings to satisfy the

first prong of the **Strickland** standard for ineffective assistance - that counsel acted in an objectively unreasonable manner.

The court stated:

> This is not a hard case in which to find deficiency [on the part of defense counsel]: The consequences [of a guilty] plea could easily be determined from reading the removal statute, . . . deportation was presumptively mandatory, and . . . counsel's advice was incorrect.

The cause was remanded for the State court to consider the second prong of **Strickland** - whether defendant was prejudiced by counsel's unreasonable actions.

2. The court acknowledged that immigration law is a complex speciality and that in many cases the deportation consequences of a particular plea will be unclear. Defense has a lesser burden in such cases - to advise the defendant of the possibility that the plea might carry immigration consequences. "Lack of clarity in [immigration] law does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice."

3. The court rejected the State court's holding that counsel need not advise a guilty plea defendant of collateral consequences of a plea, including the effect on the defendant's immigration status. The court stressed that it has never recognized the distinction between "direct" and "collateral" consequences of a plea in defining the scope of the constitutional guarantee of effective assistance of counsel. The legitimacy of the "collateral consequences" theory need not be resolved in this case, because there is a close connection between the immigration consequences of a guilty plea and the criminal process.

4. The court rejected the Solicitor General's argument that the **Strickland** standard should be applied only if counsel affirmatively misleads a guilty plea defendant concerning the effect of a plea on his immigration status. The court found that limiting **Strickland** in such a manner would create two absurd results: (1) counsel would have an incentive to remain silent even when answers are readily available, and (2) the clients who were least capable of representing themselves would be deprived of even basic, readily-available advice on deportation.

The court also rejected the argument that its opinion will "open the floodgates" to litigation challenging previously-entered convictions, noting that **Strickland** sets a high standard for establishing ineffectiveness, "professional norms" for the past 15 years have imposed a general obligation on counsel to provide advice about the deportation consequences of a plea, and guilty plea defendants have a disincentive to challenge a plea because if successful, they will lose the benefit of any plea bargain. The court also noted that both the State and the defense will be well served during plea bargaining by having accurate information concerning possible deportation issues, because the parties may be able to negotiate a plea which does not mandate deportation and the defendant will have a "powerful incentive" to plead guilty to a lesser charge in order to avoid deportation.

People v. Carrera, 239 Ill.2d 241, 940 N.E.2d 1111 (2010)

1. The court concluded that a defendant who completely served his probation sentence and had been discharged was not "imprisoned" for purposes of the Post-Conviction Hearing Act, although as a result of his Illinois conviction the Immigration and Naturalization service had taken him into custody and instituted deportation proceedings. The court found that because defendant had finished his Illinois sentence, he was not "imprisoned" for post-conviction purposes even though he faced federal consequences from what he alleged was an

involuntary Illinois guilty plea.

2. The court rejected the argument that under **Padilla v. Kentucky**, 559 U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), a defendant whose Illinois sentence has been fully discharged has standing to file a post-conviction petition based on his attorney's inaccurate advice concerning the immigration consequences of a guilty plea. In **Padilla**, the Supreme Court held that to satisfy the 6th Amendment, defense counsel must inform a guilty plea defendant of the possible or likely consequences of a conviction on his immigration status.

The trial court's dismissal of the post-conviction petition was affirmed.

People v. Hale, 2013 IL 113140 (No. 113140, 10/3/13)

1. The Sixth Amendment right to the effective assistance of counsel applies to the plea bargaining process. Thus, a defendant has the right to be reasonably informed about the direct consequences of accepting or rejecting a plea offer, even if he rejects the offer and ultimately receives a fair trial.

Claims that counsel was ineffective at the plea bargaining stage are governed by **Strickland**. Thus, the defendant must show that counsel acted in an objectively unreasonable manner and that prejudice occurred. In the context of plea bargaining, the defendant shows prejudice where he establishes that there is a reasonable probability that in the absence of his attorney's deficient advice, he would have accepted the plea offer. However, the showing of prejudice must encompass more than just the defendant's subjective, self-serving testimony.

2. In **Missouri v. Frye**, 566 U.S. ___, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012) and **Lafler v. Cooper**, 566 U.S. ___, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), the United States Supreme Court held that in order to show prejudice from ineffective assistance of counsel where a plea offer has been rejected due to counsel's deficient performance, the defendant must demonstrate not only a reasonable probability that he would have accepted the offer had counsel been effective, but also a reasonable probability that the State would not have withdrawn the offer and the court would not have rejected the plea.

3. Here, defendant was unable to satisfy even the first step required to show prejudice - that he would have accepted the plea offer had counsel provided reasonably competent advice. Defense counsel advised defendant that the maximum sentence he faced was 30 years, and that the sentences for two counts of attempt murder would likely be concurrent. Defendant rejected a plea offer for a total of 15 years imprisonment, and was convicted at trial. Contrary to counsel's understanding, consecutive sentencing was mandatory. Defendant was sentenced to consecutive terms of 30 and 10 years for two counts of attempt murder.

Defendant testified that because the plea offer was for 15 years and he thought concurrent sentencing was likely, he thought "he might as well go to trial." Defendant added, however, that had he known he would be subject to consecutive sentencing, he "would have been inclined" to accept the State's offer. The trial court found the latter statement to be incredible, and the Supreme Court found that this credibility determination was not contrary to the manifest weight of the evidence.

Furthermore, unlike **People v. Curry**, 178 Ill.2d 509, 687 N.E.2d 877 (1997), there was no additional evidence to support defendant's claim that he would have taken the plea offer had defense counsel accurately advised him about consecutive sentencing. Defendant expressed his innocence clearly and on several occasions, presented a witness who recanted her statement identifying defendant as the culprit, and may have thought that one of the victims would refuse to testify. At sentencing, defendant refused to apologize because he claimed that he not done anything. In addition, defendant did not complain about choosing a trial over the plea offer until after the Appellate Court remanded the cause on direct appeal

for the trial court to consider defendants's *pro se* claim of ineffective assistance, which raised matters unrelated to the plea offer.

In addition, defense counsel testified that defendant was not interested in accepting the plea offer and wanted to go to trial. Finally, although there was a substantial difference between the sentence contemplated by the plea agreement and the sentences imposed after trial, there was also at least a theoretical possibility that defendant could have received a lower sentence if he rejected the plea offer but was convicted at trial.

Under these circumstances, defendant failed to show that his rejection of the plea offer was due to counsel's faulty advice. Therefore, he failed to establish that even if counsel's actions were objectively unreasonable, he suffered prejudice. The convictions and sentences were affirmed.

People v. Hughes, 2012 IL 112817 (No. 112817, 11/29/12)

1. In order to render effective assistance of counsel, defense counsel must inform a defendant who pleads guilty to a sexually violent offense that he will be evaluated for possible commitment under the Sexually Violent Person's Commitment Act. Although defense counsel need not advise guilty plea defendants of every possible collateral consequence of the plea, under the rationale of **Padilla v. Kentucky**, 559 U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), defense counsel must advise defendants of collateral consequences which are closely connected to the criminal process and which carry severe consequences for the defendant. In **Padilla**, the Supreme Court concluded that counsel must advise guilty plea defendants of possible immigration consequences of a plea.

The court found that the same rationale requires counsel to advise defendants that their guilty pleas will subject them to evaluation as sexually violent persons. The court found that sexually violent person status is "enmeshed" in the criminal process and carries severe consequences for the defendant in that he or she may face involuntary civil commitment. Because the possibility of a sexually violent person proceeding might be materially important to a defendant who is deciding whether to plead guilty to a sexually violent offense, defense counsel is obliged to give advice concerning that possibility.

In the course of its opinion, the court stated that the "imposition and significance of collateral consequences has grown tremendously in recent years," contributing to defense counsel's burden of advising guilty plea defendants. The court noted that the American Bar Association maintains an online database of collateral consequences of conviction, which may "ease the burden on defense counsel" in becoming aware of possible collateral consequences of convictions.
(http://www.abacollateralconsequences.org/CollateralConsequences/docs/ProjectDescription.gp.ml.pdf)

2. The court concluded, however, that defendant failed to establish that defense counsel was ineffective. First, the record did not show that defense counsel failed to advise defendant of the possibility that a sexually violent person's petition could be filed. Although defense counsel stated at the hearing on the motion to withdraw the plea that he had not anticipated that a sexually violent person's proceeding would be instituted and did not give defendant advice concerning that possibility, defendant testified at the same hearing that he and counsel did discuss the possibility of such a petition. The court concluded that in view of the inconsistent statements by defendant and counsel, defendant failed to establish that defense counsel was deficient in his duties.

Furthermore, even if counsel's performance was deficient, defendant failed to prove that prejudice resulted. A bare allegation that the defendant would not have pleaded guilty

had counsel acted competently is insufficient to establish prejudice under **Strickland**. Instead, the defendant must either raise a claim of actual innocence or suggest a plausible defense which could have been raised at trial. Here, defendant failed to articulate any prejudice beyond stating that he would not have pleaded guilty had he known that the plea would not dispose of the entire proceeding.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

People v. Barghouti, 2013 IL App (1st) 112373 (No. 1-11-2373, 12/20/13)

A defendant has the constitutional right to be reasonably informed with respect to the direct consequences of accepting or rejecting a plea offer. Counsel thus has the obligation to inform his or her client about the maximum and minimum sentences applicable for the charged offenses.

Here, the petition alleged that trial counsel failed to advise defendant that if he rejected the State's 12-year plea offer and was found guilty, he faced a prison term of 6 to 60 years; instead counsel erroneously advised defendant that he would be eligible for probation. The petition also alleged that defendant would have accepted the State's offer if counsel had properly advised him of the correct sentencing range. These allegations made an arguable claim that trial counsel provided ineffective assistance and that defendant suffered prejudice because he would have accepted the plea bargain if he had received accurate advice about the sentencing range.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Barkes, 399 Ill.App.3d 980, 928 N.E.2d 102 (2d Dist. 2010)

1. Because a criminal defendant has a constitutional right to decide whether to waive a jury trial, the decision to request a bench or jury trial is left to the defendant. A post-conviction petitioner made a sufficient allegation of ineffective assistance to obtain a third-stage evidentiary hearing where he alleged that he told counsel he wanted a bench trial, but was told that counsel "was running the show [and defendant] was getting a jury trial." (See **COLLATERAL REMEDIES**, §§9-1(f), (g)).

2. Although a defendant has no constitutional right to plea bargain, if the State chooses to bargain there is a right to the effective assistance of counsel during the negotiations. To make a knowing and voluntary decision whether to accept or reject a plea offer, defendant must be fully informed by counsel concerning the consequences of accepting or rejecting the plea offer, including any sentencing consequences. (See also **COLLATERAL REMEDIES**, §§9-1(f), (g)).

(Defendant was represented by Assistant Defender Kim DeWitt, Elgin.)

People v. Clark, 2011 IL App (2d) 100188 (No. 2-10-0188, 9/15/11)

To prevail on a claim of ineffective assistance of counsel, defendant must show both that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and that the deficient performance prejudiced him in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different.

While as a general rule, whether to present witnesses is a tactical decision that will not be reviewed and cannot support a claim of ineffective assistance of counsel, defense counsel has a legal and ethical obligation to explore and investigate a client's potential defense. This obligation necessarily requires discussion by defense counsel with the client regarding a possible defense. The failure to interview witnesses may indicate incompetence when defense counsel knows of the witnesses and their testimony may be exonerating.

To establish the prejudice prong of an ineffectiveness claim in a guilty-plea proceeding, defendant must show a reasonable probability that, absent counsel's errors, the defendant would not have pleaded guilty, and insisted on going to trial.

Defendant's post-conviction petition made a substantial showing of a claim of ineffective assistance of counsel. Defendant alleged that his attorney coerced him to plead guilty under the false impression that there were no witnesses available to testify on his behalf, and that counsel had failed to investigate a known witness who was offering to present evidence that could support an insanity defense. In a supporting affidavit, the complaining witness averred that at the time of the offense, defendant was not taking his medications, he said he heard voices telling him to stab her, she knew that he did not mean to harm her, and it was his mental condition that prompted him to do what he did. She also alleged that she had tried to contact defense counsel but her calls were not returned. These allegations made a substantial showing that defense counsel failed to investigate a witness who could have provided evidence that, as a result of a mental disease, defendant lacked substantial capacity to appreciate the criminality of his conduct. 720 ILCS 5/6-2(a). Defendant also made a substantial showing of prejudice, as he averred that he pleaded guilty only because counsel told him that there were no witnesses available to support a plausible defense.

The court rejected the State's argument that defense counsel's decision not to investigate was reasonable because the complaining witness's testimony would be insufficient to show defendant was insane at the time of the offense, and the plea agreement was favorable given the nature of the offense and defendant's background. The nature of the plea agreement is irrelevant if defendant would have had a complete defense. It is impossible for defense counsel to have determined the value of the testimony of the witness without interviewing her.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

People v. Deltoro, 2015 IL App (3d) 130381 (Nos. 3-13-0381 & 3-13-0382, 4/22/15)

The Appellate Court held that defendant's *pro se* post-conviction petition presented an arguable claim that trial counsel was ineffective for failing to advise defendant about the immigration consequences of his guilty plea as required by **Padilla v. Kentucky**, 559 U.S. 356 (2010).

The State argued that defendant's petition was properly dismissed because defendant did not allege that he told counsel he was not a citizen of the Untied States and thus it was unclear whether counsel knew about defendant's immigration status. The Court rejected this argument. Although there are no Illinois cases addressing this issue, the Court noted that **Padilla** did not expressly require a defendant to inform his counsel of his immigration status in order to trigger counsel's duty to inform his client about the immigration consequences of a plea.

Moreover, to require that a defendant apprehend the relevance of his immigration status and affirmatively provide this information to counsel would undermine the very protection **Padilla** sought to provide. Accordingly, defendant need not make these allegations to state an arguable claim of ineffective assistance of counsel.

The Court reversed the first-stage dismissal of defendant's petition and remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

People v. Dodds, 2014 IL App (1st) 122268 (No. 1-12-2268, 2/27/14)

1. The court accepted the State's concession that a defendant who has completed his probation sentence and is ineligible to file a post-conviction petition may raise an ineffective

assistance of counsel argument by way of a §2-1401 petition. The court stressed that defendant had no other avenue to raise his claim that his plea was involuntary due to counsel's erroneous advice concerning the sex offender registration requirements that would result from a guilty plea to possession of child pornography.

2. Claims of ineffective assistance of counsel are resolved under **Strickland v. Washington**, which requires defendant to show that his attorney's actions were both objectively unreasonable and prejudicial. The court concluded that counsel's misrepresentation that defendant would be required to register as a sex offender for only 10 years was clearly unreasonable where lifetime registration was required.

The court acknowledged that sex offender registration is merely a collateral consequence of a guilty plea, but noted that it is a mandatory consequence which carries stigmatizing and far-reaching consequences into every aspect of the registrant's life. The court concluded that under the rationale of **Padilla v. Kentucky**, 559 U.S. 356 (2010), which held that defense counsel must advise defendants of the possible risk of deportation resulting from a guilty plea, counsel has an affirmative duty to advise a guilty plea defendant concerning the possibility that he will be required to register as a sex offender.

The court also noted that even before **Padilla**, giving erroneous advice concerning a collateral consequence of a plea constituted unreasonable performance under **Strickland**.

In addition, defendant suffered prejudice as a result of counsel's inaccurate advice. In **People v. Hall**, 217 Ill. 2d 324, 841 N.E.2d 913 (2005), the Illinois Supreme Court concluded that a guilty plea defendant does not establish prejudice under **Strickland** by merely alleging that he would have pleaded not guilty and insisted on a trial had counsel acted in a competent manner. Here, defendant did more than merely allege that he would have gone to trial. He specified the exact defense he would have raised to the child pornography charge - that he did not know the victim was under 18 years of age at the time of the offense. Furthermore, the record did not contradict this defense.

In addition, after his plea was entered defendant filed a motion to clarify whether the registration requirement was for 10 years or life. Under these circumstances, defendant established that he would not have pleaded guilty had he been given accurate advice. Therefore, the prejudice component of **Strickland** was satisfied.

Because defense counsel was ineffective in advising defendant of the sex offender registration consequences of his guilty plea, the plea was involuntary. The plea and conviction were vacated and the cause remanded for further proceedings. The court ordered that the additional proceedings be conducted by a different judge, and reminded the parties that retrial might be difficult in light of their inability to obtain a record of the original proceedings.

People v. Edmonson, 408 Ill.App.3d 880, 946 N.E.2d 997 (2d Dist. 2011)

A guilty plea is involuntary due to defense counsel's erroneous advice where the misadvice amounts to ineffective assistance of counsel. To establish that counsel was ineffective, defendant must show that: (1) counsel's performance was objectively unreasonable; and (2) there is a reasonable probability that, absent counsel's error, defendant would not have pleaded guilty but would have insisted on going to trial.

Defendant pleaded guilty with the State's agreement to a sentencing cap of 20 years. Both defense counsel and defendant mischaracterized this agreement on the record as an open plea, both defense counsel and the court misadvised defendant that he could move to reconsider the sentence prior to an appeal, and defendant did move to reconsider his sentence prior to appealing. The Appellate Court remanded due to the absence of a 604(d) certificate and with directions that defendant be admonished that his only option was to move to

withdraw his plea because his plea was negotiated. On remand, defendant moved to withdraw his plea on the ground that he would not have entered the plea had counsel advised him that he would not have the right to challenge his sentence.

As defendant was misinformed by the court and defense counsel that he could challenge his sentence after pleading guilty, and that misinformation was central to his decision to plead guilty, defendant was prejudiced and the plea was involuntary. Defendant need not establish that his sentence was excessive to establish prejudice.

(Defendant was represented by Assistant Defender Josette Skelnik, Elgin.)

People v. Greco, 2014 IL App (1st) 112582 (No. 1-11-2582, 5/12/14)

In **Padilla v. Kentucky**, 559 U.S. 356 (2010), the Supreme Court held that counsel is deficient if he does not inform defendant that a guilty plea may have immigration consequences. In **Chaidez v. United States**, ___ U.S. ___, 133 S.Ct. 1103 (2013), however, the Court (utilizing the test of **Teague v. Lane**, 489 U.S. 288 (1989)) held that the ruling in **Padilla** did not apply retroactively to cases on collateral review.

Here, defendant argued that despite **Chaidez**, **Padilla** should apply retroactively to his post-conviction claim that counsel was ineffective for failing to inform him of the immigration consequences of his guilty plea. Defendant relied on **Danforth v. Minnesota**, 522 U.S. 264 (2008), where the Supreme Court held that state courts are not bound by **Teague's** retroactivity analysis. Defendant argued that Illinois courts should not feel bound by **Chaidez**, but should instead follow the pre-**Chaidez** decision in **People v. Gutierrez**, 2011 IL App (1st) 093499, which held that **Padilla** does apply retroactively to cases on collateral review.

The Appellate Court rejected defendant's argument, holding that Illinois courts use **Teague's** retroactivity analysis and agreeing with "the well-reasoned decision" in **Chaidez**. Accordingly, defendant's post-conviction claim relying on **Padilla** was properly dismissed.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Guerrero, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-09-0972, 5/18/11)

1. Defense counsel provides ineffective assistance where his or her performance is objectively unreasonable and causes prejudice. A defendant is prejudiced by his attorney's unreasonable actions if there is a reasonable probability that had counsel acted competently, the result of the proceeding would have been different.

A defendant does not have a constitutional right to plea bargain. If the State chooses to bargain, however, there is a right to effective assistance of counsel during the negotiations. Providing effective assistance of counsel during plea negotiations includes accurately informing the accused of the direct consequences of accepting or rejecting a plea offer, including the maximum and minimum sentences that could be imposed if the defendant is convicted of the charged offenses.

The right to the effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial.

2. Defense counsel's performance was objectively unreasonable where counsel did not realize that defendant was subject to mandatory consecutive terms and advised him that he would likely get probation if convicted. However, defendant could not show that the result would likely have been different had counsel acted competently; although defendant stated that he would have tried to negotiate a plea had he realized that imprisonment was mandatory, the State had not offered a plea agreement and showed no interest in conducting

negotiations. In the absence of any reason to believe that plea negotiations would have occurred had defendant asked, there was no reasonable probability that the outcome would have been different had counsel given accurate information.

People v. Guzman, 2011 IL App (3d) 090464 (No. 3-09-0464, 12/20/11)

It is counsel's responsibility to inform defendant whether his guilty plea carries a risk of deportation. Counsel's failure to do so satisfies the deficient-performance prong of **Strickland v. Washington**, 466 U.S. 668 (1984). **Padilla v. Kentucky**, 559 U.S. ___, 130 S.Ct. 1473 (2010). To satisfy the prejudice prong of **Strickland**, defendant must show that there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty and instead would have gone to trial. This requires that defendant show only that he rationally could have gone to trial, not that an acquittal was likely.

Defendant entered a negotiated plea to a charge of aggravated possession of a stolen firearm. During the plea proceeding, defendant informed the court that he was not a U.S. citizen but was a permanent legal resident. Federal immigration law provides that any alien who commits a firearms possession offense "in violation of any law is deportable." 8 U.S.C §1227(a)(2)(C). Defendant unsuccessfully moved to vacate his plea on the ground that the court had failed to admonish him of the immigration consequences he faced as a consequence of his plea as provided by 725 ILCS 5/113-8. While his case was pending on appeal, appellate counsel reported to the Appellate Court, pursuant to its request, that defendant's immigration attorney informed her that defendant had been deported, but that defendant still had family in the U.S. and wanted to return.

Deportation was a clear consequence of defendant's guilty plea. Nothing in the record demonstrates that defense counsel advised defendant of any immigration consequences of his guilty plea. Therefore, the Appellate Court found that defendant satisfied the deficient-performance prong of **Strickland**.

The court also found that defendant satisfied the prejudice prong of **Strickland**. If defendant had been made aware of the immigration consequences of his plea, he could reasonably have chosen to go to trial even though he faced a Class 1 felony with a 4-to-15-year sentencing range. Under the federal statute, deportation is presumptively mandatory. It would make sense for defendant to choose the possibility of an acquittal at trial rather than a guilty plea that guaranteed his removal.

The order denying defendant's motion to vacate his plea was reversed, and the cause was remanded for further proceedings.

McDade, J., dissented. Appellate counsel's representation that defendant had been deported was hearsay. Defendant also failed to show that his deportation resulted from his plea, rather than some other ground. The record is completely silent on the issue of whether counsel discussed deportation consequences with defendant, and therefore it cannot be determined that counsel's performance was deficient.

(Defendant was represented by Panel Attorney Carrie Stevens.)

People v. Guzman, 2014 IL App (3d) 090464 (Nos. 3-09-0464 & 3-10-0802, 1/23/14)

1. Claims of ineffectiveness arising from the plea bargaining process are analyzed under **Strickland**, which requires the defendant to show that his attorney's performance was deficient and caused prejudice. For a decision to accept or reject a plea offer to be voluntary and knowing, defense counsel must fully inform the defendant of the facts and law related to the State's offer and give candid advice concerning all aspects of the case, including the direct consequences of accepting or rejecting the offer.

Where an immigration action may result from a conviction, **Padilla v. Kentucky**, 559 U.S. 356 (2010) requires that defense counsel advise the client of the risk of adverse immigration consequences. The failure to do so shows deficient performance under **Strickland**. The prejudice requirement is satisfied if there is a reasonable probability that without counsel's error, defendant would have entered a not guilty plea and gone to trial. One factor to be considered in this regard is whether a decision to reject the plea bargain would have been rational under the circumstances.

2. The court concluded that counsel's failure to advise defendant of the potential immigration consequences of his guilty plea constituted ineffective assistance. First, counsel's performance was deficient where the record did not contradict defendant's claim that counsel failed to advise him that there might be immigration consequences if he accepted the plea offer. Second, prejudice was shown because under the circumstances, it would have been reasonable for defendant to go to trial. It was not certain that the State would prevail at trial, as the factual basis showed that defendant and two other people had been found in the presence of stolen firearms and defendant may have had a plausible defense. In addition, defendant had family living in the United States.

The order denying defendant leave to withdraw his plea was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

People v. Guzman, 2014 IL App (3rd) 090464 (No. 3-09-0464 & 3-10-0802, 12/11/14)

1. Where deportation is a clear consequence of a guilty plea, defense counsel must advise the client of the potential immigration consequences of the plea. To establish prejudice for purposes of establishing ineffective assistance of counsel, defendant must demonstrate that had it not been for counsel's failure to adequately advise him, there is a reasonable probability that he would have entered a not guilty plea and insisted on going to trial. Defendant contended that he was not informed of the risk of deportation and that it would have been reasonable to plead not guilty because he had a plausible defense to the charge and had family living in the United States. The court found that under these circumstances defendant showed that he was prejudiced by counsel's failure to advise him of the risk of deportation.

The court stressed that defendant was not required to prove deportation in order to show that he was prejudiced by counsel's faulty advice.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

People v. Guzman-Ruiz, 2014 IL App (3d) 120150 (No. 3-12-0150, 3/6/14)

1. Under **Padilla v. Kentucky**, 559 U.S. 356 (2010), defense counsel has the duty to advise a non-citizen client that pleading guilty to possession of more than 30 grams of cannabis carries the "practically inevitable" collateral consequence of deportation. Because counsel failed to comply with **Padilla** where he did not advise defendant that she would likely be deported if she entered a guilty plea to possession of between 2,000 and 5,000 grams of cannabis with intent to deliver, the trial court erred by denying defendant's post-conviction petition after a third-stage hearing.

Defendant alleged in the affidavit supporting the petition that counsel advised her to plead guilty and said that her immigration status would not be affected. The affidavit was accepted as defendant's testimony because she had been deported after serving the 180-day-sentence imposed on her guilty plea.

Defense counsel admitted that he did not advise defendant that she would be deported or do any legal research to determine whether the conviction would result in deportation.

Counsel stated that he told defendant he could not "guarantee what the government's going to do" and that "you never know what the immigration people will do.

2. The court noted that under federal immigration law, an alien who is convicted of a controlled substance violation "is deportable" unless the conviction is for a single offense of possession of less than 30 grams of marijuana for personal use. The court also noted that **Padilla**, which was decided less than three months before the plea in this case, concerned counsel's failure to warn a guilty plea defendant of the possibility of deportation under the same federal statute which resulted in defendant's deportation. Therefore, even without researching the applicable statute, the **Padilla** opinion alerted counsel to the requirement that he admonish defendant concerning the immigration consequences of her plea. Because counsel failed to advise defendant that "deportation would be imminent" if she accepted the plea agreement, counsel's representation was objectively unreasonable under Strickland.

The court rejected the State's argument that defendant was aware of the immigration consequences of the plea because the trial court admonished her during the plea hearing that she taking a "roll of the dice" regarding deportation. Although in some cases admonishments by the trial court may "counterbalance" deficient legal advice from counsel, this was not such a case. Immediately after making the remark about "rolling the dice," the trial court stated that no immigration hold had been put on defendant and that because she hadn't been arrested by immigration authorities, "chances are . . . they're not going to." Because the trial court minimized any concerns about the risk of deportation, it reinforced counsel's deficient advice rather than correct it.

3. In addition, counsel's unreasonable advice resulted in prejudice where defendant's affidavit established that she would not have accepted the plea agreement had she been advised that her conviction would assure her deportation. Because defendant's goal was to remain in the United States, the trial court erred by focusing on the fact that the plea agreement afforded defendant a substantial reduction in the maximum sentence for the offense. In **Padilla**, the Supreme Court noted that it might be more important to a defendant to remain in the United States for a period of time than to avoid the possibility of a long prison term in the event of an eventual conviction. The court stressed that after **Padilla**, prejudice occurs for **Strickland** purposes "when an accused pleads guilty without being fully informed by defense counsel that the guilty plea accelerates 'presumptively mandatory' deportation.

The trial court's denial of post-conviction relief was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Miller, 2013 IL App (1st) 111147 (No. 1-11-1147, 4/15/13)

To establish prejudice when the ineffective advice of counsel leads to the rejection of a plea offer, defendant must show that (1) there is a reasonable probability that the defendant and the court would have accepted the plea offer but for the erroneous advice, and (2) the sentence under the offer's terms would have been less severe than the sentence that was imposed. **Lafler v. Cooper**, ___ U.S. ___, 132 S. Ct. 1376, ___ L.Ed.2d ___ (2012).

Defendant contended that his counsel was ineffective where he failed to inform him that if he failed to take a plea offer of 20 years for first-degree murder and was convicted at trial, he would face a 45-year minimum due to a sentence enhancement of 25 years to life. Defendant rejected the offer and received a sentence of 47 years, including a 25-year enhancement.

The Appellate Court concluded that defendant's claim that he would have accepted the 20-year offer had he known of the enhancement was fanciful even when reexamined in light

of **Lafler**. Defendant would have received a less severe sentence under the offer, but he cannot demonstrate a reasonable probability that he would have accepted the offer had he known of the enhancement where he rejected the 20-year offer knowing that he faced up to 60 years for unenhanced murder.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

People v. Presley, 2012 IL App (2d) 100617 (No. 2-10-0617, 5/18/12)

A challenge to a guilty plea based on ineffective assistance of counsel is subject to the standard set forth in **Strickland v. Washington**, 466 U.S. 668 (1984).

1. Counsel's conduct is deficient under the first prong of **Strickland** if the attorney failed to ensure that the defendant entered the plea voluntarily and intelligently. Generally, for a plea to be deemed voluntary and intelligent, defendant must be fully aware of the direct consequences of entering the plea. Direct consequences of a plea are those consequences affecting the defendant's sentence and other punishment that the trial court may impose. Illinois courts have held that a defendant's knowledge – or lack thereof – of the collateral consequences of a plea has no bearing on the validity of the plea. Collateral consequences are effects on the defendant that the trial court has no authority to impose; they result from an action that might or might not be taken by an agency that the trial court does not control.

Therefore, in measuring the reasonableness of an attorney's performance under **Strickland**, courts have emphasized the distinction between advising a defendant of the direct consequences of a guilty plea and advising him of consequences that arise collaterally from the plea. An attorney's failure to advise a defendant regarding the collateral consequences of the plea does not affect the validity of the plea except where the attorney affirmatively misleads defendant regarding those consequences. **People v. Correa**, 108 Ill. 2d 541, 485 N.E.2d 317 (1985).

More recently, the United States Supreme Court held that counsel must inform his client whether a guilty plea carries a risk of deportation, declining to distinguish between direct and collateral consequences in light of the unique nature of deportation. **Padilla v. Kentucky**, ___ U.S. ___,130 S. Ct. 147, ___ L.Ed.2d ___ (2010). Courts have disagreed whether **Padilla** can be extended to require counsel to advise a defendant that registration as a sex offender is a consequence of defendant's guilty plea.

Defendant complained that his counsel failed to advise him that, he was subject to lifetime registration as a sex offender as a consequence of his plea. The Appellate Court concluded that it was unclear whether **Padilla** applies to collateral consequences other than deportation. It declined to resolve the issue, however, because it concluded that defendant had not met his burden with respect to the prejudice prong of **Strickland**.

2. To establish prejudice under the second prong of **Strickland**, the defendant must show that there is a reasonable probability that but for counsel's errors, he would have pleaded not guilty and insisted on going to trial. A bare allegation that the defendant would have pleaded not guilty and insisted on trial if counsel's conduct had not been deficient is not enough to satisfy the prejudice prong of **Strickland**. Defendant's claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial. Cases requiring nothing more than a showing that defendant would not have pleaded guilty are inconsistent with **Hill v. Lockhart**, 474 U.S. 52 (1975), and **People v. Hall**, 217 Ill. 2d 324, 841 N.E.2d 913 (2005), which held to the contrary. Defendant must demonstrate that a decision to reject the plea bargain would be rational.

Defendant did not make a claim of innocence or articulate a plausible defense. He merely contended that he would not have pleaded guilty had he known of the lifetime

registration requirement. He made no showing that a decision to reject the plea deal would be rational. Defendant confessed and would have subjected himself to an additional charge had he gone to trial. Going to trial would not have spared defendant of the requirement of lifetime of registration if convicted, which was likely, and would have subjected him to the possible penalty of imprisonment, rather than the probation that he received as a result of his plea.

The Appellate Court affirmed the denial of defendant's motion to withdraw his plea.

(Defendant was represented by Panel Attorney James Leven, Chicago.)

People v. Robinson, 2012 IL App (4th) 101048 (No. 4-10-1048, 8/27/12)

1. Whether to accept a plea agreement is a decision left to the defendant rather than to defense counsel. However, the defendant is limited to either accepting or rejecting the plea agreement that has been negotiated by defense counsel. In other words, defendant is not entitled to direct counsel in his or her negotiations with the prosecutor.

Because plea negotiations are generally governed by principles of contract law, the legal effect of making a counteroffer is to reject a standing offer. Furthermore, a rejected offer cannot be revived by a subsequent attempt at acceptance.

2. Defense counsel was not ineffective where, after he negotiated a plea agreement with an eight-year sentencing cap, he declined defendant's request to attempt to negotiate a seven-year-cap but to accept the eight year offer if further negotiations were unsuccessful. Counsel's refusal to follow the defendant's instruction was not objectively unreasonable, because counsel likely realized that making a counteroffer for seven years would operate as a rejection of the State's eight year offer. Because counsel's actions were objectively reasonable, defendant could not satisfy the first element of **Strickland**.

The trial court's order granting the State's motion to dismiss the petition at the second stage was affirmed.

(Defendant was represented by Assistant Defender Christopher Gehrke, Chicago.)

People v. Trujillo, 2012 IL App (1st) 103212 (No. 1-10-3212, 5/8/12)

Defense counsel has a duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Counsel's performance is constitutionally deficient where counsel does not inform defendant of a formal plea offer from the State and there is a reasonable probability defendant would have accepted the offer had it been presented to him.

Defendant filed a *pro se* post-conviction petition supported by his affidavit alleging that defense counsel failed to communicate a plea offer to him, that he would have accepted the offer had he known of it, and that he only learned of the offer from a letter his counsel sent to the ARDC, a copy of which was appended to the petition, in which counsel represented that the State had offered defendant a six-year sentence if he would plead guilty, but defendant rejected the offer.

If counsel had failed to inform defendant of the plea offer, it is arguable that his assistance was deficient. Because defendant alleged that he would have accepted the offer had he been advised of it, he has arguably been prejudiced by counsel's deficient performance if he can establish that the offer was not communicated to him. Therefore, the claim did not lack legal merit.

(Defendant was represented by Assistant Defender Jeffrey Svehla, Chicago.)

People v. Valdez, 2015 IL App (3rd) 120892 (No. 3-12-0892, 5/19/15)

1. Under **Padilla v. Kentucky**, 559 U.S. 356 (2010), the Sixth Amendment right to effective assistance of counsel requires that counsel advise a guilty plea defendant concerning any potential immigration consequences that may result from the conviction. **Padilla** established a two-tier standard for determining the extent of counsel's duty to advise about immigration issues. Where the immigration consequences of a plea are uncertain, counsel need only advise the client that the plea "may carry a risk of adverse immigration consequences." By contrast, where the immigration consequences of a particular plea are "succinct, clear, and explicit," counsel must advise the client of those specific consequences.

Here, the defendant's guilty plea to residential burglary predicated on theft exposed him to deportation on the ground that the conviction constituted a crime involving moral turpitude. Such crimes are deportable under 8 U.S.C. §1227(a)(2)(A)(i). The court concluded that federal case law clearly indicated that the offense to which defendant was pleading was deportable, and that with minimum research counsel could have discovered the applicable law. Under these circumstances, counsel's failure to advise defendant that the plea would make him deportable was unreasonable and satisfied the first prong of **Strickland**.

The court rejected the State's argument that the immigration consequences of a conviction are clear only if the text of the immigration statute itself explicitly declares that a particular conviction is deportable. The court found that where a minimal investigation of case law makes it clear that a conviction will result in deportation, the second-tier duty under **Padilla** applies.

2. To establish ineffective assistance of counsel, defendant must show not only that his attorney acted unreasonably but also that prejudice resulted. Prejudice is defined as a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. In the context of a guilty plea, the defendant must assert either a claim of actual innocence or a plausible defense that could have been raised at trial.

Where defendant claimed in his motion to withdraw the plea that he would not have pleaded guilty had he known that deportation would result, and also asserted that he was actually innocent of the charge, he satisfied the prejudice requirement for showing that he received ineffective assistance of counsel in regards to his plea.

3. The court rejected the argument that the trial judge's admonishments under 725 ILCS 5/113-8 cured counsel's failure to advise defendant of the immigration consequences of the plea. Section 113-8 requires the trial court to advise a guilty plea defendant that if he or she is not a U.S. citizen, the conviction may result in deportation, exclusion from admission to the United States, or denial of naturalization.

The Appellate Court found that the §113-8 admonishments mirror the advice counsel is required to give when the immigration consequences of a plea are uncertain and counsel need only inform defendant that the plea "may carry a risk of adverse immigration consequences." Thus, where the immigration consequences are unclear, §113-8 admonishments may cure the prejudice resulting from defense counsel's failure to comply with **Padilla**.

Here, however, defendant faced an explicit risk of deportation. Under **Padilla**, counsel was required to advise defendant concerning the specific immigration consequences of the plea. Under these circumstances, the trial court's general admonishments under §113-8 were insufficient to cure the prejudice from counsel's failure to give explicit advice concerning the likelihood that defendant would be deported.

4. In a concurring opinion, Justice Holdridge found that where the error in question concerns a failure to advise a defendant under **Padilla**, the defendant is not required to make a claim of actual innocence or show that he had a plausible trial defense in order to establish

prejudice. Instead, defendant should be allowed to withdraw the plea if it would have been rational to reject the plea bargain. Justice Holdridge stressed that a defendant facing potential deportation may elect to reject a plea offer and go to trial even where there is little chance of an acquittal, because he or she may rationally fear being deported more than the risk of a lengthy prison sentence.

Justice Holdridge also noted that because the President and Attorney General have stated that the executive has authority to decline to follow deportation statutes, the immigration consequences of a guilty plea may never be sufficiently clear or explicit to trigger counsel's duty under the second tier of **Padilla**.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

Top

§13-4(b)(3)
Errors in Presenting Evidence

Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (No. 09-587, 1/19/11)

1. The Supreme Court concluded that the Court of Appeals erred in a federal *habeas* case by finding that trial counsel was ineffective.

To satisfy **Strickland**, defendant was required to show that: (1) counsel's representation fell below an objective standard of reasonableness, and (2)there was a reasonable probability the result of the proceeding would have been different had counsel acted competently. A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceedings; counsel's errors must be so serious as to deprive the defendant of a fair trial.

In most criminal cases, there are multiple ways in which counsel could effectively represent the defendant. Only rarely will an effective defense necessarily encompass one technique or approach. Counsel is required to formulate a defense strategy that is reasonable at the time the case is being prepared and which balances limited resources in accordance with effective trial tactics and strategies. Finally, **Strickland** allows counsel to make a reasonable decision not to investigate a particular line of defense.

2. Counsel did not act unreasonably by failing to consult a forensic blood expert or offer expert testimony on blood evidence. The court concluded that it was at least arguable that a reasonable attorney could decide to forego blood evidence under the circumstances.

A. Only after trial, when forensic evidence concerning the source of blood found at the scene "emerged," could it be concluded that blood evidence was a critical issue. At trial, there were many factual differences between the parties' versions of the events. The prosecution's case did not stress blood evidence; in fact, it appeared that the prosecution decided to present blood evidence only after opening statements. Although counsel's opening statement may have been the impetus which caused the State to reconsider, the court found that strength of the prosecution's evidence "may well have been weakened by the fact that it was assembled late in the process."

The court also found that even had expert blood testimony supported the defense, a reasonable attorney might have elected not to present it. Had defense counsel chosen to rely

on such evidence, the prosecution might have responded by developing its own expert evidence and possibly destroying defendant's case. Expert blood testimony might also have distracted the jury's attention or turned the case into a battle of experts. Finally, counsel had reason to doubt his client's story, and expert blood analysis might well have exposed defendant's claims as fabrications.

B. Counsel was not ineffective because he did not anticipate that the prosecution would offer expert testimony and was unprepared to offer expert testimony in response. Counsel is not required to be prepared for "any contingency" which may arise at trial; **Strickland** guarantees not perfect representation, but only a reasonably competent attorney. Although defense counsel was mistaken in his belief concerning the prosecution's intentions, representation is constitutionally deficient only if the adversarial process is undermined to the extent that the fairness of the trial is called into question. Any error by counsel in failing to anticipate the State's evidence did not rise to that level.

In any event, effective representation would not have necessarily required expert evidence in response to the State's expert. In many instances, cross-examination of the State's expert is sufficient to expose defects in the expert's presentation. In addition, where defense counsel lacks a solid case, challenging the sufficiency of the State's case may be a more effective defense than presenting evidence. Here, defense counsel conducted a skillful cross-examination, elicited concessions from the State's experts, and drew attention to weaknesses in their conclusions. Because a State court could have decided that counsel acted reasonably by electing to not present expert evidence, there was no basis on which to grant *habeas* relief.

3. The court also concluded that the Court of Appeals erred in applying the "prejudice" requirement of **Strickland**. "Prejudice" does not exist under **Strickland** merely because a different result would have been possible had counsel acted reasonably. Instead, it must be "reasonably likely" that a different result would have occurred.

The State court could reasonably have concluded that defendant failed to show that a different outcome was likely where the expert evidence developed by the defense was no more than a theoretical possibility, counsel had elicited a concession along the same line from the State's expert, there was no evidence challenging many of the conclusions by the State's experts, and the non-scientific evidence of guilt was strong.

Because it could not be said that the State court applied **Strickland** unreasonably, *habeas* relief was not warranted.

People v. Clendenin, 238 Ill.2d 302, 939 N.E.2d 310 (2010)

Because the decision whether to waive the right of confrontation is not among those decisions that ultimately belong to the defendant, defense counsel may waive the defendant's right of confrontation by entering into an evidentiary stipulation where two elements are met: (1) defendant does not object; and (2) the decision to stipulate is a matter of trial tactics and strategy. The exception to this general rule exists where the stipulation is the equivalent of a guilty plea, because defendant's constitutional right to plead not guilty is implicated. A stipulation is the equivalent of a guilty plea where either (1) the State's entire case is presented by stipulation and the defendant fails to present or preserve a defense; or (2) the stipulation concedes the sufficiency of the evidence to support the conviction. Only in those limited circumstances must the trial court personally admonish defendant about the stipulation and obtain defendant's agreement to the stipulation. No other restriction exists on defense counsel's authority to stipulate to the admission of evidence. **People v. Campbell**, 208 Ill.2d 203, 802 N.E.2d 1205 (2003); **People v. Phillips**, 217 Ill.2d 270, 840 N.E.2d 1194 (2005).

After denial of defendant's motion to suppress, the case proceeded by stipulated bench trial. The stipulation included the disclaimer that defendant stipulated to the sufficiency of the evidence to convict. It also preserved defendant's objection to the admission of the evidence that was the subject of his motion to suppress. The court asked defendant if he wished to be bound by the stipulation and defendant responded affirmatively. After the court found him guilty, defendant retained new counsel and an evidentiary hearing was conducted on his claim that his attorney had been ineffective in advising him to proceed by stipulation. Defendant testified that defense counsel had not explained the option of a stipulated bench trial to him "thoroughly," that his memory of the court asking him about the stipulation was vague, and that defense counsel had not shown him the stipulation and he did not want to be bound by it.

The Appellate Court concluded that implicit in **Campbell** and **Phillips** was the requirement that defendant be apprised of the content of the stipulation to allow him a meaningful opportunity to object. Because defendant was provided no opportunity to review the stipulation, the Appellate Court reversed.

The Illinois Supreme Court found that defendant's efforts to disavow the stipulation were unavailing. Not only did the defendant not object to the stipulation, he expressed no disapproval of the stipulation when addressed by the trial judge, who had no duty to admonish defendant in any respect regarding the stipulation. The decision to proceed by stipulation was a matter of trial tactic and strategy by defense counsel who decided to seek suppression of the evidence, and the stipulation preserving the suppression issue was part of that strategy. The stipulation was not tantamount to a guilty plea. By its terms it did not concede the sufficiency of the evidence of guilt. It also preserved a defense because by it terms it contested the correctness of the court's ruling on the motion to suppress. The Appellate Court incorrectly found a restriction on defense counsel's authority to stipulate that is not found in either **Campbell** or **Phillips**.

People v. Patterson, 2014 IL 115102 (No. 115102, 10/17/14)

To establish ineffective assistance under the second prong of **Strickland**, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. In reviewing a ruling on a motion to suppress in which counsel's performance is challenged, a defendant must show a reasonable probability both that the suppression motion would have been granted and that the trial outcome would have been different if the evidence had been suppressed.

Defendant argued that trial counsel was ineffective for failing to introduce evidence at his motion to suppress confession hearing about defendant's lengthy history of mental health problems and limited intellectual capacity. This evidence would have showed that defendant was more susceptible to subtle police intimidation and coercion, and if it had been produced there was a reasonable probability defendant's motion would have been granted.

The court held that even if defendant's statement had been suppressed, defendant could not show that the outcome of the entire trial would have changed, resulting in his acquittal.

The complainant and defendant gave two entirely different accounts of what occurred. The complainant, an employee of the residential treatment facility where defendant lived, testified that she was driving defendant back to the facility when he forced her to pull the van over and forced her to have sex with him. Defendant, by contrast, testified that complainant chose to pull the van over and that she initiated sexual contact with him.

The court held that the physical evidence, including complainant's physical injuries, damage to the van, and emotional state upon arriving at the facility, overwhelmingly

corroborated complainant's verison of events. Given this evidence, the court held that the jury would not have acquitted defendant even if his confession had been excluded. Defendant thus failed to establish ineffectiveness under the second prong of **Strickland.**

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

People v. Baldwin, 2014 IL App (1st) 121725 (No. 1-12-1725, 8/15/14)

725 ILCS 5/115-7.3 provides that where a defendant is accused of certain sex offenses, evidence of the commission of another sex offense may be admitted and considered for its bearing on any matter to which it is relevant. In weighing the probative value of the evidence against the risk of undue prejudice, the court may consider the proximity in time to the charged or predicate offense, the degree of factual similarity between the offenses, and any other relevant facts or circumstances. If the trial court admits the other crimes evidence, defendant is entitled to present rebuttal evidence. §115-7.3(b).

At defendant's trial for aggravated criminal sexual assault, the trial court admitted evidence that defendant had committed a separate aggravated criminal sexual assault several months before the charged offense. The Appellate Court concluded that defense counsel acted unreasonably by failing to respond by introducing evidence that defendant had been acquitted of one charge concerning the prior offense and that the jury had been unable to reach a verdict on the other charge. In **People v. Ward**, 2011 IL 108690, the Supreme Court concluded that where other crimes evidence is admitted, the fact that the defendant was acquitted of the other crime is admissible to provide context for the evidence and to counteract the prejudice caused by evidence that defendant committed the other crime.

The court declined to find that defendant had been denied the effective assistance of counsel, however, concluding that defendant could not show prejudice from counsel's failure where the record clearly showed that the trial judge would have convicted defendant even in the absence of the other crimes evidence. Thus, the result of the proceeding would have been the same had the evidence of the acquittal and the hung jury been presented.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Bryant, 391 Ill.App.3d 228, 907 N.E.2d 862 (5th Dist. 2009)

1. To establish ineffective assistance of counsel, the defendant must show both that counsel's performance was objectively unreasonable and that prejudice resulted. Prejudice is shown where there is a reasonable probability that had counsel been competent, the result of the trial would have been different.

Deciding not to present a particular witness is generally a matter of trial strategy. A defendant attempting to show that counsel was ineffective must overcome the presumption that the challenged action might have been sound trial strategy; that presumption is rebutted where counsel's decision is so irrational and unreasonable that no reasonably effective defense attorney would have pursued such a strategy under the circumstances.

Counsel may be found ineffective for failing to present known exculpatory evidence, or for failing to call a witness after promising during opening statements to do so. In addition, failing to present known evidence to support an uncorroborated defense may constitute ineffectiveness.

2. Here, counsel's decision not to call any witnesses in support of the defense was clearly a matter of trial strategy. However, that the strategy was unsound and caused prejudice to the defendant.

After unsuccessfully attempting to introduce defense evidence through cross-examination of State's witnesses, counsel said repeatedly in the presence of the jury that he

would recall certain State's witnesses when the defense presented its case. However, defense counsel elected to present no evidence, stating in closing argument that "I thought we've had enough."

Abandoning or changing a defense during trial can be a plausible strategic decision; in this case, however, the defense was consistent throughout the trial but unsupported by any evidence. Counsel's post-trial explanations for not presenting any evidence – that he had been able to raise the defense theory of the case through cross-examination of the State's witnesses – was unreasonable because even if the cross-examination made the jury aware of the defense theory, there was no evidence to support it.

Similarly, it was unreasonable for defense counsel to fail to call either of the defendants to testify, after promising in opening statements that both would testify and setting forth in detail their anticipated testimony. Counsel's subsequent claim that he decided not to call the defendants so he could shield them from cross-examination and avoid the possibility that the State would elicit damaging rebuttal evidence was not persuasive; it is unreasonable to conclude that "rather than support the defense theory with evidence that the jury might reject, it [is] better not to support the theory at all."

The court also stressed that in the absence of any evidence to support the defense theory, the jury could not have acquitted the defendants unless it chose to ignore the trial court's instructions.

> "[T]he spectrum of sound strategy does not include failing to adduce available evidence that would support an otherwise unsupported defense in the hope that the jury would both forgive counsel's promises to present that evidence and ignore the court's instructions."

3. The defendants were clearly prejudiced by counsel's failure to present evidence. The only direct evidence in support of the State's case was the impeached testimony of an admitted addict and uncharged accomplice. Under these circumstances, the jury could not be expected to overlook the fact that counsel repeatedly promised to present several witnesses, but ultimately presented no evidence at all. Finally, by leaving the defense theory wholly unsupported, counsel allowed the State to argue to the jury that its theory of guilt was uncontradicted.

4. The trial judge did not abuse its discretion by admitting redacted recordings of videotapes showing the defendants' interrogations by police, although the defendants refused to make any statements. (See **EVIDENCE**, §19-2(b)(1)).

People v. Clendenin, ___ Ill.App.3d ___, 913 N.E.2d 1179 (2d Dist. 2009)

1. Under **People v. Campbell**, 208 Ill.2d 203, 802 N.E.2d 1205 (2003) and **People v. Phillips**, 217 Ill.2d 270, 840 N.E.2d 1194 (2005), defense counsel may waive the defendant's right to confrontation by agreeing to a stipulation, so long as the defendant does not object and the decision to stipulate is a matter of trial tactics and strategy. However, the defendant must personally waive the right to confrontation if the stipulation contains a statement that the evidence is sufficient to convict, or if the State's entire case is to be presented by stipulation and a defense is neither presented nor preserved. In addition, the trial court is required to give guilty plea admonishments if a stipulation is tantamount to a guilty plea.

The Appellate Court found that the **Campbell/Phillips** rule implicitly requires that the defendant be informed of the specific content of a stipulation, either directly by the court or defense counsel or by having the stipulation read into the record. The court noted, however, that procedural admonishments are not required where the stipulation is a matter of sound

trial tactics or strategy, and that the defendant need not affirmatively accept the stipulation so long as he fails to object once he has knowledge of its content.

Because the record showed that the defendant was unaware of the specific content of the stipulation on which his conviction rested, his failure to object cannot be construed as the informed acquiescence required by **Campbell/Phillips**. The court also found that defense counsel failed to handle the stipulations in a reasonable manner, and therefore did not adequately waive defendant's right to confrontation. The conviction was reversed and the cause remanded for a new trial.

2. In *dicta*, the court warned of the dangers inherent in the **Campbell/Phillips** rule for both defendants and defense counsel. The court urged the legislature to authorize the use of "conditional pleas," which allow the defendant to plead guilty while preserving certain pretrial issues for appeal. The court also concluded that the stipulation in this case was not a matter of sound trial tactics and strategy in the context of the entire trial, because the stipulation contained evidence which assured defendant's conviction without providing either a strategic advantage or a basis on which defense counsel could argue that defendant was innocent. Thus, reversal would be required even if not necessitated by the failure to advise defendant of the content of the stipulation.

People v. Coleman, 2012 IL App (4th) 110463 (No. 4-11-0463, 12/24/12)

Defendant filed a post-conviction petition claiming that: (1) defense counsel was ineffective for failing to call two witnesses who would have given exculpatory testimony, (2) the State committed a **Brady** violation by failing to disclose to the defense that police officers tested only one of the 15 bags of white powder found at the scene of the arrest before emptying all the bags into one large bag for testing by the crime lab, and (3) defense counsel was ineffective for entering a stipulation that the large bag contained 926 grams of cocaine. The trial court summarily dismissed the petition as frivolous and patently without merit, finding that to show prejudice under **Strickland** defendant was required to show that had the lab analyst been called to testify, he either would not have testified or would have testified differently from what was stated in the stipulation.

In a *pro se* motion to reconsider the summary dismissal, defendant submitted an affidavit from a private investigator who had interviewed the analyst who performed the testing. The affidavit stated that the analyst said he had not performed tests to determine the purity of the cocaine in the large bag of white powder. The analyst also described the decision of police to commingle the contents of the 15 bags as "bad evidence gathering." Although defendant did not submit an affidavit from the analyst, the investigator's affidavit stated that additional efforts to contact the analyst had been unsuccessful.

The Appellate Court reversed the order summarily dismissing the petition.

1. The court found that the petition failed to present the gist of a constitutional violation concerning counsel's failure to call two witnesses to testify, because the only affidavit attached to the petition was that of the defendant, not the witnesses themselves. Although the Post-Conviction Hearing Act requires only that the petition be supported by affidavits, the court concluded that such affidavits should concern matters to which the affiant could testify if called as a witness. Although defendant's sworn affidavit described the anticipated testimony of the two witnesses whom defense counsel failed to call, the defendant would not be competent to testify to such testimony if called as a witness. Thus, the defendant's affidavit was insufficient to withstand summary dismissal, at least in the absence of an explanation why affidavits from the witnesses themselves were unavailable.

2. However, the court concluded that the petition showed an arguable case of ineffective

assistance concerning counsel's agreement to the stipulation that the entire large bag contained cocaine. To allege the gist of a claim of ineffective assistance of counsel, the petitioner need not satisfy the **Strickland** standard of deficient performance and prejudice. Instead, at the first stage of proceedings a claim of ineffective assistance is sufficient if counsel's performance was arguably unreasonable and defendant was arguably prejudiced. An arguable allegation of prejudice exists if it could be reasonably argued that confidence in the outcome of the trial was undermined by counsel's deficient performance.

Here, defense counsel's stipulation relieved the State of a potentially serious problem. In order to aggregate the contents of the 15 bags and obtain a conviction for the cumulative weight, the State was required to prove beyond a reasonable doubt that each of the 15 bags contained cocaine. Because only one bag had been tested before the bags were commingled, the State would have been unable to carry this burden. By stipulating that the entire weight of the large bag's contents was cocaine, counsel's performance was arguably deficient and arguably undermined confidence in the outcome of the trial, especially in light of the investigator's affidavit that no purity test had been conducted.

The court noted that it need not resolve at this stage whether counsel was ineffective. Because the claim was arguable, it was clearly not frivolous or patently without merit. Thus, the petition should not have been summarily dismissed.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Dupree, 2014 IL App (1st) 111872 (No. 1-11-1872, 7/30/14)

1. To prevail on a claim of ineffective assistance of counsel, defendant must show both that counsel's representation fell below an objective standard of reasonableness and a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

To show that trial counsel's performance was deficient, defendant must overcome the strong presumption that the questioned action or inaction was the result of sound trial strategy. A reviewing court is highly deferential to trial counsel on matters of strategy and must view counsel's performance at the time it occurred rather than in hindsight.

2. A prior consistent statement may not be introduced on direct examination to enhance the credibility of a witness's testimony. Even when a witness is impeached by means of a prior inconsistent statement, a prior consistent statement is inadmissible unless it disproves or explains the making of the inconsistent statement.

However, where there is a charge or inference of recent fabrication, a prior consistent statement is admissible to show that the witness told the same story before the alleged fabrication. Merely questioning a witness about whether the witness rehearsed his testimony with opposing counsel does not constitute a charge of recent fabrication.

3. The Appellate Court held that trial counsel was ineffective for opening the door for the State to admit an otherwise inadmissible prior consistent statement from a prosecution witness, failing to object when the State introduced the evidence and repeatedly argued it as substantive evidence, and failing to request that the jury be given a limiting instruction.

The witness made two statements to police - one on October 31, and one on November 1. During cross-examination, defense counsel impeached the witness with the first statement, which was inconsistent with the witness's trial testimony. After pointing out discrepancies between the first statement and the trial testimony, counsel asked the witness whether his "enhanced memory had just come to his mind in the last week."

On redirect, the witness testified that he had not told the truth in his first statement

to police, that he returned to the station on the following day because he wanted to tell the truth, and that he remembered the second statement because it was the truth. The prosecutor made several references to the fact that the witness's second statement was truthful. The prosecutor also read several questions and answers from the second statement that were consistent with the witness's trial testimony and asked the witness to confirm that he had made such statements in the second statement. Defense counsel did not object to any of this testimony.

A. The court found that counsel's representation was objectively unreasonable because his cross-examination allowed the State to introduce the prior consistent second statement. Had counsel merely cross-examined the witness about the inconsistencies between his first statement and his trial testimony, the State would have been unable to introduce the second, consistent statement. Although counsel undoubtedly knew of the second statement, he alleged that the witness's trial testimony was a recent fabrication. By doing so, he opened the door for admission of the second statement.

The court rejected the State's argument that defense counsel's strategy was to demonstrate that the witness had given inconsistent statements from the beginning and argue that the second statement and the trial testimony were intended to frame defendant. Defense counsel took several actions that were inconsistent with such a strategy, including not introducing the second statement himself, eventually objecting to its introduction, and objecting to the introduction of a video of the statement. The court concluded that counsel's strategy was to cast doubt on the witness's credibility by referring to his inconsistent statements, and noted that such a strategy did not require counsel to open the door to admission of the second statement.

Furthermore, counsel compounded his error by failing to object to the State's use of the second statement as substantive evidence and failing to request a limiting instruction. Finally, although counsel was successful in a sidebar in excluding part of the content of the second statement when it was subsequently presented through a police detective's testimony, counsel inexplicably failed to request that the jury be instructed to disregard the evidence.

B. Defendant was prejudiced by counsel's errors because the result of the trial was unreliable. Prior consistent statements are prohibited because they are likely to unfairly enhance a witness's credibility simply because a statement has been repeated. Improperly bolstering a witness's credibility constitutes reversible error when the trial testimony of that witness is crucial and the jury's verdict may have been influenced. Improperly bolstering a witness's credibility is especially prejudicial if the witness's statement relates to guilt and innocence.

The evidence against defendant was far from compelling, as there was no physical evidence linking him to the shooting, his fingerprints were not found in the car from which the shots were fired or on the shell casings which were recovered, and no weapon was recovered. Furthermore, although defendant had not been involved in any prior altercations with the victims, both of the witnesses who implicated defendant as the shooter had prior problems with the victims. In addition, those witnesses provided conflicting accounts about the incident. Finally, the prior inconsistent statement related to defendant's guilt or innocence. Under these circumstances, counsel's unreasonable actions clearly caused prejudice.

Defendant's convictions for first degree murder and attempt first degree murder were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Fillyaw and Parker, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011)

Counsel is ineffective where his performance is deficient and defendant suffers prejudice as a result of counsel's deficient performance. Although there is a presumption that counsel's conduct constitutes sound trial strategy, this presumption may be overcome where no reasonably effective criminal defense attorney, confronting the circumstances of defendant's trial, would engage in similar conduct. The constitutional guarantee of effective assistance of counsel requires a criminal defense attorney to use the applicable rules of evidence to shield his client from a trial based upon unreliable evidence. To establish prejudice, defendant need only show that it is plausible that the result of the trial could have been different absent counsel's errors. He need not show that the evidence not attributable to counsel's errors would have been insufficient to sustain the conviction.

Counsel's performance was deficient where he did not understand that 725 ILCS 5/115-10.1(c)(2) addresses only the admission of prior inconsistent statements as substantive evidence, not as impeachment, and bars the admission of statements made to a testifying witness by the defendant describing events of which the witness had no firsthand knowledge. As a result, counsel did not make proper objections that would have prevented admission of hearsay evidence that Fillyaw admitted that he had kicked in a door and shot three people.

Counsel's unprofessional error prejudiced Fillyaw. The principal evidence against Fillyaw was the testimony of Graham who claimed that he knew Fillyaw and Parker and saw them at the scene. The identification of Parker was corroborated by the discovery of Parker's cell phone near the scene and the identification of Parker's jacket as the jacket worn by one of the offenders. But that evidence did not increase the probability that the identification of Fillyaw was accurate absent evidence linking Fillyaw to Parker and the crime scene. Graham's credibility was questionable because he testified that the offenders wore no masks and he saw their faces, whereas another eyewitness testified that the offenders were masked. Graham had an extensive criminal history. He did not name defendant as the shooters until following his surgery, while he was on morphine, and after he had talked to his family. He also named a third person as an offender, but later retracted this identification. Another witness, Deshae R., identified defendants out of court, but could not identify them in court and acknowledged she did not get a good look at the offenders. The prejudicial effect of the hearsay evidence was magnified by the State's repeated characterization of the evidence as an admission by Fillyaw in its argument to the jury, the fact that a copy of Graham's prior statement accompanied the jury during its deliberations, and the court's instruction that the jury could consider the statement as substantive evidence of guilt. Therefore, a reasonable probability existed that the result of Fillyaw's trial would have been different without the inadmissible evidence.

(Defendant Fillyaw was represented by Assistant Defender Kathleen Hamill, Elgin and Defendant Parker was represented by Assistant Defender Yasaman Navai, Chicago.)

People v. Sanchez, 404 Ill.App.3d 15, 935 N.E.2d 1099 (1st Dist. 2010)

Counsel was ineffective in stipulating to the admission of a prior conviction to impeach defendant's trial testimony where more than ten years had elapsed between the date of defendant's release from prison and the date of his trial. (See also **WITNESSES**, §§57-6(b)(4)(f)(1), 57-6(b)(4)(f)(3)).

Counsel's performance was deficient. No valid strategic reason existed for counsel's failure to object as the conviction only damaged defendant's credibility as a witness. Counsel either failed to investigate the relevant dates, or did investigate and misapprehended the law.

A reasonable probability existed that the result of the trial would have been different absent counsel's deficiency. The trial was a credibility contest between a police officer, who

testified that he saw defendant throw a controlled substance out of a window of his second-floor apartment, and the testimony of the defendant that there was another second-floor apartment in the same building, and that he did not and could not have thrown the substance from his apartment due to the difficulty of opening the screens of his windows. The court expressly relied on the prior conviction in assessing defendant's credibility in his bench trial.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

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§13-4(b)(4)
Failure to Assert Issue Or Seek Instruction

Berghuis v. Thompkins, ___ U.S. ___, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010) (No. 08-1470, 6/1/10)

To establish ineffective assistance of counsel, the defendant must show both deficient performance by his attorney and that the result of the proceeding would likely have been different had counsel acted properly. In assessing prejudice, courts must consider the totality of the evidence that was before the trier of fact.

The court found that it need not determine whether counsel acted deficiently by failing to request an instruction that a co-defendant's conviction for some of the same charges could be considered only as it related to the co-defendant's credibility when he testified at defendant's trial. The court concluded that in light of the evidence of guilt, there was no reasonable likelihood that an instruction would have changed the result of the trial. (See also **CONFESSIONS**, §§10-4(a), (d)).

People v. Givens, 237 Ill.2d 311, 934 N.E.2d 470 (2010)

1. To establish prejudice from trial counsel's failure to file a motion to suppress, the defendant must show a reasonable probability that the motion would have been granted and that the outcome of the trial could have been different.

2. Because there was no reasonable probability that the trial court would have granted a suppression motion arguing that the tenant's consent to search her bedroom was involuntary, defendant did not establish that counsel was ineffective for withdrawing a motion to suppress. Although the motion was withdrawn before trial, the evidence and argument at trial dealt primarily with the voluntariness of that consent.

Furthermore, the only dispute concerning the credibility of the witnesses focused on conflicting evidence concerning the voluntariness of the tenant's consent. The trial court resolved the credibility issue in favor of the prosecution by convicting defendant in a bench trial, and there was no reason to believe that its conclusion would have been different had the motion to suppress been heard. (See also, **APPEAL**, §2-6(a) & **NARCOTICS**, §35-3(c)(1)).

Defendant's conviction was affirmed.

(Defendant was represented by former Assistant Defender Elizabeth Botti, Chicago.)

People v. Hanson, 238 Ill.2d 74, 939 N.E.2d 238 (2010)

Trial counsel was not ineffective for failing to file a motion *in limine* to exclude evidence that airline records contained two notations: that the ticket agent was to contact the Los Angles Police Department if defendant checked in at the airport, and that defendant was

considered to be "very dangerous." Two airline employees testified concerning the notation - the airline records custodian, and an agent who sold defendant a ticket to Chicago.

The court concluded that because a motion *in limine* would have been unsuccessful, counsel was not ineffective. The court found that the testimony by the second agent would have been admissible for a non-hearsay purpose - to show why the witness recognized defendant's name, and to explain her subsequent actions. In addition, a motion *in limine* would not have been granted because the probative value was outweighed by the prejudicial effect.

Furthermore, defense counsel was not ineffective for failing to object the second of the three times the notations were mentioned. An objection would not have resulted in the evidence being excluded, but would at most have resulted in a limiting instruction identical to the one given a few minutes later - after the court sustained an objection to the third time mention of the notations. Under these circumstances, counsel's failure to object was not objectively unreasonable.

(Defendant was represented by Assistant Defender Steve Clark, Supreme Court Unit.)

People v. Henderson, 2013 IL 114040 (No. 114040, 5/23/13)

Acknowledging a conflict in Illinois precedent, the Supreme Court held that where a claim of ineffective assistance of counsel is based on the failure to file a suppression motion, the prejudice element of **Strickland** requires defendant to show that: (1) a suppression motion would have been meritorious, and (2) there is a reasonable probability the trial outcome would have been different had the evidence been suppressed. The court declined to follow precedent holding that where a claim of ineffectiveness is based on the failure to file a suppression motion, the prejudice requirement of **Strickland** is satisfied upon a showing of: (1) a reasonable probability that the motion would have been granted, and (2) a reasonable probability that the result of the trial would have been different had the evidence been suppressed.

The court concluded that because there were no grounds on which a motion to suppress would have been granted, defense counsel was not ineffective for failing to file such a motion.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Phipps, 238 Ill.2d 54, 933 N.E.2d 1186 (2010)

1. Waiver is an intentional relinquishment or abandonment of a known right.

After defendant filed a motion to withdraw his guilty plea, defense counsel informed the court that defendant might want to claim counsel's ineffectiveness. The court appointed new counsel to determine whether defendant wanted to pursue a claim of ineffective assistance of counsel. At the next hearing date, plea counsel informed the court that defendant had mentioned a mechanical problem that he thought should have explored at sentencing. Appointed counsel stated that he had consulted with defendant, gone over the issues, and spoken with plea counsel, and defendant did not want to raise any ineffectiveness claim, but wanted to proceed on his motion with plea counsel. The court allowed defendant to proceed on his motion with plea counsel, and no challenge was made until appeal to plea counsel's effectiveness.

The Supreme Court concluded that defendant had not waived any claim of ineffective assistance of counsel other than the one claim specifically mention by plea counsel. Appointed counsel's statement could not be construed as a general waiver of any ineffectiveness claim due to the context in which it was made. Any ambiguity in appointed counsel's statement must be interpreted narrowly as waiver principles are construed liberally in favor of the defendant.

2. To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate that his counsel's performance was deficient and that he was prejudiced by that deficient performance.

The State charged defendant with reckless homicide, but based on a version of the statute not in effect at the time of the offense. The defendant pled guilty to that offense in return for a promise of a sentence cap of 12 years. Before the defendant was sentenced, the State realized its error and moved to vacate the defendant's plea and substitute a charge of aggravated DUI. With defense counsel's agreement, the court vacated the plea, and defendant entered a guilty plea to the new charge, subject to the same 12-year cap. The court sentenced defendant to 12 years' imprisonment.

The defendant charged that his counsel was ineffective for agreeing to vacate the plea and substitute the aggravated DUI charge, which was barred by the speedy-trial term. Under the reckless homicide statute in effect at the time of the offense, defendant could be sentenced to a maximum of five years' imprisonment, whereas the maximum for aggravated DUI was 14 years. The Supreme Court rejected that argument based on its conclusion that the substitution of the aggravated DUI charge did not violate the speedy-trial statute. (See also **SPEEDY TRIAL,** §47-1(b)).

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Simpson, 2015 IL 116512 (No. 116512, 1/23/15)

Defense counsel was ineffective where he failed to object to a prior inconsistent statement that was inadmissible under 725 ILCS 5/115–10.1.

1. First, counsel did not provide objectively reasonable representation. There was no strategic reason for failing to object to the statement, and by not raising an objection counsel allowed the State to place defendant's purported confession before the jury. Not only are confessions recognized as powerful evidence of guilt, but in this case the confession highlighted defendants's brutality and his role as the leader of the group of men who beat the decedent.

The court also noted that defense counsel failed to object when the court instructed the jury that it had received evidence of a statement made by the defendant or when the prosecutor argued the prior statement as substantive evidence of defendant's guilt.

2. Second, defendant was prejudiced by counsel's inaction because there was a reasonable probability that had counsel objected, the confession would have been excluded and the result of the proceeding would have been different. The court acknowledged that there was evidence on which a rational trier of fact could have convicted even had the prior statement been excluded. On the other hand, the purported confession was a potent piece of evidence which indicated that defendant played a primary role in the offense.

In addition, an eyewitness was unable to identify defendant or the co-defendant at trial and had expressed uncertainty about his pretrial identifications. Finally, the trier of fact would have been entitled to discount the testimony of accomplices given the relatively light treatment they had received for the same offense. Under these circumstances, there was a reasonable likelihood that the result of the proceeding would have been different had the prior inconsistent statement not been admitted.

The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Megan Ledbetter, Chicago.)

In re Austin M., 403 Ill.App.3d 667, 941 N.E.2d 903 (4th Dist. 2010)

1. A *per se* conflict of interest arises when counsel has ties to an entity that would benefit from a verdict that is unfavorable to the defendant. Where a *per se* conflict exists,

reversal is automatic unless the record shows that the defendant was aware of the conflict and intentionally waived it.

The respondent expressly waived any *per se* conflict of interest resulting from claims that he and his co-defendant were each the victim of sex offenses committed by the other. Furthermore, representation by a single attorney did not constitute a conflict where neither of the minors claimed to have been abused by his co-respondent; both consistently maintained that the allegations were completely fabricated and that no sexual offenses had occurred.

2. The court rejected the argument that defense counsel labored under an actual conflict of interest because the respondent's parents directed counsel's representation in a way that was contrary to the respondent's interests. Defense counsel represented only the respondent; in fact, the trial court specifically admonished the parents that counsel was not representing them. Furthermore, counsel's remarks during the proceedings did not suggest that his consultation with the parents in any way contradicted the interests of the minor.

The court also stated that in juvenile cases, defense counsel must not only protect the juvenile's legal rights but also recommend a disposition that is in the juvenile's best interest. The latter duty may require consultation between counsel and the parents.

3. There was no conflict of interest in counsel's dual role as defense attorney and guardian *ad litem*. First, the court rejected the State's argument that counsel did not act as guardian *ad litem*. Although the trial judge never expressly appointed counsel as guardian *ad litem*, both the trial court and defense counsel conceived the attorney's role as guardian *ad litem* (i.e., safeguarding the interests of both the minor and society), rather than as a traditional defense attorney. Because counsel in fact functioned as a guardian *ad litem*, the Appellate Court elected to reach the issue although defense counsel was never formally appointed.

Because 705 ILCS 405/1 contemplates that a single attorney can be both guardian *ad litem* and defense counsel "unless the court finds that the minor's interests are in conflict with what the guardian *ad litem* determines to be in the interest of the minor," the court rejected the argument that it is necessarily a conflict of interest for an attorney to act both as guardian *ad litem* and defense counsel. The court acknowledged that other jurisdictions hold that a *per se* conflict exists where one person is both guardian *ad litem* and defense counsel, but concluded that Illinois follows a different rule.

Furthermore, counsel's dual role did not constitute an actual conflict in this case. An actual conflict exists when some specific defect in defense counsel's strategy, tactics or decision making is attributable to a conflict of interest.

Although defense counsel allowed certain testimony to be presented by videotape and waived cross-examination of the witnesses who had been videotaped, the minor expressly waived any objection to that procedure. Furthermore, counsel's actions did not prejudice the minor where the trial court deemed the videotaped testimony unworthy of belief. The court also noted that by agreeing to the videotaped testimony, counsel gained an advantage for the defense by depriving the State of "more persuasive" live testimony.

4. Defense counsel was not ineffective although he failed to move to suppress a statement made by the minor to police. In determining whether a confession is voluntary, the totality of the circumstances are to be considered, including: (1) the respondent's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning, (2) the legality and duration of the detention, (3) the duration of the questioning, and (4) any physical or mental abuse by the police. No single factor controls – whether a statement is voluntary depends on whether the respondent made the statement freely, voluntarily and without compulsion or inducement of any sort.

Because the statement would likely have been deemed voluntary had a motion to suppress been filed, counsel was not ineffective. The respondent was 16 years old, arrived at the police station voluntarily, signed a form acknowledging his **Miranda** rights, and submitted to police questioning in the presence of his father. Although the father testified that the minor made no statements and that the police chief employed "psychologically coercive tactics," the record contained a basis on which a reasonable judge could have viewed the officers' testimony as more persuasive.

5. The court rejected respondent's argument that counsel was ineffective because he stipulated to the admissibility of videotaped statements of three children, without challenging the statements as hearsay or exercising defendant's right to confrontation. The respondent was specifically advised by the trial court of his right to cross-examine the witnesses, and waived that right. In addition, whether to admit the evidence by way of videotape was a matter of trial strategy which had the beneficial effect of depriving the State of the ability to present "more persuasive" live testimony.

(The respondent was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Centeno, 394 Ill.App.3d 710, 916 N.E.2d 70 (3d Dist. 2009)

Defense counsel was ineffective for failing to move to surrender defendant's Will County bond on a petition to revoke probation, where defendant was simultaneously in custody in Cook County. Under **People v. Robinson**, 172 Ill.2d 452, 667 N.E.2d 1305 (1996), a defendant who is in simultaneous custody for multiple offenses is entitled to presentence credit on both offenses if he surrenders bond on his first offense after being placed in custody for the second.

Defendant was prejudiced by counsel's failure to move to surrender the Will County bond, because the trial court denied the request for credit on the ground that defendant had never been in custody on the Will County petition.

The clerk was directed to amend the mittimus to reflect an additional 301 days of presentence credit.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Coots, 2012 IL App (2d) 100592 (No. 2-10-0592, 4/16/12)

To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's performance was objectively unreasonable; and (2) it is reasonably probably that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Defendant was charged with the commission of drug-induced homicide, which required that she unlawfully deliver a controlled substance to another where that person's death was caused by ingestion of the controlled substance. 720 ILCS 5/9-3.3(a). The trial evidence allowed the jury to find that defendant either merely jointly possessed the controlled substance with the deceased, or that she delivered the controlled substance to the deceased.

During deliberations, the jury sent a note reading, "With respect to the definition of the term 'delivery,' may the jury reasonably interpret the term to mean 'give[?]'" With the agreement of the parties, the court told the jury to refer to its instructions, which did not include a complete definition of "delivery."

The jury's question demonstrated that it was confused about a question of law and was at least entertaining the belief that defendant could be found guilty by doing no more than handing the heroin to the deceased, which would be legally insufficient to support a guilty

verdict.

Defense counsel's failure to submit a proposed supplemental instruction on the meaning of "delivery" was objectively unreasonable and prejudiced defendant given the closeness of the evidence. The trial court's refusal to clarify the jury's confusion over the meaning of "delivery" created a serious danger that the jury would and did convict the defendant based on facts that were legally insufficient to establish delivery under the drug-induced-homicide statute. Defense counsel should have requested that the trial court answer the jury's question. To avert the danger of a conviction based on an error of law, the attorney should have tendered the Illinois Pattern Jury Instructions defining "deliver" and "possession." IPI Crim. Nos. 17.05A(1), (2) and 4.16 (4th Ed. 2000).

Because counsel was ineffective, the Appellate Court reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)

People v. Davis, 2014 IL App (4th) 121040 (No. 4-12-1040, 12/8/14)

1. Counsel may be ineffective for misunderstanding applicable law, but his understanding must be viewed in the context of the state of the law at the time the alleged error occurred and counsel is not incompetent for failing to accurately predict that the law will change.

Defendant argued that his trial counsel was ineffective for failing to file a motion to suppress a text message that police recovered from his cell phone without a search warrant. The Appellate Court rejected this argument since this issue had not been resolved in Illinois at the time of defendant's trial.

Nearly two years after defendant's trial, the United States Supreme Court held that the search-incident-to-arrest exception to the warrant requirement does not extend to cell-phone data. **Riley v. California**, 573 U.S. ___, 134 S.Ct. 2473 (2014). But at the time of defendant's trial, courts across the country were split on this issue, and in Illinois a reasonable argument could have been made that a warrantless search of a cell phone was permissible. A motion to suppress thus would have had a questionable chance of success. The court declined to find that counsel was ineffective for failing predict the future and anticipate **Riley**.

2. The court also held that trial counsel was not ineffective for failing to object to the text message on three evidentiary grounds (lack of foundation, violation of the best evidence rule, and hearsay), since none of these objections would have been successful.

The State introduced evidence that a detective searched defendant's cell phone and found a text message asking to meet defendant "for a 30 or a 40." During defendant's interrogation (recorded on video and played at trial), the detective confronted defendant with this message. The detective then testified that he believed this message was about trying to purchase $30 or $40 of cocaine.

a. The court rejected the foundation argument because it rested on a faulty assumption that the State had to lay a foundation for the introduction of a document. The State, however, never introduced any document. It simply played a video of the interrogation where the detective confronted defendant with the text message and then asked the detective what the message meant. Once the detective testified that he had read the message, there was a proper foundation for him to testify about its contents.

b. The court rejected the best evidence rule argument because it only applies when the contents of a writing are at issue. Here the State did not try to prove the content of the text message; it instead used the text message as circumstantial evidence that defendant intended to deliver cocaine. The actual content of the message did not matter.

c. Finally, the court rejected the hearsay argument because the detective's testimony about the contents of the text message was not offered to prove the truth of the matter asserted in the message. Instead, it was offered to show police investigation and circumstantial evidence of defendant's intent.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Daaron Kimmel, Springfield.)

People v. Falco, 2014 IL App (1st) 111797 (No. 1-11-1797, 8/12/14)

Generally, counsel's choice of jury instructions is a matter of trial strategy. But the failure to request a particular jury instruction may be ineffective assistance if the instruction was so critical to the defense that it was necessary for a fair trial.

Defendant was convicted of possession of a firearm with defaced identification marks. 720 ILCS 5/24-5(b). The jury was instructed with a non-IPI instruction which tracked the language of the statute defining the offense but, like the statute, omitted any reference to a mental state.

Counsel was ineffective for failing to request an instruction informing the jury that to prove defendant guilty of the charged offense, the State had to prove that he knowingly or intentionally possessed the firearm. Although the statute defining the offense of possession of a firearm with a defaced serial number does not specify a mental state, Illinois law is clear that the State must prove that the defendant intentionally or knowingly possessed the firearm, although the State does not have to prove that defendant knew of the defacement.

Where the statute does not specify a mental state, and instead one is implied, it is not always necessary to instruct the jury on the necessary mental state. Some mental states, however, may be specific enough to require a jury instruction. Here, the implied mental state of intent and knowledge was specific enough to require instruction. The present offense was no different than any other possession charge. Typical possession cases, such as unlawful use of a weapon, require the State to prove knowing possession and the corresponding IPI instructions inform the jury of this element.

There is no IPI instruction for the offense at issue here, but the jury should have been given a modified instruction that included the appropriate mental state as one of the elements of the offense. In the absence of such an instruction, the jury could have concluded that this was a strict liability offense; there was no likelihood that the jury would have understood that knowledge was the appropriate mental state or that knowledge applied only to possession, not to defacement.

The conviction was reversed and remanded for a new trial.

People v. Gallagher, 2012 IL App (1st) 101772 (No. 1-10-1772, 6/5/12)

To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness and resulted in prejudice. To show that counsel's actions were deficient, the defendant must overcome a strong presumption that the challenged action may have been the result of sound trial strategy.

At defendants's residential burglary trial, counsel claimed that defendant's actions constituted a trespass, but not residential burglary. The court found that counsel was ineffective for failing to request instructions on a lesser included offense supported by the defense evidence - criminal trespass to a residence (IPI Crim. 4th No. 14.17). "Where defense counsel argues a theory of defense but then fails to offer an instruction on that theory of defense, the failure cannot be called trial strategy and is evidence of ineffective assistance of counsel."

The court acknowledged that at an instruction conference held before the defense presented its case, the trial judge declined to give instructions requested by the defense concerning the lesser included offense of trespass to real property (IPI Crim. 4th No. 16.11, 16.11). However, once defendant testified, counsel should have realized that the testimony supported a lesser included instruction for a different offense - criminal trespass to a residence. At that point, counsel should have requested an additional instruction conference for the purpose of requesting that IPI Crim. 4th No. 14.17 be given.

The court also concluded that defendant was prejudiced because there was a reasonable probability that a properly instructed jury would have convicted only on the lesser charge. The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Patrick Morales-Doyle, Chicago.)

People v. Hill, 2012 IL App (1st) 102028 (No. 1-10-2028, mod. op. 8/24/12)

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's representation was deficient and that this deficiency prejudiced defendant.

Generally, the decision whether to file a motion to suppress is a matter of trial strategy entitled to great deference. But no strategic reason explains counsel's failure to file a motion if it would have been defendant's best chance of success. To establish prejudice resulting from failure to file a motion to suppress a defendant must show a reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been suppressed.

The police stopped a vehicle being driven by defendant because it matched the description of a subject's vehicle and plates named in a search warrant. The warrant authorized the search of the subject and an apartment on West Flournoy. A pat-down search of defendant resulted in the discovery of keys, which defendant admitted were for the apartment on Flournoy. Defendant was taken into custody.

The police used the keys to enter the apartment and conduct a search. The complaint for a warrant indicated that ecstacy would be found in the front bedroom. The police found no drugs in that bedroom but did recover a loaded shotgun inside a bag in a box under the bed in the middle bedroom. When questioned by the police, defendant admitted that the shotgun was his and that he had been living in the apartment with his girlfriend.

At trial, the defense presented evidence that defendant did not live in the apartment although he slept there on occasion. Defendant had been given a key to allow him to let his girlfriend's daughter and brother into the apartment when she was absent. Defendant denied knowledge of the shotgun and making a statement admitting to possession of the shotgun.

1. Even though the initial stop and search of defendant was lawful, a motion to suppress defendant's statement as the fruit of his unlawful detention after the search would have had a reasonable probability of success.

A. The continued detention of defendant was not supported by probable cause or reasonable suspicion. The police recovered no contraband from defendant, only keys. No contraband had yet been recovered from the apartment.

B. Probable cause to support the warrant to search the apartment did not allow the court to assume that there was probable cause or reasonable suspicion to justify the continued detention of the defendant. These are related, but different inquiries: in the case of the detention of the defendant, the inquiry concerns the guilt of defendant, whereas in the case of the search warrant, the inquiry relates to "the connection of the items sought with the crime and to their present location." Where the police found no drugs on defendant and had not yet found any contraband at the apartment, the mere expectation that the police would find drugs

in the apartment, without more, could not justify the continued detention of defendant. The State had not argued that the facts alleged in the complaint for search warrant supported an independent finding of probable cause or reasonable suspicion to justify the detention.

C. The continued detention of defendant was not a valid seizure incident to execution of the warrant. **Michigan v. Summers**, 452 U.S. 692 (1981), authorized the detention of occupants of the premises while a search warrant is executed in order to: (1) prevent flight in the event that incriminating evidence is found, (2) minimize the risk of harm to officers, and (3) facilitate the orderly completion of the search. Courts disagree whether this rule can be extended to an occupant who leaves the premises immediately before execution of the warrant who is detained soon as practicable after leaving. The court found it unnecessary to decide whether Illinois should adopt the expansive interpretation of **Summers** where there was no evidence defendant had come from the Flournoy apartment just before his detention.

D. The court declined to determine whether the statement was attenuated from the detention by the presence of independent, intervening probable cause – the recovery of the shotgun. That was a fact question related to defendant's constructive possession of a weapon found hidden under a bed in a three-bedroom apartment. The parties would have an opportunity to address the question on remand, if necessary.

2. There is a reasonable probability that the outcome of the trial would have been different had defendant's statement been suppressed. To establish defendant's constructive possession of the weapon, the State had to prove defendant's knowledge of the presence of the weapon and that he had immediate and exclusive control of the area where it was found. The crucial piece of evidence establishing these facts was the defendant's statement, as demonstrated by the trial court's finding that the statement was the most damning evidence against him.

3. No reasonable strategy explains counsel's failure to file the motion where a successful motion would have removed the most damaging evidence connecting defendant to the weapon. Even if counsel only became aware of the basis of the motion during trial, by statute, defendant may make a motion to suppress after trial has started if he was not previously aware of the grounds for the motion. 725 ILCS 5/114-12(c).

Because counsel's failure to move to suppress denied defendant the effective assistance of counsel, the court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

People v. Hill, 2014 IL App (2d) 120506 (No. 2-12-0506, 3/31/14)

Defense counsel was not ineffective for failing to request separate verdicts concerning the State's three theories of first-degree murder: intentional murder, knowing murder and felony murder.

1. The defendant is presumed to have been convicted of the least serious offense where the jury returns a general verdict after the trial court denies a defense request for specific verdicts on multiple counts of first degree murder which carry sentencing and "one-act, one-crime" ramifications. (**People v. Smith**, 233 Ill. 2d 1, 906 N.E.2d 529 (2009)). Thus, where the jury returned a general verdict after the trial court refused a request for specific verdict forms, and a consecutive sentence would be required for the predicate of felony murder if the conviction was for intentional or knowing murder, the trial court must vacate the conviction for the predicate of felony murder.

2. The court noted that **Smith** has been limited to situations in which the trial court refuses a defense request for separate verdict forms. Thus, the failure to request separate verdicts cannot form the basis for a finding of ineffective assistance.

In addition, defendant could not overcome the presumption that counsel's failure to ask for specific verdict forms was based on sound strategy. At trial, defendant's theory was that he did not commit the offense of murder in any of its forms. Under these circumstances, counsel's decision not to separate felony murder from the other offenses was presumably a tactical decision based on "sensible trial strategy."

Defendant's convictions for first degree murder and aggravated arson were affirmed.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Hobson, 2014 IL App (1st) 110585 (No. 1-11-0585, 3/12/14)

After defendant's conviction for murder was affirmed on direct appeal, defendant filed a post-conviction petition which the trial court dismissed at the second stage. The Appellate Court found that defendant made a substantial showing that defense counsel was ineffective and remanded the cause for a third-stage evidentiary hearing.

1. First, defendant made a substantial showing that his attorney acted unreasonably by failing to object to the prosecution's use of prior inconsistent statements. At trial, the judge admitted statements which two witnesses had signed and grand jury testimony that was consistent with those statements. The statements claimed that the witnesses overheard statements concerning a shooting that was the basis of the charges. At trial, the witnesses testified that they knew nothing about the shooting and that the prior statements were untrue.

Under 725 ILCS 5/115-10.1(c)(2), a prior inconsistent statement that was not made under oath in a legal proceeding constitutes hearsay and is inadmissible as substantive evidence unless it describes an event or condition of which the declarant had personal knowledge. Because neither of the witnesses saw the shooting, they lacked the personal knowledge required to make their prior statements admissible as substantive evidence under §10.1(c)(2).

The court concluded that counsel acted unreasonably by failing to object, and that there was no valid strategic reason for not objecting.

2. Defendant also made a substantial showing that counsel acted unreasonably by failing to discover and present evidence that two witnesses were promised leniency on pending cases in return for testifying falsely before the grand jury. The testimony of both witnesses in other proceedings indicated that they would have been disclosed the promises of leniency and their false testimony had defense counsel interviewed them.

3. Defendant also made a substantial showing that counsel acted unreasonably by failing to impeach a police officer who testified that when he questioned one witness who was subsequently promised leniency, he did not know that the witness had an outstanding warrant. Evidence submitted in support of the post-conviction petition and in other proceedings indicated that the officer did know of the warrant, and had the officer been impeached his entire testimony would have been cast in doubt.

4. Defendant also showed a reasonable probability that trial counsel's actions affected the outcome of the trial and were therefore prejudicial. The written statements bolstered the witness's grand jury testimony and cast doubts on their trial testimony, which favored the defense. The failure to introduce the promises of leniency made the witnesses' grand jury testimony seem more credible, and impeaching the officer would have substantially undercut his testimony at trial. Had counsel acted reasonably, "the balance of credibility" could have shifted enough to cause the trier of fact to conclude that the State had failed to satisfy the reasonable doubt standard.

The cause was remanded for a third-stage evidentiary hearing.

(Defendant was represented by Assistant Defender Autumn Fincher, Chicago.)

People v. Kidd, 2013 IL App (2d) 120088 (No. 2-12-0088, 9/25/13)

Defendant demonstrates that counsel is ineffective where: (1) counsel's performance is objectively unreasonable, and (2) it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

The offense of drug-induced homicide requires proof that defendant delivered a controlled substance to another, and that person's death was caused by ingestion of any amount of that controlled substance. 720 ILCS 5/9-3.3(a). Where an issue of fact exists regarding whether defendant delivered the controlled substance, counsel's failure to have the jury instructed on the definition of "delivery" constitutes ineffective assistance if the jury may have given the term a broader definition than it deserved to the prejudice of the defendant.

Defendant was convicted of drug-induced homicide of his girlfriend whose death resulted after she ingested cocaine. The evidence at trial created an issue of fact regarding whether defendant and his girlfriend bought the cocaine together or one or the other actually purchased and possessed it. If the jury found that defendant and his girlfriend jointly possessed the cocaine (either actually or constructively), there was no delivery.

Counsel was ineffective where the jury did not receive the complete IPI instruction regarding the definition of "delivery." The court gave the jury the third paragraph of IPI Criminal 4th No. 17.05A, which clarified that consideration was not necessary for a delivery to occur. But defense counsel did not tender, or object to the jury not receiving, the first two paragraphs of that instruction, which defined "delivery" as the transfer or attempted transfer of possession, and explained the concept of constructive delivery. Defendant was prejudiced by this omission because there was a reasonable probability that the jury would have acquitted defendant had the complete instruction been given.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

People v. Marshall, 399 Ill.App.3d 626, 926 N.E.2d 862 (1st Dist. 2010)

Defense counsel was ineffective for failing to file a motion to suppress where there was no sound tactical reason to forego suppression of the evidence in favor of a necessity defense, and a high probability that a motion to suppress would have been successful.

In the course of its holding, the court concluded that defendant was "seized" where a police officer pulled behind him and activated his overhead lights when defendant stopped in a "No Parking" zone. (See **SEARCH & SEIZURE**, §§44-1(c)(1), 44-4(d), 44-5(a), 44-12(a)).

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People v. Martin, 408 Ill.App.3d 44, 945 N.E.2d 1239 (1st Dist. 2011)

Although evidence should have been excluded had defense counsel objected, counsel was not constitutionally ineffective where the overwhelming admissible evidence of guilt precluded a finding that a different result would have been likely had counsel acted competently.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. McCarter, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-2864, 6/24/11)

To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) the deficiency in counsel's performance was prejudicial to the defense.

Claims of plain error and ineffective assistance of counsel to obtain review of unpreserved trial errors overlap. A defendant who is able to establish that trial counsel rendered constitutionally deficient representation has proved plain error under the second-prong of the plain error rule because defendant has suffered a substantial impairment of a fundamental right.

Counsel was ineffective in failing to object to inadmissible evidence that provided the only evidence that defendants committed an armed robbery. Therefore, the second prong of the plain-error rule was satisfied. "Based on plain error [the court] exercised [its] duty to set aside the armed robbery conviction where reasonable doubt remains of defendant's guilt."

(Defendant was represented by Assistant Defender Jessica Fortier, Chicago.)

People v. Miller, 2013 IL App (1st) 110879 (No. 1-11-0879, 6/28/13)

1. Trial counsel was ineffective for failing to move to suppress defendant's inculpatory statement on **Miranda** grounds. To provide objectively reasonable representation, counsel must raise constitutional violations unless the failure to do so is part of trial strategy. Although there is a strong presumption that a decision not to file a motion to suppress is the result of trial strategy, that presumption is overcome where defendant demonstrates reasonable probabilities that the motion would have been granted and that the outcome of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.

2. The court concluded there was a reasonable probability that a motion to suppress would have been granted. Defendant was driving a car which a police officer tried to stop for a traffic violation. The car collided with another vehicle, and defendant exited the car and attempted to flee. However, due to an injury defendant fell to the ground as the officer approached with his gun drawn. The officer testified that he placed defendant in custody and asked defendant why he was fleeing and whether the car was stolen. According to the officer, defendant responded "yes."

The Appellate Court concluded that there was a reasonable probability that the trial court would have found that defendant's statement was not given spontaneously, but was instead a product of custodial interrogation conducted without **Miranda** warnings. Thus, there was a reasonable probability that the trial court would have granted a motion to suppress.

The court also found that there was a reasonable probability that the outcome of trial would have been different had the statement been suppressed. First, the evidence was closely balanced, and the verdict came down to whether defendant knew that the vehicle was stolen. Defendant's statement was the only direct evidence concerning such knowledge.

Furthermore, had the statement been suppressed, much of the officer's testimony would have been called into question because it was corroborated only by defendant's statement.

3. The court concluded that defendant was prejudiced by counsel's unreasonable representation because the evidence was close, a confession is the most powerful piece of evidence the State can offer, and the statement "was a key piece of the State's proof that [defendant] knew he was in possession of a stolen motor vehicle."

4. Because a motion to suppress would have been the strongest and wisest course of action under the circumstances, the failure to move to suppress constituted ineffective assistance although counsel was competent in other areas and vigorously tested the State's evidence at trial. The court also noted that there was no explanation how the failure to file a motion to suppress could have been part of any legitimate trial strategy.

Defendant's conviction for aggravated possession of a motor vehicle was reversed, and

the cause was remanded for a new trial.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

People v. Mims, 403 Ill.App.3d 884, 934 N.E.2d 666 (1st Dist. 2010)

1. Trial counsel was not ineffective at a trial for aggravated criminal sexual assault although he failed to request a jury instruction concerning the defense of consent. The court found that the failure to request the instruction was a matter of sound trial strategy because the definition of "consent" (IPI Crim. No. 11.63), which is to be given with the IPI instruction on consent, included matters which counsel felt were detrimental to the consent defense which counsel raised.

The court rejected the argument that without an instruction on consent, the jury had no basis on which it could have acquitted. Because aggravated criminal sexual assault is defined as an act of sexual penetration by use or threat of force, and a consensual act is not perpetrated by force, the jury could have acquitted defendant had it believed that his actions were consensual.

2. The court also rejected the argument that defense counsel was ineffective for failing to object to hearsay testimony by a police officer who reiterated the complainant's statements concerning the offense. The court rejected the State's argument that counsel made a reasonable tactical decision not to object because he wanted to stress to the jury that all of the evidence of guilt came from the complainant rather than from independent witnesses. However, the court concluded that the error was cured by the trial court's *sua sponte* instruction to the jury to disregard the evidence. The court also noted that the jury had already heard the complainant's testimony and that the officer's testimony did not raise any new matters.

(Defendant was represented by Assistant Defender Brett Zeeb, Chicago.)

People v. Moore, 2012 IL App (1st) 100857 (No. 1-10-0857, 2/1/12)

To demonstrate ineffective assistance of counsel, defendant must show that counsel's representation of defendant fell below an objective standard of reasonableness, and that counsel's alleged deficient performance prejudiced the defense. Defense counsel is not required to make losing motions or objections in order to provide effective legal assistance. A judicial error is necessary to a showing that counsel's performance prejudiced the defense.

1. Counsel's performance was deficient where she failed to object to allowing the jury the opportunity to view a complete recording of the police interrogation of defendant during its deliberations. Had an objection been made, it would have been successful. The recording included references to other offenses relevant only to defendant's propensity to commit crimes. No sound trial strategy explained counsel's failure to object.

2. The court rejected the argument that it was unlikely that the jury viewed the recording because it deliberated for only 5½ hours and the recording was over 12 hours in length. The prejudicial material appeared in the first hours of the recording, while most of the recording depicted defendant alone in a room sleeping. Both parties emphasized to the jury in argument that it would be able to watch the entire recording, and the court told the jury that it could watch as much of the recording as it wanted.

3. There is a reasonable probability that the result of the trial would have been different had the recording not been admitted. The State's evidence proved only that defendant had a relationship with the murder victim, received the final telephone call placed from her telephone, had sexual intercourse with her within three days of her death, and lied to the police about these facts. It could not be determined whether or not a sexual assault had

occurred. There was no evidence directly linking defendant to a murder weapon or placing him on the scene. While the evidence was sufficient to convict, it was not overwhelming.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Simpson, 2013 IL App (1st) 111914 (No. 1-11-1914, 6/19/13)

1. To establish ineffective assistance of counsel, the defendant must show that his attorney's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that had counsel acted reasonably, the result of the proceeding would have been different. The court concluded that defense counsel was ineffective where he failed to object when the prosecution played a videotape in which a witness stated that defendant had confessed to the offense.

2. Counsel's failure to object was objectively unreasonable where, had an objection been raised, the recording would have been inadmissible. First, because the witness did not affirmatively damage the State's case where he testified only that he could not recall what defendant had said, the videotape was inadmissible as impeachment.

Second, the videotape was inadmissible under 725 ILCS 5/115-10.1, which authorizes the admission of a prior inconsistent statement which "narrates, describes, or explains an event or condition of which the witness had personal knowledge." In order for an out-of-court statement to satisfy the "personal knowledge" requirement, the witness must have actually seen the event which formed the subject matter of the statement. Here, the out-of-court statements were used as evidence that the defendant repeatedly struck the decedent with a bat. Because the witness admitted that he had no personal knowledge whether defendant struck the decedent and was merely repeating what he claimed defendant had said, the "personal knowledge" requirement was not satisfied.

The court also noted that there was no strategic reason for failing to object to the videotape. Confessions have special persuasive force, and the alleged confession here highlighted defendant's brutality and role as the leader of a group which murdered the decedent. Under these circumstances, counsel's representation fell below an objective standard of reasonableness.

3. The court also held that the error was prejudicial because there was a reasonable probability that absent the error, the result of the proceeding would have been different. Although three other witnesses testified, one was a 74-year-old who observed the incident from a distance of more than 150 feet and who admitted that he had poor eyesight. In addition, this witness was unable to make courtroom identifications of either the defendant or the co-defendant.

Two other witnesses testified that defendant committed the beating, but both were accomplices who received substantial benefits from their testimony. One of the accomplices was never charged concerning the incident, and the other received a sentence of 14 years and expected to be released in less than seven years. "[T]riers of fact should view the testimony of accomplices with suspicion and accept it only with great caution, especially when a promise of leniency or immunity induced the testimony."

In addition, the erroneous admission of a confession is rarely harmless error, because confessions carry extreme weight and are frequently the most persuasive evidence against a defendant. Because there was no physical evidence to connect defendant to the crime and a rational trier of fact could have disbelieved both of the accomplices and the 74-year-old eyewitness who admitted having poor eyesight, the court concluded that defendant had established a reasonable likelihood that he would have achieved a better result had counsel objected to the videotape.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Megan Ledbetter, Chicago.)

People v. Wheeler, 401 Ill.App.3d 304, 929 N.E.2d 99 (3d Dist. 2010)

Defense counsel was ineffective for failing to tender I.P.I. Crim. No. 3.17, which instructs the jury that the testimony of an accomplice should be considered with caution. Because the result of the trial may well have been different had the jury been instructed to closely scrutinize the witness's testimony, counsel's failure to tender the instruction caused prejudice. The conviction was reversed and the cause remanded for a new trial. (See **JURY**, §32-8(j)).

(Defendant was represented by Deputy Defender Robert Agostinelli, Ottawa.)

People v. Wood, 2014 IL App (1st) 121408 (No. 1-12-1408, 7/23/14)

1. Under Illinois law, a defendant must first raise an insanity defense to be eligible for a finding of guilty but mentally ill (GBMI). When a defendant raises an insanity defense, the court may find defendant GBMI if the State has proved defendant guilty of the offense beyond a reasonable doubt, the defendant has failed to prove insanity, but the defendant has proved by a preponderance of the evidence that he was mentally ill at the time of the offense.

Defendant argued that trial counsel provided ineffective assistance by requesting a finding of GBMI without first presenting an insanity defense and by failing to call his expert to testify that defendant suffered from paranoid schizophrenia.

To establish ineffective assistance, a defendant must show that his counsel's representation fell below an objective standard of reasonableness (the performance prong) and that there is a reasonable probability that but for counsel's errors the result of the proceedings would have been different (the prejudice prong).

2. The Appellate Court first found that defendant established that he had been prejudiced by counsel's actions. If counsel had raised an insanity defense and presented the testimony of an expert witness about defendant's lengthy history of mental illness, the evidence here would have been sufficient to prove by a preponderance of the evidence that defendant was mentally ill at the time of the offense.

The court specifically rejected the State's argument that no prejudice occurred because a finding of GBMI would provide no benefit to defendant. Although a GBMI finding would not necessarily result in a lower sentence, it does require the Department of Corrections to take certain actions to provide treatment for defendant's mental illness.

3. Counsel's performance, however, was not deficient. Although counsel mistakenly believed a GBMI finding was permissible without first raising an insanity defense, counsel also reasonably believed he had no good-faith basis for raising an insanity defense. Defendant's own expert concluded that defendant was not insane at the time of the offense, and his conclusion was supported by trial evidence showing that defendant appreciated the criminality of his conduct.

The court noted that an attorney has an ethical obligation to not raise any issue or defense that is frivolous. Here, it would have been an ethical violation for defense counsel to assert an insanity defense which lacked a factual and legal basis. Counsel therefore did not provide ineffective assistance.

(Defendant was represented by Assistant Defender Robert Markfield, Chicago.)

People v. Wright, 2012 IL App (1st) 073106 (Nos. 1-07-3106 & 1-07-3464 (cons.), 3/30/12)

The constitutional right to the effective assistance of counsel applies to pretrial proceedings to exclude evidence. To establish a claim of ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different.

Prior to trial, defense counsel moved to exclude evidence of a nine-loci match between defendant's DNA profile and a male DNA profile derived from the complainant's rectal swab. This match constituted the primary evidence of guilt. The defense also requested a search of the Illinois DNA database to determine if any of the database's records matched another at nine or more loci. The trial court denied both requests.

The database search that defense counsel requested had already been conducted in another case at the request of the same counsel. Counsel was aware that 1806 profiles matched one other profile in the database at nine loci, and that the administrator of the database had testified at a deposition that nine-loci comparisons were not true matches, that true matches could only be determined by comparison of 13 loci, and that a comparison of further loci of the 1806 profiles that matched at nine loci would exclude those profiles as matches.

Counsel was ineffective in failing to reveal that information to the trial court in support of the motion to exclude evidence of the nine-loci match. No reason existed for defense counsel to withhold from the court that the nine-loci search of the Illinois database had already been conducted, that it revealed that close to 2000 profiles matched another at nine loci, and that the administrator of the database concluded that nine-loci matches were not true matches. Had that information been presented to the trial court, there was a reasonable probability that the court would have granted the defense motion to exclude evidence of the nine-loci match at defendant's trial.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

Top

§13-4(b)(5)
Mistakes of Fact or Law

Hinton v. Alabama, ____ U.S. ____, ____ S.Ct. ____, ____ L.E2d ____ (2014) (13-6440, 2/24/14)

1. Under **Strickland v. Washington**, 466 U.S. 668 (1984), to establish ineffective assistance of counsel the defendant must show that counsel's representation was objectively unreasonable and that prejudice resulted. Prejudice occurs where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome of the proceeding.

2. Here, the essence of the State's case consisted of forensic evidence which identified six bullets found at the scenes of three offenses as having been fired from a handgun which belonged to defendant's mother. The court concluded that defense counsel acted unreasonably when he presented the testimony of a firearms and toolmark expert whom he believed to be unconvincing, where counsel presented the witness solely because he believed State law limited expert witness fees to $1,000 and he was unable to find other experts who were willing to work for that amount.

Counsel was unaware that more than a year before defendant's arrest, State law had been amended to authorize reimbursement for "any" defense expenses that were "reasonably incurred" and approved in advance by the trial court. In addition, although the trial court also appeared to erroneously believe that expert witness fees were limited to $1,000, it invited defense counsel to request additional funding if he found that $1,000 was insufficient.

The Supreme Court noted that counsel's failure to seek additional funding was based not on a strategic calculation, but on the mistaken belief that expert witness fees were limited by State law. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under **Strickland**."

The court stressed that its holding did not concern the strategic decision whether to hire a particular expert. Instead, the issue involved counsel's decision to present what he believed to be inadequate expert testimony solely because he did not understand the applicable law concerning permissible expert witness fees.

3. The court rejected the argument that defendant was not prejudiced in light of the expert's testimony that the gun barrel was so corroded that an expert opinion concerning the bullets was not possible. The expert was "badly discredited" on cross-examination, and the court found that a more credible expert may well have created a reasonable doubt in the jury's mind concerning the testimony of the State's experts that the bullets had been fired from the mother's weapon. The court stated:

> Prosecution experts, of course, can sometimes make mistakes. . . . This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law.

Because the lower courts did not apply the proper prejudice inquiry to the facts of this case, the cause was remanded for further proceedings.

In re Danielle J., 2013 IL 110810 (No. 110810, 12/19/13)

1. A minor is entitled to the effective assistance of counsel in juvenile delinquency proceedings. Whether counsel is effective in a delinquency proceeding is determined under the **Strickland** standard.

2. The minor was denied the effective assistance of counsel where her attorney misunderstand the law and failed to realize that a continuance for supervision may be ordered only before an adjudication of delinquency is made. The minor rejected the State's pretrial offer of a continuance under supervision, but counsel requested such a continuance after the minor had been adjudicated delinquent, at which point a continuance was statutorily precluded.

The court concluded that counsel's actions were objectively unreasonable because he misunderstood the applicable law, and that the minor was prejudiced because she lost the opportunity to obtain a continuance under supervision.

The court remanded the cause for a new first-phase hearing at which the minor is to be properly advised that if she proceeds to trial and is unsuccessful, a continuance of supervision will be subject to the State's Attorney's approval. The minor will then be in a position to make an informed and knowing decision whether to accept the pretrial offer of a continuance under supervision, if that offer is reinstated. If she elects to go to trial, the minor will be able to request a continuance under supervision before the adjudication is announced.

People v. Brown, 2014 IL App (4th) 120887 (No. 4-12-0887, 10/8/14)

1. A *pro se* post-conviction petition may be summarily dismissed as frivolous or patently without merit only if it has no arguable basis in law or fact. At the first stage of post-conviction proceedings, a defendant raising a claim of ineffective assistance of counsel need only establish that it is arguable that counsel's performance fell below an objective standard of reasonableness and he was arguably prejudiced as a result.

2. During his trial for the first-degree murder of two individuals, defendant asserted a claim of self-defense, but stated on the record that after consulting with his counsel, he did not want the jury instructed on second-degree murder. Defendant was found guilty of both murders and sentenced to natural life imprisonment.

Defendant filed a *pro se* post-conviction petition alleging ineffective assistance of trial counsel for misadvising him about the potential sentence for double murder. Defendant alleged that counsel informed him that he only faced 20-60 years of imprisonment if convicted of both murders. Defendant attached a letter from counsel written on the date of the guilty verdicts, in which counsel stated that the sentencing range was 20-60 years, with an additional 25 years for the firearm add-ons. Counsel also stated that life imprisonment was not a possible sentence in this case.

Defendant alleged that had he known he faced life imprisonment he would not have agreed with counsel's advice to forego tendering a second-degree murder instruction. The trial court dismissed defendant's petition as frivolous and patently without merit.

3. The Appellate Court held that defendant's *pro se* petition made an arguable claim of ineffective assistance. It was undisputed that defendant was subject to mandatory natural life imprisonment and counsel's letter clearly demonstrated that he advised defendant of the incorrect sentencing range.

Defendant had the right to decide whether to ask for second degree murder instructions. By providing defendant with incorrect advice about the sentence he faced, defendant's ability to make an informed decision regarding the jury instructions may have been impaired. Counsel's performance thus arguably fell below an objective standard of reasonableness.

The evidence at trial also supported giving the second-degree instruction and supported defendant's version of events. As such, it was arguable that there was a reasonable probability that if the jury had been instructed on second-degree murder, it would have convicted defendant of that offense rather than first-degree murder. It was thus arguable that defendant was prejudiced by counsel's incorrect advice.

Accordingly, the court found that it was at least arguable that defendant received ineffective assistance of counsel. The court reversed the dismissal of defendant's petition and remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Buchanan, 403 Ill.App.3d 600, 935 N.E.2d 603 (2d Dist. 2010)

Repudiating its decision in **People v. Lester**, 261 Ill.App.3d 1075, 634 N.E.2d 356 (2d Dist. 1994), the court held that it is not necessarily professionally unreasonable for an attorney to advise the defendant not to testify because if he is convicted, he will receive a greater sentence and hurt his chances on appeal. Even though counsel's advice assumes that the trial is lost before it has begun, it is not misleading if it represents counsel's honest assessment of the case based on his or her professional experience.

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

People v. Davis, 2014 IL App (4th) 121040 (No. 4-12-1040, 12/8/14)

1. Counsel may be ineffective for misunderstanding applicable law, but his understanding must be viewed in the context of the state of the law at the time the alleged error occurred and counsel is not incompetent for failing to accurately predict that the law will change.

Defendant argued that his trial counsel was ineffective for failing to file a motion to suppress a text message that police recovered from his cell phone without a search warrant. The Appellate Court rejected this argument since this issue had not been resolved in Illinois at the time of defendant's trial.

Nearly two years after defendant's trial, the United States Supreme Court held that the search-incident-to-arrest exception to the warrant requirement does not extend to cell-phone data. **Riley v. California**, 573 U.S. ___, 134 S.Ct. 2473 (2014). But at the time of defendant's trial, courts across the country were split on this issue, and in Illinois a reasonable argument could have been made that a warrantless search of a cell phone was permissible. A motion to suppress thus would have had a questionable chance of success. The court declined to find that counsel was ineffective for failing predict the future and anticipate **Riley**.

2. The court also held that trial counsel was not ineffective for failing to object to the text message on three evidentiary grounds (lack of foundation, violation of the best evidence rule, and hearsay), since none of these objections would have been successful.

The State introduced evidence that a detective searched defendant's cell phone and found a text message asking to meet defendant "for a 30 or a 40." During defendant's interrogation (recorded on video and played at trial), the detective confronted defendant with this message. The detective then testified that he believed this message was about trying to purchase $30 or $40 of cocaine.

a. The court rejected the foundation argument because it rested on a faulty assumption that the State had to lay a foundation for the introduction of a document. The State, however, never introduced any document. It simply played a video of the interrogation where the detective confronted defendant with the text message and then asked the detective what the message meant. Once the detective testified that he had read the message, there was a proper foundation for him to testify about its contents.

b. The court rejected the best evidence rule argument because it only applies when the contents of a writing are at issue. Here the State did not try to prove the content of the text message; it instead used the text message as circumstantial evidence that defendant intended to deliver cocaine. The actual content of the message did not matter.

c. Finally, the court rejected the hearsay argument because the detective's testimony about the contents of the text message was not offered to prove the truth of the matter asserted in the message. Instead, it was offered to show police investigation and circumstantial evidence of defendant's intent.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Daaron Kimmel, Springfield.)

People v. Pacheco, 2013 IL App (4th) 110409 (No. 4-11-0409, 6/24/13)

The court rejected the argument that trial counsel was ineffective because he conceded to the jury that a minor tried as an adult was likely guilty of robbery, which under the law of accountability also made her guilty of felony murder.

In **People v. Chandler**, 129 Ill.2d 233, 543 N.E.2d 1290 (1989), the Supreme Court held that trial counsel cannot concede his client's guilt unless the record affirmatively shows that the attorney did so for legitimate strategic reasons and with the client's knowing consent.

However, in **People v. Shatner**, 174 Ill.2d 133, 673 N.E.2d 258 (1996), the Supreme Court distinguished **Chandler** and stated that claims of ineffective assistance depend on a case-by-case analysis of the reasonableness of counsel's conduct under the facts of the particular case. The court noted that in light of the overwhelming evidence of guilt, "it is difficult to conceive of a legitimate trial strategy counsel could have implemented on defendant's behalf other than the one he attempted," which was to attempt to keep defendant's incarceration to a minimum by conceding "the obvious in the hopes the jury would believe that defendant did not know [her accomplice] intended to kill [the decedent]. Regardless of the legal validity of the argument, this was defendant's best chance of acquittal on the murder charges."

The court also noted that unlike **Chandler**, the defendant testified and in her testimony conceded her guilt to robbery and possession of a stolen vehicle. "We are not going to reverse a defendant's conviction based on a concession made by her attorney when she essentially made the same concessions in her own testimony."

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Sanchez, 404 Ill.App.3d 15, 935 N.E.2d 1099 (1st Dist. 2010)

Counsel was ineffective in stipulating to the admission of a prior conviction to impeach defendant's trial testimony where more than ten years had elapsed between the date of defendant's release from prison and the date of his trial. (See also **WITNESSES**, §§57-6(b)(4)(f)(1), 57-6(b)(4)(f)(3)).

Counsel's performance was deficient. No valid strategic reason existed for counsel's failure to object as the conviction only damaged defendant's credibility as a witness. Counsel either failed to investigate the relevant dates, or did investigate and misapprehended the law.

A reasonable probability existed that the result of the trial would have been different absent counsel's deficiency. The trial was a credibility contest between a police officer, who testified that he saw defendant throw a controlled substance out of a window of his second-floor apartment, and the testimony of the defendant that there was another second-floor apartment in the same building, and that he did not and could not have thrown the substance from his apartment due to the difficulty of opening the screens of his windows. The court expressly relied on the prior conviction in assessing defendant's credibility in his bench trial.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

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§13-4(b)(6)
Strategic Decisions

§13-4(b)(6)(a)
Generally

People v. Coleman, 2012 IL App (4th) 110463 (No. 4-11-0463, 12/24/12)

Defendant filed a post-conviction petition claiming that: (1) defense counsel was ineffective for failing to call two witnesses who would have given exculpatory testimony, (2) the State committed a **Brady** violation by failing to disclose to the defense that police officers tested only one of the 15 bags of white powder found at the scene of the arrest before emptying all the bags into one large bag for testing by the crime lab, and (3) defense counsel was ineffective for entering a stipulation that the large bag contained 926 grams of cocaine. The

trial court summarily dismissed the petition as frivolous and patently without merit, finding that to show prejudice under **Strickland** defendant was required to show that had the lab analyst been called to testify, he either would not have testified or would have testified differently from what was stated in the stipulation.

In a *pro se* motion to reconsider the summary dismissal, defendant submitted an affidavit from a private investigator who had interviewed the analyst who performed the testing. The affidavit stated that the analyst said he had not performed tests to determine the purity of the cocaine in the large bag of white powder. The analyst also described the decision of police to commingle the contents of the 15 bags as "bad evidence gathering." Although defendant did not submit an affidavit from the analyst, the investigator's affidavit stated that additional efforts to contact the analyst had been unsuccessful.

The Appellate Court reversed the order summarily dismissing the petition.

1. The court found that the petition failed to present the gist of a constitutional violation concerning counsel's failure to call two witnesses to testify, because the only affidavit attached to the petition was that of the defendant, not the witnesses themselves. Although the Post-Conviction Hearing Act requires only that the petition be supported by affidavits, the court concluded that such affidavits should concern matters to which the affiant could testify if called as a witness. Although defendant's sworn affidavit described the anticipated testimony of the two witnesses whom defense counsel failed to call, the defendant would not be competent to testify to such testimony if called as a witness. Thus, the defendant's affidavit was insufficient to withstand summary dismissal, at least in the absence of an explanation why affidavits from the witnesses themselves were unavailable.

2. However, the court concluded that the petition showed an arguable case of ineffective assistance concerning counsel's agreement to the stipulation that the entire large bag contained cocaine. To allege the gist of a claim of ineffective assistance of counsel, the petitioner need not satisfy the **Strickland** standard of deficient performance and prejudice. Instead, at the first stage of proceedings a claim of ineffective assistance is sufficient if counsel's performance was arguably unreasonable and defendant was arguably prejudiced. An arguable allegation of prejudice exists if it could be reasonably argued that confidence in the outcome of the trial was undermined by counsel's deficient performance.

Here, defense counsel's stipulation relieved the State of a potentially serious problem. In order to aggregate the contents of the 15 bags and obtain a conviction for the cumulative weight, the State was required to prove beyond a reasonable doubt that each of the 15 bags contained cocaine. Because only one bag had been tested before the bags were commingled, the State would have been unable to carry this burden. By stipulating that the entire weight of the large bag's contents was cocaine, counsel's performance was arguably deficient and arguably undermined confidence in the outcome of the trial, especially in light of the investigator's affidavit that no purity test had been conducted.

The court noted that it need not resolve at this stage whether counsel was ineffective. Because the claim was arguable, it was clearly not frivolous or patently without merit. Thus, the petition should not have been summarily dismissed.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Sanchez, 404 Ill.App.3d 15, 935 N.E.2d 1099 (1st Dist. 2010)

Counsel was ineffective in stipulating to the admission of a prior conviction to impeach defendant's trial testimony where more than ten years had elapsed between the date of defendant's release from prison and the date of his trial. (See also **WITNESSES**, §§57-

6(b)(4)(f)(1), 57-6(b)(4)(f)(3)).

Counsel's performance was deficient. No valid strategic reason existed for counsel's failure to object as the conviction only damaged defendant's credibility as a witness. Counsel either failed to investigate the relevant dates, or did investigate and misapprehended the law.

A reasonable probability existed that the result of the trial would have been different absent counsel's deficiency. The trial was a credibility contest between a police officer, who testified that he saw defendant throw a controlled substance out of a window of his second-floor apartment, and the testimony of the defendant that there was another second-floor apartment in the same building, and that he did not and could not have thrown the substance from his apartment due to the difficulty of opening the screens of his windows. The court expressly relied on the prior conviction in assessing defendant's credibility in his bench trial.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Woods, 2011 IL App (1st) 092908 (No. 1-09-2908, 11/22/11)

Defendant was convicted of armed robbery and first degree murder. The latter conviction was based on felony murder; the decedent was a co-participant with the defendant in the armed robbery, and was killed by police officers who were responding to the offense. There was a dispute in the evidence whether the co-participant was armed. On appeal, defendant claimed that trial counsel was ineffective when he conceded defendant's guilt of armed robbery in opening statements, thereby also conceding his guilt of felony murder.

1. To prevail on an ineffective assistance of counsel claim, the defendant must normally meet the **Strickland** standard, which requires showing that counsel's performance was objectively unreasonable and that there is a reasonable probability that with competent representation the result of the proceeding would have been different. However, if counsel entirely failed to subject the State's case to meaningful adversarial testing, the latter showing is unnecessary.

The Appellate Court held that **Strickland** applied here, as counsel did not fail to subject the State's case to meaningful adversarial testing. Although counsel conceded defendant's guilt of armed robbery, he continued to act as defendant's advocate, developed a theory of defense in opening and closing arguments, cross-examined witnesses, presented witnesses on defendant's behalf, and moved for a directed verdict.

2. The court concluded that defendant could not show that defense counsel acted unreasonably. The evidence that defendant committed an armed robbery was overwhelming, and a person who commits a felony is responsible for deaths that are the direct and foreseeable result of his actions. A felon is responsible for the death of a co-felon at the hands of police if the officers' actions were in direct response to an offense that was set in motion by the defendant and did not break the causal chain between defendant's acts and the co-felon's death.

Although counsel conceded defendant's guilt of armed robbery, for which there was overwhelming evidence, he argued that the death of the co-participant was not foreseeable where the police acted irrationally by firing 41 shots at a felon who was arguably unarmed and outnumbered by several officers. Counsel argued that it would be unfair to hold the defendant responsible for a co-felon's death caused by unforeseeable police misconduct.

Although "this appeal to the jury's sense of justice had no legal basis as a defense," courts have held that reliance on such arguments is not necessarily ineffective where the defendant insists on pleading not guilty in the face of overwhelming evidence of guilt. Where no other defenses are available, it is not necessarily ineffective to argue nonlegal defenses such as jury nullification or to appeal to the jury's sympathy.

The court also noted that defendant agreed on the record to defense counsel's strategy, and there was no evidence that his consent was based on any misunderstanding or that counsel misunderstood the applicable law.

3. Furthermore, defendant could not show prejudice under **Strickland**. In light of the overwhelming evidence of guilt, there was no reasonable probability that different tactics would have led to a different result. Although defendant claimed that he could have argued that he had withdrawn from the felony before the co-defendant was killed, he did not specify any evidence to support that defense. In addition, had defendant testified in support of a withdrawal defense, the State would have introduced defendant's videotaped statement contradicting that defense. Given the overwhelming evidence of guilt, there is little likelihood that such a strategy would have resulted in a different outcome at trial.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

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§13-4(b)(6)(b)
Counsel Not Ineffective

Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (No. 09-587, 1/19/11)

1. The Supreme Court concluded that the Court of Appeals erred in a federal *habeas* case by finding that trial counsel was ineffective.

To satisfy **Strickland**, defendant was required to show that: (1) counsel's representation fell below an objective standard of reasonableness, and (2)there was a reasonable probability the result of the proceeding would have been different had counsel acted competently. A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceedings; counsel's errors must be so serious as to deprive the defendant of a fair trial.

In most criminal cases, there are multiple ways in which counsel could effectively represent the defendant. Only rarely will an effective defense necessarily encompass one technique or approach. Counsel is required to formulate a defense strategy that is reasonable at the time the case is being prepared and which balances limited resources in accordance with effective trial tactics and strategies. Finally, **Strickland** allows counsel to make a reasonable decision not to investigate a particular line of defense.

2. Counsel did not act unreasonably by failing to consult a forensic blood expert or offer expert testimony on blood evidence. The court concluded that it was at least arguable that a reasonable attorney could decide to forego blood evidence under the circumstances.

A. Only after trial, when forensic evidence concerning the source of blood found at the scene "emerged," could it be concluded that blood evidence was a critical issue. At trial, there were many factual differences between the parties' versions of the events. The prosecution's case did not stress blood evidence; in fact, it appeared that the prosecution decided to present blood evidence only after opening statements. Although counsel's opening statement may have been the impetus which caused the State to reconsider, the court found that strength of the prosecution's evidence "may well have been weakened by the fact that it was assembled late in the process."

The court also found that even had expert blood testimony supported the defense, a reasonable attorney might have elected not to present it. Had defense counsel chosen to rely on such evidence, the prosecution might have responded by developing its own expert evidence and possibly destroying defendant's case. Expert blood testimony might also have distracted the jury's attention or turned the case into a battle of experts. Finally, counsel had reason to doubt his client's story, and expert blood analysis might well have exposed defendant's claims as fabrications.

B. Counsel was not ineffective because he did not anticipate that the prosecution would offer expert testimony and was unprepared to offer expert testimony in response. Counsel is not required to be prepared for "any contingency" which may arise at trial; **Strickland** guarantees not perfect representation, but only a reasonably competent attorney. Although defense counsel was mistaken in his belief concerning the prosecution's intentions, representation is constitutionally deficient only if the adversarial process is undermined to the extent that the fairness of the trial is called into question. Any error by counsel in failing to anticipate the State's evidence did not rise to that level.

In any event, effective representation would not have necessarily required expert evidence in response to the State's expert. In many instances, cross-examination of the State's expert is sufficient to expose defects in the expert's presentation. In addition, where defense counsel lacks a solid case, challenging the sufficiency of the State's case may be a more effective defense than presenting evidence. Here, defense counsel conducted a skillful cross-examination, elicited concessions from the State's experts, and drew attention to weaknesses in their conclusions. Because a State court could have decided that counsel acted reasonably by electing to not present expert evidence, there was no basis on which to grant *habeas* relief.

3. The court also concluded that the Court of Appeals erred in applying the "prejudice" requirement of **Strickland**. "Prejudice" does not exist under **Strickland** merely because a different result would have been possible had counsel acted reasonably. Instead, it must be "reasonably likely" that a different result would have occurred.

The State court could reasonably have concluded that defendant failed to show that a different outcome was likely where the expert evidence developed by the defense was no more than a theoretical possibility, counsel had elicited a concession along the same line from the State's expert, there was no evidence challenging many of the conclusions by the State's experts, and the non-scientific evidence of guilt was strong.

Because it could not be said that the State court applied **Strickland** unreasonably, *habeas* relief was not warranted.

People v. Adkins, 239 Ill.2d 1, 940 N.E.2d 11 (2010)

A defendant is denied his Sixth Amendment right to counsel when his attorney entirely fails to subject the prosecution's case to adversarial testing. In such circumstance defendant need not demonstrate prejudice because the adversary process is presumptively unreliable.

There was no complete breakdown in the adversarial process when defense counsel conceded defendant's guilt of residential burglary at the guilt phase, even though this concession meant that defendant had no defense to his eligibility for the death penalty once the jury convicted him of murder. Counsel did not concede defendant's guilt of murder. He subjected the State's case to adversarial testing. Given the evidence, he presented the only reasonable theory of defense – that defendant had committed the burglary, but had left the apartment before the deceased was killed by someone else.

(Defendant was represented by Assistant Defender Allen Andrews, Supreme Court Unit.)

People v. Manning, 241 Ill.2d 319, 948 N.E.2d 542 (2011)

1. Under **Strickland v. Washington**, 466 U.S. 668 (1984), a defendant who claims that he was denied the constitutional right to effective assistance of counsel must show both that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. To establish the first prong, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. To establish prejudice, the defendant need not show that the result of the trial would have been different had counsel been competent. Instead, counsel's deficient performance is deemed prejudicial if it rendered the result of the trial unreliable or the proceeding fundamentally unfair.

The failure to meet either prong of **Strickland** precludes a finding of ineffective assistance of counsel.

2. At defendant's trial for delivery of a controlled substance, defense counsel did not act in an objectively unreasonable manner by failing to peremptorily challenge a juror who stated that he could not be fair in light of defendant's status as a convicted sex offender. The court stressed that counsel's decisions during jury selection are matters of trial strategy and are virtually unchallengeable. Although the juror stated that he believed sex offenders should be "locked up for life" and said four times that he could not give the defendant a fair trial, the court noted that before making these statements he said he did not think that defendant's background would influence his decision. Thus, his answers did not unequivocally indicate that he would be biased.

Furthermore, the court believed that trial counsel was sensitive to the effect of defendant's status on the jurors, as he exercised peremptory challenges against some (but not all) veniremembers who expressed similar misgivings. Thus, counsel could have decided the juror was not clearly biased, or may have wanted him on the jury because he was an immigrant and had prior encounters with law enforcement officers (in connection with speeding tickets). "Attorneys consider many factors in making their decisions about which jurors to challenge and which to accept."

Finally, the court noted that when the juror was questioned, defense counsel had only two remaining peremptory challenges with three juror slots remaining to be filled. Given the juror's equivocal answers, counsel could have reasonably decided to reserve the remaining peremptory challenges.

3. *In dicta*, a plurality of the court (Justices Garman, Thomas and Theis) rejected defendant's argument that the seating of a biased juror is structural error which is presumed to be prejudicial under **Strickland**. The court acknowledged that courts in other jurisdictions have found structural error under such circumstances, but declined to reconsider Illinois precedent holding that a defendant who raises such a challenge must satisfy **Strickland's** prejudice requirement.

4. In a concurring opinion, Justice Karmeier criticized the plurality for discussing the prejudice component of **Strickland** after finding that defense counsel's actions were not objectively unreasonable. In a concurring opinion, Justices Kilbride concluded that the plurality should have limited its holding to the prejudice prong in order to provide guidance to the bench and bar and because the plurality had failed to explain how seating a biased juror could be a reasonable trial strategy.

In a dissenting opinion, Justices Freeman and Burke noted that although it is presumed that counsel's decisions are based on strategy, that trial strategy must itself be

objectively reasonable in order to satisfy **Strickland**. The dissenters concluded that the juror's answers clearly indicated that he was biased, and that the failure to remove him from the jury should be presumed to have been prejudicial.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People v. Calhoun, 404 Ill.App.3d 362, 935 N.E.2d 663 (1st Dist. 2010)

To demonstrate that counsel failed the performance prong of **Strickland v. Washington**, 466 U.S. 668 (1984), defendant must overcome a strong presumption that the challenged action or inaction of trial counsel was valid trial strategy. The reasonableness of the conduct must be evaluated from counsel's perspective at the time of the alleged error, and without hindsight, in light of the totality of circumstances, and not just on the basis of isolated acts. Because effective assistance refers to competent and not perfect representation, mere mistakes in trial strategy or judgment will not render the representation incompetent.

The court concluded that counsel had a valid strategic reason not to ask for special verdict forms distinguishing intentional or knowing murder from felony murder. Counsel could conclude that a special verdict form would make it easier for the jury to convict, as there was overwhelming evidence of defendant's participation in the kidnaping underlying the felony murder charge. On the other hand, a general verdict form would give the jury more latitude to reach a more lenient verdict, particularly where counsel hoped the jury would sympathize with the fact that defendant was provoked by her sincere belief that the deceased had raped her infant daughter.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

People v. Fields, 2014 IL App (1st) 110311 (No. 1-11-0311, 2/11/14)

Defense counsel was not ineffective for failing to move for a severance, even if a severance would have prevented the jury from hearing about defendant's prior conviction for armed robbery. Generally, defense counsel's decision not to seek a severance, although it may prove unwise in hindsight, is a matter of trial strategy. In deciding whether to seek a severance, defense counsel may choose to pursue an "all or nothing" strategy in which defendant is acquitted or convicted of all charges in a single proceeding. The mere fact that such strategy proved unsuccessful does not mean counsel performed unreasonably. Here, defense counsel may have believed the odds of obtaining two acquittals were greater in one proceeding, and hence defendant cannot overcome the presumption that counsel's actions were the product of sound trial strategy.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

People v. Poole, 2012 IL App (4th) 101017 (No. 4-10-1017, 7/17/12)

To establish that he was denied effective assistance of counsel, defendant must show both that his counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In considering whether counsel's performance was deficient, a court must indulge a strong presumption that the challenged action or inaction was the result of sound trial strategy.

Generally, a defense decision not to seek a severance of charges, although it may prove unwise in hindsight, is regarded as a matter of trial strategy. A major disadvantage of severance is that it gives the prosecution two bites at the apple. An evidentiary deficiency at the first trial can perhaps be cured in the second. Counsel may conclude that it makes sense to try for an acquittal of both charges in one proceeding, because the impact of an additional

conviction would not be significant.

Defendant was convicted of aggravated battery with a firearm and unlawful possession of a firearm by a felon in a joint trial. He claimed on appeal that his counsel's failure to seek severance of the charges was professionally unreasonable, citing **People v. Edwards**, 63 Ill. 2d 134, 345 N.E.2d 496 (1976), for the proposition that he was entitled to severance because there was a strong probability that he would be prejudiced in his defense of the battery charge where the weapons charge required proof of his previous conviction. Notwithstanding **Edwards**, the Appellate Court concluded that defendant could not satisfy the performance prong of an ineffective-assistance-of-counsel claim because "[a] potential trial strategy is apparent here, even if counsel should choose to deny it."

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

People v. Shamlodhiya, 2013 IL App (2d) 120065 (No. 2-12-0065, 2/26/13)

The right to effective assistance of counsel extends to closing argument, but the content of closing argument is generally considered a matter of trial strategy. Deference to counsel's tactical decisions in closing argument is particularly important because of the broad range of legitimate defense strategy at that stage.

Defendant complained that counsel was ineffective in abandoning his request that the jury consider involuntary manslaughter where counsel's closing argument was tantamount to a withdrawal of the involuntary manslaughter instruction.

Defense counsel told the jury he did not want a "compromised verdict," but he also told the jury he did not want a first-degree-murder verdict. Counsel asked for an acquittal based on self-defense. Although he could have argued for involuntary manslaughter as an alternative to an acquittal, counsel explained that he did not do so because it would have undermined the credibility of his plea for an acquittal based on self-defense. He presented the option of involuntary manslaughter verdict to the jury as a choice provided the jury by the court, which in his professional judgment would make the jury more receptive to that option.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

People v. Wood, 2014 IL App (1st) 121408 (No. 1-12-1408, 7/23/14)

1. Under Illinois law, a defendant must first raise an insanity defense to be eligible for a finding of guilty but mentally ill (GBMI). When a defendant raises an insanity defense, the court may find defendant GBMI if the State has proved defendant guilty of the offense beyond a reasonable doubt, the defendant has failed to prove insanity, but the defendant has proved by a preponderance of the evidence that he was mentally ill at the time of the offense.

Defendant argued that trial counsel provided ineffective assistance by requesting a finding of GBMI without first presenting an insanity defense and by failing to call his expert to testify that defendant suffered from paranoid schizophrenia.

To establish ineffective assistance, a defendant must show that his counsel's representation fell below an objective standard of reasonableness (the performance prong) and that there is a reasonable probability that but for counsel's errors the result of the proceedings would have been different (the prejudice prong).

2. The Appellate Court first found that defendant established that he had been prejudiced by counsel's actions. If counsel had raised an insanity defense and presented the testimony of an expert witness about defendant's lengthy history of mental illness, the evidence here would have been sufficient to prove by a preponderance of the evidence that defendant was mentally ill at the time of the offense.

The court specifically rejected the State's argument that no prejudice occurred because

a finding of GBMI would provide no benefit to defendant. Although a GBMI finding would not necessarily result in a lower sentence, it does require the Department of Corrections to take certain actions to provide treatment for defendant's mental illness.

3. Counsel's performance, however, was not deficient. Although counsel mistakenly believed a GBMI finding was permissible without first raising an insanity defense, counsel also reasonably believed he had no good-faith basis for raising an insanity defense. Defendant's own expert concluded that defendant was not insane at the time of the offense, and his conclusion was supported by trial evidence showing that defendant appreciated the criminality of his conduct.

The court noted that an attorney has an ethical obligation to not raise any issue or defense that is frivolous. Here, it would have been an ethical violation for defense counsel to assert an insanity defense which lacked a factual and legal basis. Counsel therefore did not provide ineffective assistance.

(Defendant was represented by Assistant Defender Robert Markfield, Chicago.)

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§13-4(b)(6)(c)
Counsel Ineffective

People v. Dupree, 2014 IL App (1st) 111872 (No. 1-11-1872, 7/30/14)

1. To prevail on a claim of ineffective assistance of counsel, defendant must show both that counsel's representation fell below an objective standard of reasonableness and a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

To show that trial counsel's performance was deficient, defendant must overcome the strong presumption that the questioned action or inaction was the result of sound trial strategy. A reviewing court is highly deferential to trial counsel on matters of strategy and must view counsel's performance at the time it occurred rather than in hindsight.

2. A prior consistent statement may not be introduced on direct examination to enhance the credibility of a witness's testimony. Even when a witness is impeached by means of a prior inconsistent statement, a prior consistent statement is inadmissible unless it disproves or explains the making of the inconsistent statement.

However, where there is a charge or inference of recent fabrication, a prior consistent statement is admissible to show that the witness told the same story before the alleged fabrication. Merely questioning a witness about whether the witness rehearsed his testimony with opposing counsel does not constitute a charge of recent fabrication.

3. The Appellate Court held that trial counsel was ineffective for opening the door for the State to admit an otherwise inadmissible prior consistent statement from a prosecution witness, failing to object when the State introduced the evidence and repeatedly argued it as substantive evidence, and failing to request that the jury be given a limiting instruction.

The witness made two statements to police - one on October 31, and one on November 1. During cross-examination, defense counsel impeached the witness with the first statement, which was inconsistent with the witness's trial testimony. After pointing out discrepancies between the first statement and the trial testimony, counsel asked the witness whether his "enhanced memory had just come to his mind in the last week."

On redirect, the witness testified that he had not told the truth in his first statement to police, that he returned to the station on the following day because he wanted to tell the truth, and that he remembered the second statement because it was the truth. The prosecutor made several references to the fact that the witness's second statement was truthful. The prosecutor also read several questions and answers from the second statement that were consistent with the witness's trial testimony and asked the witness to confirm that he had made such statements in the second statement. Defense counsel did not object to any of this testimony.

A. The court found that counsel's representation was objectively unreasonable because his cross-examination allowed the State to introduce the prior consistent second statement. Had counsel merely cross-examined the witness about the inconsistencies between his first statement and his trial testimony, the State would have been unable to introduce the second, consistent statement. Although counsel undoubtedly knew of the second statement, he alleged that the witness's trial testimony was a recent fabrication. By doing so, he opened the door for admission of the second statement.

The court rejected the State's argument that defense counsel's strategy was to demonstrate that the witness had given inconsistent statements from the beginning and argue that the second statement and the trial testimony were intended to frame defendant. Defense counsel took several actions that were inconsistent with such a strategy, including not introducing the second statement himself, eventually objecting to its introduction, and objecting to the introduction of a video of the statement. The court concluded that counsel's strategy was to cast doubt on the witness's credibility by referring to his inconsistent statements, and noted that such a strategy did not require counsel to open the door to admission of the second statement.

Furthermore, counsel compounded his error by failing to object to the State's use of the second statement as substantive evidence and failing to request a limiting instruction. Finally, although counsel was successful in a sidebar in excluding part of the content of the second statement when it was subsequently presented through a police detective's testimony, counsel inexplicably failed to request that the jury be instructed to disregard the evidence.

B. Defendant was prejudiced by counsel's errors because the result of the trial was unreliable. Prior consistent statements are prohibited because they are likely to unfairly enhance a witness's credibility simply because a statement has been repeated. Improperly bolstering a witness's credibility constitutes reversible error when the trial testimony of that witness is crucial and the jury's verdict may have been influenced. Improperly bolstering a witness's credibility is especially prejudicial if the witness's statement relates to guilt and innocence.

The evidence against defendant was far from compelling, as there was no physical evidence linking him to the shooting, his fingerprints were not found in the car from which the shots were fired or on the shell casings which were recovered, and no weapon was recovered. Furthermore, although defendant had not been involved in any prior altercations with the victims, both of the witnesses who implicated defendant as the shooter had prior problems with the victims. In addition, those witnesses provided conflicting accounts about the incident. Finally, the prior inconsistent statement related to defendant's guilt or innocence. Under these circumstances, counsel's unreasonable actions clearly caused prejudice.

Defendant's convictions for first degree murder and attempt first degree murder were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Gallagher, 2012 IL App (1st) 101772 (No. 1-10-1772, 6/5/12)

To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness and resulted in prejudice. To show that counsel's actions were deficient, the defendant must overcome a strong presumption that the challenged action may have been the result of sound trial strategy.

At defendants's residential burglary trial, counsel claimed that defendant's actions constituted a trespass, but not residential burglary. The court found that counsel was ineffective for failing to request instructions on a lesser included offense supported by the defense evidence - criminal trespass to a residence (IPI Crim. 4th No. 14.17). "Where defense counsel argues a theory of defense but then fails to offer an instruction on that theory of defense, the failure cannot be called trial strategy and is evidence of ineffective assistance of counsel."

The court acknowledged that at an instruction conference held before the defense presented its case, the trial judge declined to give instructions requested by the defense concerning the lesser included offense of trespass to real property (IPI Crim. 4th No. 16.11, 16.11). However, once defendant testified, counsel should have realized that the testimony supported a lesser included instruction for a different offense - criminal trespass to a residence. At that point, counsel should have requested an additional instruction conference for the purpose of requesting that IPI Crim. 4th No. 14.17 be given.

The court also concluded that defendant was prejudiced because there was a reasonable probability that a properly instructed jury would have convicted only on the lesser charge. The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Patrick Morales-Doyle, Chicago.)

People v. Johnson, 2013 IL App (2d) 110535 (Nos. 2-11-0535 & 2-11-0782 cons., 5/31/13)

Defense counsel is ineffective only if (1) counsel's performance falls below an objective standard of reasonableness; and (2) counsel's error prejudiced the defendant.

Counsel's decision to allow joinder of domestic battery and UUW by a felon charges was unreasonable and prejudiced defendant. The decision was based on nothing other than convenience of scheduling. It allowed the jury to hear of defendant's status as a convicted felon in the domestic battery case, and allowed the jury to hear evidence of two instances of domestic battery and threats that accompanied those offenses in the UUW by a felon case. Defendant was especially prejudiced where the jury had no appropriate instructions on the other-crimes evidence. The fundamental fairness of the trial was comprised, rendering the result of the trial unreliable.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

People v. Sanchez, 404 Ill.App.3d 15, 935 N.E.2d 1099 (1st Dist. 2010)

Counsel was ineffective in stipulating to the admission of a prior conviction to impeach defendant's trial testimony where more than ten years had elapsed between the date of defendant's release from prison and the date of his trial. (See also **WITNESSES**, §§57-6(b)(4)(f)(1), 57-6(b)(4)(f)(3)).

Counsel's performance was deficient. No valid strategic reason existed for counsel's failure to object as the conviction only damaged defendant's credibility as a witness. Counsel either failed to investigate the relevant dates, or did investigate and misapprehended the law.

A reasonable probability existed that the result of the trial would have been different absent counsel's deficiency. The trial was a credibility contest between a police officer, who testified that he saw defendant throw a controlled substance out of a window of his second-

floor apartment, and the testimony of the defendant that there was another second-floor apartment in the same building, and that he did not and could not have thrown the substance from his apartment due to the difficulty of opening the screens of his windows. The court expressly relied on the prior conviction in assessing defendant's credibility in his bench trial.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Watson, 2012 IL App (2d) 091328 (No. 2-09-1328, 1/25/12)

Counsel is ineffective where her performance falls below an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different.

Defendant was convicted of residential burglary based solely on the opinion of a state police forensic scientist that defendant could not be excluded as the contributor to a 7-loci DNA profile derived from small hairs found at the point of entry. Generally, 13 loci are typed to create a profile, but the expert was unable to obtain a full profile from the hairs. The expert identified six locations on the hair profile where there was a match with defendant's profile, and a seventh location where defendant's profile was consistent with the hair profile. He testified that the odds of finding that DNA profile in the general population were 1 in 1.4 billion blacks, 1 in 103 million whites, and 1 in 170 million Hispanics. Defense counsel's cross-examination was limited to clarifying that those statistics took into consideration only persons unrelated to defendant.

1. The Appellate Court concluded that defense counsel's performance was deficient in two respects. First, counsel failed to challenge the reliability of a partial-profile comparison. Counsel should have adduced evidence that if defendant's DNA matched the hair DNA at seven loci, but did not match at the remaining six, defendant would be excluded as the source of the crime-scene DNA. Counsel also did not highlight that the expert could not claim a match at one of the seven loci, and therefore defendant could only not be excluded as a contributor, rather than that there was a match. Instead, in argument to the jury, counsel stated that seven loci were a match to the defendant, never developing that the missing loci could be critical and, in fact, exculpatory.

Second, counsel did not probe the accuracy of the expert's testimony regarding the statistical probabilities of finding another profile similar to the defendant's in the general population such that it would match the hair DNA at seven loci. The statistical probability of finding a DNA profile in the general population is a critical step in DNA analysis. The court noted that studies of various states' databases collecting offenders' DNA profiles have led legal scholars and mathematicians to doubt the alleged low probability of encountering a random, partial-profile match in the general population, as studies have uncovered large numbers of nine- and ten-loci matches. Legal scholars and scientists have also questioned whether the extraordinarily large figures used in court to estimate the probability of a random match in the general population are "no better than alchemy," and have characterized them as "total nonsense," and a "damned lie."

2. The court rejected the argument that counsel did not perform unreasonably because the expert's methods and statistical analyses had been found reliable in other cases, and convictions have been upheld on matches fewer than seven loci. The issue of counsel's effectiveness concerns advocacy, not admissibility. The court clarified that it expressed no opinion on whether a conviction based on a seven-loci match is sustainable, or whether the expert's methods were reliable. It only expressed the view that a reasonably effective defense attorney would have argued that a DNA comparison based on fewer than 13 loci might be unreliable or that the partial profile might not be uncommon.

3. Trial strategy cannot be the basis for finding counsel ineffective. The presumption that counsel's challenged action or inaction was the product of sound trial strategy may be overcome where no reasonably effective defense attorney, faced with the circumstances of defendant's trial, would engage in similar conduct, such as where the chosen strategy is so unsound that counsel failed to conduct any meaningful adversarial testing. Because the DNA evidence was the only evidence linking defendant to the crime, the circumstances required that counsel subject that evidence to adversarial testing. Her failure to do so cannot be dismissed as sound trial strategy.

4. Defendant was prejudiced by counsel's deficient performance. DNA evidence is often assumed to have a special aura of certainty and mystic infallibility. There was a basis to challenge the DNA evidence portrayed as a match, but that argument and evidence was not developed. Because the DNA was the only evidence of guilt, there is a reasonable probability that counsel might have raised a reasonable doubt as to defendant's guilt had she effectively explained and argued to the jury the potential weaknesses of the evidence.

5. The prejudice was not cured by closing argument. Defense counsel accurately recounted that the expert testified only that defendant could not be excluded as contributing to the hair profile, but then repeatedly referred to the seven-loci identification as a "match." Therefore, counsel's argument did not serve to erase the prejudice caused by counsel's deficient performance.

6. The court also rejected the argument that there was no prejudice because defendant admitted his guilt. A judicial confession is a voluntary acknowledgment of guilt during a judicial proceedings such as a plea of guilty, testimony at trial, or testimony at some other hearing. To constitute a judicial confession, the statement must directly acknowledge guilt, or directly and necessarily imply guilt.

Defendant's statements in allocution may be read to suggest his guilt, but may also be read as an expression of remorse for his life of crime generally, and not specifically to this offense. Therefore, they are too vague to be considered a judicial confession.

Statements made by defendant in his examination of witnesses at a hearing on his post-trial motion challenging the competency of his counsel did not qualify as judicial confessions. Defendant offered no guilty plea or personal testimony at that hearing. The evidence at that hearing revealed that defendant and his counsel disagreed about whether defendant should adopt the trial strategy of making a judicial confession at trial, and established that defendant entertained pleading guilty. But defendant ultimately did not make a judicial confession or plead guilty.

(Defendant was represented by Assistant Defender Linda Johnson, Elgin.)

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§13-4(b)(7)
Opening & Closing Statements

People v. Adkins, 239 Ill.2d 1, 940 N.E.2d 11 (2010)

A defendant is denied his Sixth Amendment right to counsel when his attorney entirely fails to subject the prosecution's case to adversarial testing. In such circumstance defendant need not demonstrate prejudice because the adversary process is presumptively unreliable.

There was no complete breakdown in the adversarial process when defense counsel conceded defendant's guilt of residential burglary at the guilt phase, even though this

concession meant that defendant had no defense to his eligibility for the death penalty once the jury convicted him of murder. Counsel did not concede defendant's guilt of murder. He subjected the State's case to adversarial testing. Given the evidence, he presented the only reasonable theory of defense – that defendant had committed the burglary, but had left the apartment before the deceased was killed by someone else.

(Defendant was represented by Assistant Defender Allen Andrews, Supreme Court Unit.)

People v. Everhart, 405 Ill.App.3d 687, 939 N.E.2d 82 (1st Dist. 2010)

Trial counsel was not ineffective at a jury trial for aggravated criminal sexual assault where defendant failed to testify, and the defense presented no evidence, after counsel stated in opening argument that defendant would testify and say that the conduct was consensual.

To show that defense counsel was ineffective, the defendant must show that counsel's performance was deficient and that there is a reasonable probability that the result of the proceeding would have been different had counsel acted competently. Thus, counsel's failure to fulfill a promise to present testimony does not necessarily constitute ineffective assistance of counsel.

Without deciding whether the failure to present the defendant's testimony constituted deficient performance, the court concluded that defendant could not show that the result of the proceeding would likely have been different had he testified. The State presented overwhelming evidence that the intercourse was nonconsensual, and defendant's testimony would have been contradicted not only by the complainant's testimony but also by defendant's own confession. Under these circumstances, any error by defense counsel was not serious enough to undermine confidence in the result of the proceedings.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Lewis, 2015 IL App (1st) 130171 (No. 1-13-0171, 5/12/15)

1. Defendant's Sixth Amendment right to counsel did not attach when he was arrested and arraigned for extradition proceedings in Nevada pursuant to an Illinois arrest warrant. Extradition is a summary ministerial procedure designed to return a fugitive to another State so he may stand trial. An extradition hearing does not commence adversary proceedings and is not a critical stage for Sixth Amendment purposes.

The Court rejected defendant's argument that the extradition hearing was a critical stage because the State at that point committed itself to prosecution. Although defendant was brought before a judicial officer during the hearing, the State had not yet charged him with a crime. The only purpose of the hearing was to transfer defendant to Illinois pursuant to an arrest warrant. Because defendant was not formally charged until he was returned to Illinois and identified in a lineup, the extradition hearing did not entail adversary proceedings against him.

The denial of the motion to suppress lineup identification was affirmed.

2. Trial counsel's closing argument fell below an objective standard of reasonableness under the first prong of **Strickland** where he compared the reasonable doubt standard to a football game. Counsel first stated that in a civil case, with a preponderance of the evidence standard "they have to take it past the 50 yard line." But in a criminal case, "it's beyond a reasonable doubt, so it's beyond the 50 yard line. You have to take it to the opponents 20, the red zone. You got to get it in the red zone for beyond a reasonable doubt."

But defendant suffered no prejudice because there was overwhelming evidence of guilt and the jury instructions following closing arguments cured any potential confusion regarding

the meaning of reasonable doubt.

Defendant's conviction was affirmed.

People v. Shamlodhiya, 2013 IL App (2d) 120065 (No. 2-12-0065, 2/26/13)

The right to effective assistance of counsel extends to closing argument, but the content of closing argument is generally considered a matter of trial strategy. Deference to counsel's tactical decisions in closing argument is particularly important because of the broad range of legitimate defense strategy at that stage.

Defendant complained that counsel was ineffective in abandoning his request that the jury consider involuntary manslaughter where counsel's closing argument was tantamount to a withdrawal of the involuntary manslaughter instruction.

Defense counsel told the jury he did not want a "compromised verdict," but he also told the jury he did not want a first-degree-murder verdict. Counsel asked for an acquittal based on self-defense. Although he could have argued for involuntary manslaughter as an alternative to an acquittal, counsel explained that he did not do so because it would have undermined the credibility of his plea for an acquittal based on self-defense. He presented the option of involuntary manslaughter verdict to the jury as a choice provided the jury by the court, which in his professional judgment would make the jury more receptive to that option.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

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§13-4(b)(8)
State Interference/Extrinsic Factors

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§13-4(b)(9)
Post-trial Motion & Sentencing

People v. Burnett, 237 Ill.2d 381, 930 N.E.2d 953 (2010)

1. No error occurred where: (1) defense counsel failed to appear for the hearing on a motion to reconsider the sentence, and (2) the trial court denied the motion in counsel's absence. The motion was a "boiler-plate motion," and the Assistant State's Attorney offered no argument or input before the trial court's ruling. Furthermore, defense counsel did not object to the court's action, although he was obviously following the progress of the case and filed a timely notice of appeal.

By filing the motion to reconsider, counsel preserved the only apparent issue for appeal. Under these circumstances, counsel might well have decided that oral argument would not be helpful:

> [I]t is difficult to see what counsel would have gained by rearguing the same points he made at sentencing - before the same judge - in a hearing on the motion to reconsider . . ..
>
> The circumstances strongly suggest that counsel, too, came to that realization, and that accounted for his absence on

> the date scheduled for disposition of the motion. . . . It is obvious that counsel had few favorable facts at his disposal, and many unfavorable ones with which to contend.

2. In the course of its holding, the court noted that **Herring v. New York**, 442 U.S. 853 (1975), which found that the Sixth Amendment right to counsel was denied by a State statute which gave the trial court discretion to dispense with closing arguments, does not create a constitutional right to present oral argument at any stage other than closing argument.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

People v. Heinz, 391 Ill.App.3d 854, ___ N.E.2d ___ (2nd Dist. 2009) (No. 2-07-0139, 6/1/09)

The defendant was convicted of burglary and theft, sentenced to concurrent 10 and 5-year terms of imprisonment, and ordered to pay $7,000 in restitution. In support of its request for restitution, the State relied on an unnotarized document signed by the owner of the burglarized building and listing a hodgepodge of items that had allegedly been "damaged, lost or stolen."

The Appellate Court found that defense counsel was ineffective for not challenging a restitution request that "was cursory at best." Defense counsel was faulted because "there was virtually no testing of the inconsistencies and ambiguities in the documentation presented to the trial court in support of the restitution request," and no apparent "reasonable defense strategy in remaining silent under these circumstances."

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

Griffin v. Pierce, 622 F.3d 831 , 2010 WL 3655899 (7th Cir. 2010)

Defendant is prejudiced by his attorney's deficient performance where there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different.

The state court unreasonably concluded that defendant was not prejudiced by his attorney's failure to conduct any investigation into mitigation in preparation for defendant's capital sentencing hearing. Had the attorney conducted the investigation, the sentencing court would have learned about aspects of defendant's background that the Supreme Court has declared relevant in assessing a defendant's moral culpability: his father's alcoholism and abusiveness; his mother's absence from the home and the circumstances of her death, as well as how it affected him, including increasing mental abuse from his father; his diagnosis of schizophrenic reaction chronic undifferentiated type with suicidal tendencies; details of his mental health and drug addition; his suicide attempts and attempts at self-mutilation; and his good acts of caring for dying and ill family members, including his father.

The state Supreme Court concluded that there was no reasonable probability that the mitigating evidence would have persuaded the sentencing court not to impose the death penalty. It was unclear how much weight that court gave to the sentencing court's statement that the mitigating evidence would not have changed the sentence, but the sentencing court's statement is not conclusive. The question is not whether a particular judge would have imposed a different sentence, but whether there is a reasonable probability that the sentence would have been different, based on an objective evaluation of the evidence.

The state Supreme Court also failed to evaluate the totality of the mitigating evidence against the aggravation, focusing only on the seriousness of the offense, the corroboration of the confession, and defendant's lengthy criminal history. The Supreme Court's assessment

that the mitigating evidence was not inherently mitigating and cumulative of the pre-sentence investigation report, which was incomplete and misleading, was unreasonable.

(Defendant was represented by Staff Attorney Gregory Swygert, Capital Post-Conviction Unit.)

People v. Tapia, 2014 IL App (2d) 111314 (No. 2-11-1314, 1/9/14)

Defendant entered a negotiated guilty plea in exchange for the State's recommendation of a sentencing cap. At the sentencing hearing, the trial court relied upon incorrect information in the pre-sentence investigation report (PSI) which listed a prior conviction from Georgia as a felony rather than a misdemeanor. Defendant did not object to the court's actions, and filed no post-judgment motions or direct appeal.

Defendant filed a post-conviction petition alleging that trial counsel was ineffective for failing to correct the misinformation about the Georgia conviction. At a third-stage evidentiary hearing, the State introduced trial counsel's affidavit which stated that he reviewed the PSI with defendant and defendant never indicated that the description of the Georgia conviction as a felony was inaccurate. Defendant filed an affidavit stating that he did not receive a copy of the PSI until the day of sentencing when trial counsel asked him to quickly look it over. Defendant looked it over but did not notice any errors because he did not understand all the legalese. The circuit court denied the petition and defendant appealed.

The Appellate Court held that defendant's claim of ineffective assistance was completely without merit. The record showed that counsel reviewed the PSI and asked defendant to review it for errors. After his review, defendant did not identify any errors in the PSI, even though defendant knew the difference between a felony and a misdemeanor. Defendant also failed to say anything when the trial court erroneously referred to the Georgia conviction as a felony. And despite receiving proper admonitions about the need to file post-judgment motions, defendant did not file any.

Based on these factors, the Appellate Court found that trial counsel's performance was objectively reasonable. While counsel has an obligation to consult with his clients, communication is a two-way street, and the information a defendant provides to counsel is critical in determining whether counsel acted reasonably. Here, counsel had no way of knowing that the information about the Georgia conviction was incorrect except by asking defendant to review the PSI, which is precisely what counsel did. The failure to further check the records of these convictions did not fall below an objective standard of reasonableness.

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§13-4(b)(10)
On Appeal

People v. English, 2013 IL 112890 (No. 112890, 1/25/13)

To establish that appellate counsel was ineffective, defendant must satisfy the standard set forth in **Strickland v. Washington**, 466 U.S. 668 (1984). Defendant must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful. Appellate counsel is not obligated to raise every conceivable issue on appeal, but is expected to exercise professional judgment to select from the many potential claims of error that might be asserted on appeal.

Appellate counsel's assessment of the merits of an issue depends on the state of the law

at the time of the direct appeal. Representation based on the law prevailing at the time of appeal is adequate, and counsel is not incompetent for failing to accurately predict that existing law will change. Appellate counsel is not required to raise issues that he reasonably determines are not meritorious.

Because the basis on which defendant sought to invalidate his conviction was not supported by precedent at the time of his direct appeal, it was reasonable for appellate counsel to conclude that the issue was unlikely to succeed. Appellate counsel was not deficient in failing to predict a subsequent change in the law. Counsel proceeded on other challenges, one of which was ultimately successful. Therefore, appellate counsel's forfeiture of the issue on appeal is not excused based on ineffective assistance of appellate counsel.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Dixon, 409 Ill.App.3d 915, 948 N.E.2d 786 (1st Dist. 2011)

The defendant's post-conviction petition did not present the gist of a meritorious issue that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness. Although trial counsel failed to use a peremptory challenge against a prospective juror who failed to mention two 20-year-old arrests when asked about his prior arrest record, and the juror eventually became the jury's foreperson, in light of the overwhelming evidence of guilt there was no reasonable probability that the defendant would have been acquitted had the foreman not been part of the jury.

Thus, defendant could not show any prejudice from the alleged error. Because defendant could not show that trial counsel was ineffective, appellate counsel's failure to raise the issue on direct appeal was not error.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

People v. English, ___ Ill.App.3d ___, ___ N.E.2d ___ (3d Dist. 2011) (No. 3-10-0764, 6/27/11)

Appellate counsel was not ineffective for failing to raise the issue that aggravated battery cannot serve as the predicate felony for felony murder, as recognized in **People v. Morgan**, 197 Ill.2d 404, 758 N.E.2d 813 (2001), and **People v. Pelt**, 207 Ill.2d 434, 800 N.E.2d 1193 (2003). **People v. Viser**, 62 Ill.2d 568, 343 N.E.2d 903 (1975), holding that aggravated battery can serve as the predicate felony to felony murder, was the controlling case at the time of defendant's direct appeal. While **Morgan** and **Pelt** "somewhat depart from the holding in **Viser**," **Viser** has never been overruled and post-**Morgan**, felony murder predicated on aggravated battery continues as a legally existent crime in Illinois.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Gomez, 409 Ill.App.3d 335, 947 N.E.2d 303 (2d Dist. 2011)

Where an attorney is ineffective due to the failure to perfect defendant's appeal, defendant need not show that there were meritorious issues on appeal to be entitled to relief. **Roe v. Flores-Ortega**, 528 U.S. 470 (2000).

Where counsel fails to file a motion to withdraw plea at the request of defendant following a guilty plea, prejudice is not presumed. To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate that he had a basis to move to withdraw his plea and there is a reasonable probability that the motion would have been granted.

(Defendant was represented by Panel Attorney Dev Parikh, Wilmington, DE.)

People v. Reed, 2014 IL App (1st) 122610 (No. 1-12-2610, 12/31/14)

Appellate counsel's assessment of the merits of an issue depends on the state of the law

at the time of the appeal, and counsel is not incompetent for failing to accurately predict that existing law may change.

Appellate counsel was not ineffective for failing to raise an issue challenging defendant's sentence of life imprisonment based on the trial court's failure to provide separate verdict forms for different theories of first degree murder. The Illinois Supreme Court's decision in **People v. Bailey**, 2013 IL 113690, which provided the basis for this argument, had not been decided at the time of defendant's direct appeal.

Bailey created a new legal rule, expanding its decision in **People v. Smith**, 233 Ill. 2d (2009). **Smith** held that a trial court must provide separate verdict forms for different theories of murder if the failure to do so creates sentencing consequences for defendant. **Bailey** applied **Smith** to the situation where a defendant has a death penalty sentencing hearing conducted by the trial judge. **Bailey** held that the failure to provide separate verdict forms for the different theories of murder precluded the trial judge from imposing a sentence of life imprisonment since a conviction for felony murder alone, which might have been the basis for the jury's general verdict, would not support a life sentence.

Defendant was in the same situation as **Bailey**. The trial judge denied his request for separate jury forms and later imposed a life sentence after conducting a death penalty sentencing hearing. Although **Smith** had been decided at the time of defendant's direct appeal, appellate counsel was not ineffective for failing to anticipate the new rule created in **Bailey** and challenge his life sentence on that basis.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

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§13-4(b)(11)
Other

In re Denzel W. & Smith, 237 Ill.2d 285, 930 N.E.2d 974 (2010)

1. Under Supreme Court Rule 711, a recent law graduate or senior law student who has completed three-fifths of the required coursework and who is in good academic standing may perform legal services under the supervision of a member of the Illinois Bar. Rule 711 requires that the written consent of the client be filed and brought to the attention of the trial judge.

In criminal cases in which imprisonment is an authorized penalty, a 711 student may participate in pretrial, trial and post-trial proceedings as an assistant of the supervising member of the bar, who must be present and who is responsible for conducting the proceedings. In civil cases and in criminal cases in which imprisonment is not a potential penalty, the 711 student must work under the supervision of a licensed attorney, who need not be present during the proceeding.

Rule 711 is intended to permit law students to gain practical courtroom experience under the supervision of a licensed attorney. A 711 student must adhere to the same rules of legal procedure, ethics, and practice as a licensed attorney.

2. Under the plain language of Rule 711, the client's written consent must be obtained before a law student may provide legal services. A student who fails to comply with the requirements of Rule 711, including obtaining the written consent of the client, is not "counsel" for Sixth Amendment purposes. However, because the constitutional right to counsel exists only where imprisonment is a potential penalty, and Rule 711 specifically requires that in such

cases the licensed attorney must be present and actively supervising the student's actions, the defendant is not denied "counsel" merely because a student did not satisfy the consent requirement.

The supervising attorney does not satisfy his or her obligations under Rule 711 merely by being physically present. Under **Strickland**, the defendant may establish ineffective assistance of counsel by showing that the conduct of the supervising attorney was objectively unreasonable and caused prejudice. The court rejected defendant's argument that **Strickland** is inapplicable where a law student appeared without complying with Rule 711.

3. The court rejected defendant's argument that consent to participation by a 711 student amounts to a partial waiver of counsel, and that the failure to obtain the client's consent is therefore an independent constitutional error. Because the right to counsel is afforded by the supervising attorney, rather than the law student, the defendant does not waive counsel by consenting to the student's participation.

4. In **Denzel W.**, the trial court's actions were "troubling" because the judge refused to allow the supervising attorney to conduct redirect examination once direct examination had been conducted by the 711 student. The court stressed that trial courts before whom 711 law students appear must "be particularly mindful of the supervising attorney's obligation to ensure that counsel is effective." **Denzel W.** was remanded for the Appellate Court to determine whether the trial court's actions, along with respondent's other claimed errors, violated the right to counsel.

5. Because defendant Smith argued only that a *per se* rule should be applied when a 711 student fails to obtain the client's consent, and did not argue that counsel was ineffective in his case, the court affirmed the lower court's finding that defense counsel was not ineffective.

(Defendant Denzel W. was represented by Assistant Defender Caroline Bourland, Chicago.)

(Defendant Smith was represented by Assistant Defender Brian McNeil, Chicago.)

People v. Burnett, 237 Ill.2d 381, 930 N.E.2d 953 (2010)

1. No error occurred where: (1) defense counsel failed to appear for the hearing on a motion to reconsider the sentence, and (2) the trial court denied the motion in counsel's absence. The motion was a "boiler-plate motion," and the Assistant State's Attorney offered no argument or input before the trial court's ruling. Furthermore, defense counsel did not object to the court's action, although he was obviously following the progress of the case and filed a timely notice of appeal.

By filing the motion to reconsider, counsel preserved the only apparent issue for appeal. Under these circumstances, counsel might well have decided that oral argument would not be helpful:

> [I]t is difficult to see what counsel would have gained by rearguing the same points he made at sentencing - before the same judge - in a hearing on the motion to reconsider . . ..
>
> The circumstances strongly suggest that counsel, too, came to that realization, and that accounted for his absence on the date scheduled for disposition of the motion. . . . It is obvious that counsel had few favorable facts at his disposal, and many unfavorable ones with which to contend.

2. In the course of its holding, the court noted that **Herring v. New York**, 442 U.S. 853 (1975), which found that the Sixth Amendment right to counsel was denied by a State statute

which gave the trial court discretion to dispense with closing arguments, does not create a constitutional right to present oral argument at any stage other than closing argument.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

People v. Bowens, 2013 IL App (4th) 120860 (No. 4-12-0860, 11/19/13)

Under **Strickland**, a defendant establishes that his attorney was ineffective where counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced the defense. A post-conviction petition alleging ineffective assistance may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness and arguable that the defendant was prejudiced.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Coleman, 2012 IL App (4th) 110463 (No. 4-11-0463, 12/24/12)

Defendant filed a post-conviction petition claiming that: (1) defense counsel was ineffective for failing to call two witnesses who would have given exculpatory testimony, (2) the State committed a **Brady** violation by failing to disclose to the defense that police officers tested only one of the 15 bags of white powder found at the scene of the arrest before emptying all the bags into one large bag for testing by the crime lab, and (3) defense counsel was ineffective for entering a stipulation that the large bag contained 926 grams of cocaine. The trial court summarily dismissed the petition as frivolous and patently without merit, finding that to show prejudice under **Strickland** defendant was required to show that had the lab analyst been called to testify, he either would not have testified or would have testified differently from what was stated in the stipulation.

In a *pro se* motion to reconsider the summary dismissal, defendant submitted an affidavit from a private investigator who had interviewed the analyst who performed the testing. The affidavit stated that the analyst said he had not performed tests to determine the purity of the cocaine in the large bag of white powder. The analyst also described the decision of police to commingle the contents of the 15 bags as "bad evidence gathering." Although defendant did not submit an affidavit from the analyst, the investigator's affidavit stated that additional efforts to contact the analyst had been unsuccessful.

The Appellate Court reversed the order summarily dismissing the petition.

1. The court found that the petition failed to present the gist of a constitutional violation concerning counsel's failure to call two witnesses to testify, because the only affidavit attached to the petition was that of the defendant, not the witnesses themselves. Although the Post-Conviction Hearing Act requires only that the petition be supported by affidavits, the court concluded that such affidavits should concern matters to which the affiant could testify if called as a witness. Although defendant's sworn affidavit described the anticipated testimony of the two witnesses whom defense counsel failed to call, the defendant would not be competent to testify to such testimony if called as a witness. Thus, the defendant's affidavit was insufficient to withstand summary dismissal, at least in the absence of an explanation why affidavits from the witnesses themselves were unavailable.

2. However, the court concluded that the petition showed an arguable case of ineffective assistance concerning counsel's agreement to the stipulation that the entire large bag contained cocaine. To allege the gist of a claim of ineffective assistance of counsel, the petitioner need not satisfy the **Strickland** standard of deficient performance and prejudice. Instead, at the first stage of proceedings a claim of ineffective assistance is sufficient if counsel's performance was arguably unreasonable and defendant was arguably prejudiced. An

arguable allegation of prejudice exists if it could be reasonably argued that confidence in the outcome of the trial was undermined by counsel's deficient performance.

Here, defense counsel's stipulation relieved the State of a potentially serious problem. In order to aggregate the contents of the 15 bags and obtain a conviction for the cumulative weight, the State was required to prove beyond a reasonable doubt that each of the 15 bags contained cocaine. Because only one bag had been tested before the bags were commingled, the State would have been unable to carry this burden. By stipulating that the entire weight of the large bag's contents was cocaine, counsel's performance was arguably deficient and arguably undermined confidence in the outcome of the trial, especially in light of the investigator's affidavit that no purity test had been conducted.

The court noted that it need not resolve at this stage whether counsel was ineffective. Because the claim was arguable, it was clearly not frivolous or patently without merit. Thus, the petition should not have been summarily dismissed.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Coleman, 2015 IL App (4th) 131045 (No. 4-13-1045, 1/6/15)

Defendant was convicted of unlawfully delivering more than 900 grams of a substance containing cocaine. The cocaine was seized in 15 individual bags. After field testing one of the bags, an officer commingled the contents of all the bags into a single container for transmittal to the crime lab. Defense counsel stipulated that if the forensic scientist was called as a witness he would testify that the exhibit was "926.0 grams of cocaine."

1. The court concluded that counsel provided unreasonable representation where he stipulated that the aggregate weight of the substance was cocaine without investigating whether the contents of the 15 bags were tested separately before being combined. Counsel has a duty to make a reasonable investigation or a reasonable decision that makes a particular investigation unnecessary. Where the defendant is charged with possessing a specific amount of an illegal drug and there is a lesser included offense involving possession of a smaller amount, the weight of the substance is an essential element of the offense and must be proven beyond a reasonable doubt. Thus, where the suspected contraband was seized in separate containers, the State can carry its burden concerning the aggregate weight only if it can show that each of the packages contained the controlled substance.

The court concluded that where defendant was charged with unlawfully delivering the aggregate weight of 900 grams or more of a substance containing cocaine, counsel had a duty to make a reasonable investigation of the chemical testing to determine whether the 15 bags had been tested separately. Where the record showed no reason to believe that the bags had been separately tested, and a police report tendered to defense counsel before trial implied that the contents of the bags had been commingled before any testing by the crime lab, counsel's decision to enter a stipulation without conducting an investigation was objectively unreasonable.

2. In order to prevail on an ineffective assistance claim, the defendant must also show a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. A reasonable probability of a different result is a probability sufficient to undermine confidence in the outcome.

Defendant showed a reasonable probability of a different outcome where, had counsel not entered the stipulation, the State would have been able to obtain a conviction for possession of the contents of just one bag. Defendant then would have been subject to a sentence of six to 30 years instead of the 30 to 60-year term which he faced for delivery of the aggregate weight.

3. The court rejected the State's argument that in the absence of a stipulation it would have presented the testimony of the chemist who tested the substance. The court noted that the chemist could have testified only that the commingled substance contained an unknown amount of cocaine, and not whether the cocaine came from one or several of the smaller bags.

The court also rejected the State's argument that it could be inferred that each of the 15 bags contained substance that had been broken off a one-kilogram block of cocaine for which wrapping material had been found at the scene of the arrest. The court concluded that the entire block could have been a lookalike substance which became mixed with preexisting cocaine residue from some other source. "In short, to prove, beyond a reasonable doubt, that each of the 15 bags contained cocaine, there was no way around [the] requirement of chemically testing the contents of each bag - unless a stipulation freed the State from that requirement. That is what the stipulation did, and it was prejudicial."

Defendant's conviction and sentence for unlawfully delivering 900 grams or more of a substance containing cocaine was vacated, and the cause was remanded with directions to sentence defendant for the lesser included offense of possession of 15 grams or more but less than 100 grams of a substance containing cocaine.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Gilbert, 2013 IL App (1st) 103055 (No. 1-10-3055, 3/19/13)

1. Within 21 days after the entry of a final order of disbarment or suspension for more than six months, an attorney must notify his or her clients about the discipline and the client's right to retain another attorney. (Supreme Court Rule 764). On the other hand, an attorney who merely faces a possible suspension of his license due to a recommendation by the ARDC remains a licensed attorney and is qualified to represent clients until the Supreme Court acts on the recommendation. Attorneys are permitted to practice law until they are actually suspended or disbarred, and no *per se* rule grants a new trial to a criminal defendant merely because their attorney faces potential suspension or disbarment.

Although defense counsel was facing possible suspension due to an ARDC hearing board's recommendation, he was under no duty to inform defendant of the potential suspension until the Illinois Supreme Court acted on the recommendation. Thus, where no action had been taken at the time of trial and the Supreme Court did not enter a suspension order until six months after trial, counsel was not ineffective for failing to advise defendant that he might be suspended.

2. The court rejected defendant's argument that trial counsel was ineffective because he suffered from dementia during the trial. Although defendant claimed that the records of the ARDC hearing board indicated that counsel suffered from "significant mental health problems," those records were not part of the record on appeal. Furthermore, psychological evaluations relied upon by the ARDC were conducted some two years before defendant's trial. The court also noted that the trial judge conducted a hearing on counsel's post-trial motion, and that the transcript of that hearing gave no indication that counsel suffered from dementia.

3. The court rejected defendant's argument that counsel committed several errors at trial which rendered his representation ineffective, including that counsel relied on an argument of jury nullification rather than compulsion or coercion. An attorney is not necessarily ineffective for relying on a defense that is unsupported by the evidence. Where the evidence of guilt is overwhelming, the defendant persists in pleading not guilty, and the circumstances of the case render other defensive strategies unavailable, counsel may reasonably elect to present a nonlegal defense. Although counsel may not argue that the jury should ignore the law, an attempt to invoke the empathy, compassion, understanding or

sympathy of the jurors may create the possibility of jury nullification.

Because the evidence of guilt was overwhelming and there was no viable defense, counsel's trial strategy of arguing jury nullification was reasonable under the circumstances. Furthermore, even if counsel did act unreasonably, in light of the overwhelming evidence it is unlikely that defendant can satisfy the prejudice requirement of **Strickland.**

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Holt, 2013 IL App (2d) 120476 (No. 2–12–0476, 10/29/13)

Defense counsel was not ineffective at a fitness hearing where he moved for a directed verdict after the State conceded that it could not meet its burden of showing that defendant was fit. Defendant contended that she was fit, and argued that counsel should have presented an argument that she was fit to stand trial.

As a matter of first impression, the court found that a person about whom there is a *bona fide* doubt of fitness is not entitled to require her attorney to assert that she is fit. The court concluded that counsel has a duty to protect the due process right not to be tried while unfit, and that counsel who believes his client to be unfit may assume that the client is incapable of acting in her own best interests.

The court rejected the argument that the **Cronic** test rather than the **Strickland** standard applied here, because **Cronic** applies where counsel entirely fails to subject the State's case to meaningful adversarial testing. The court concluded that counsel subjected the State's case to meaningful adversarial testing by successfully arguing that the State had failed to meet its burden of proof and obtaining a directed verdict.

In *dicta,* the court also noted that under Illinois precedent, an attorney need not assist a client who is competent to stand trial in an attempt to feign a mental condition for the purpose of obtaining a finding that he or she is unfit.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Vega, 408 Ill.App.3d 887, 945 N.E.2d 1189 (2d Dist. 2011)

Defendant received ineffective assistance of counsel in the proceedings resulting in his conviction for criminal damage to government-supported property in excess of $500. The cost of repairs to the property that defendant damaged totaled $501.93, according to the testimony of the estimator for the business that performed the repairs. However, $32.85 of the estimate was attributed to sales tax on parts and materials. Defense counsel discovered post-trial that the government entity that owned the property was exempt from paying sales tax.

Because challenging the sales tax at trial could have resulted in conviction of a lower-class felony, defense counsel's representation fell below an objective standard of reasonableness when he failed to timely discover the sales tax exemption and raise it at trial. There is a reasonable probability that but for counsel's error, the sales tax would have been excluded from the calculation of the cost of the repairs resulting from defendant's conduct, and defendant would have been convicted on the lower-class felony.

(Defendant was represented by Panel Attorney Carol Anfinson, Aurora.)

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§13-5

Conflict of Interest

§13-5(a)
Generally

People v. Fields, 2012 IL 112438 (No. 112438, mod. op. 11/26/12)

1. *Per se* conflicts of interest have been recognized where: (1) defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) defense counsel contemporaneously represents the defendant and a prosecution witness; or (3) defense counsel is a former prosecutor who was personally involved in prosecuting the defendant. If a *per se* conflict exists, the defendant need not show that the conflict actually affected his attorney's performance. Thus, unless defendant waived his right to conflict-free representation, the existence of a *per se* conflict requires reversal.

2. The Appellate Court erred by finding that at defendant's trial for a sexual assault against his stepdaughter, defense counsel had a *per se* conflict of interest because several years earlier, he had been guardian *ad litem* for the complainant in a previous sexual assault which was admitted to show defendant's propensity to commit sex offenses. The complainant from the earlier case testified as a State's witness in the instant matter.

In rejecting the Appellate Court's finding, the Supreme Court noted that its precedent holds that defense counsel's representation of a State witness creates a *per se* conflict only if the professional relationship between the attorney and the witness is contemporaneous with counsel's representation of the defendant. Because the guardian *ad litem* relationship with the State's witness ended several years before defense counsel represented defendant, no *per se* conflict occurred.

3. The court rejected the argument that whether or not counsel had a contemporaneous relationship with the State's witness, a *per se* conflict of interest existed under the first alternative above because a prosecution witness is an "entity assisting the prosecution." The court noted that the only Illinois Supreme Court case to find a *per se* conflict based on counsel's relationship with an "entity" involved a defense attorney who was also a part-time attorney for the municipality where the defendant was being prosecuted. Accordingly, the court concluded that Illinois conflict of interest law recognizes a distinction between a person and an "entity assisting the prosecution."

The court also noted that if merely testifying for the prosecution constitutes a *per se* conflict under the first alternative, the second alternative, which requires that defense counsel contemporaneously represent the defendant and a prosecution witness, would be meaningless.

The court noted, however, that defendant was not without recourse even if there was no *per se* conflict of interest. In the absence of a *per se* conflict, a criminal defendant may show that his right to effective assistance of counsel was violated by an actual conflict of interest that adversely affected counsel's performance.

4. The court acknowledged that Supreme Court precedent states that a *per se* conflict of interest may exist due to the simultaneous representation of the defendant and a person who would benefit from an unfavorable verdict for the defendant. The court concluded that such statements do not create a fourth category of conflict of interest, but are merely descriptions of the rationale for the *per se* conflict of interest rule. Thus, there was not a *per se* conflict based on the theory that the State's witness would benefit because her assailant would be incarcerated, her claim of having been sexually abused would be vindicated, or her testimony would aid another person who had been sexually abused by the same offender.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Glenn Sroka, Ottawa.)

People v. Rivera, 2013 IL 112467 (No. 112467, 2/22/13)

The Sixth Amendment guarantees the defendant the right to select and be represented by an attorney of his choice. This right is not absolute and chosen counsel may be disqualified in the event of a conflict of interest. A reviewing court will set aside a trial court's decision to disqualify defense counsel only where there has been a clear abuse of discretion.

At the time of defendant's trial, Rule 3.7 of the Illinois Rules of Professional Conduct provided that, except in certain specified circumstances, a lawyer shall not accept or continue employment if the lawyer knows or should know that he may be called as a witness on behalf of the client.

The court did not abuse its discretion in disqualifying defense counsel where defendant intended to call defense counsel as a witness at a pretrial suppression hearing. Even though defendant had no intention to call defense counsel as a witness at trial, counsel was disqualified prior to the suppression hearing and therefore the fact that counsel was not called as a witness at trial was irrelevant to the court's decision to disqualify him prior to the suppression hearing.

People v. Taylor, 237 Ill.2d 356, 930 N.E.2d 959 (2010)

1. Illinois law identifies two types of conflicts of interest: *per se* and actual. A *per se* conflict exists where certain facts about a defense attorney's status, in and of themselves, engender a disabling conflict. *Per se* conflicts of interest exist in three situations, including where: (1) defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) defense counsel contemporaneously represents a prosecution witness; and (3) defense counsel is a former prosecutor who was personally involved in the defendant's prosecution.

If a *per se* conflict of interest is found, the defendant need not show that the conflict actually affected counsel's performance. Unless the defendant waived the right to conflict-free representation, a *per se* conflict of interest requires reversal.

Actual conflicts of interest frequently involve joint representation of co-defendants. Although the representation of co-defendants does not necessarily constitute a conflict of interest, in a particular case the circumstances may create a conflict.

Unless a potential conflict of interest was brought to the trial court's attention, the defendant is entitled to relief only if he shows that an actual conflict of interest adversely affected his lawyer's performance. The defendant need not prove prejudice or that the conflict contributed to the conviction; however, he must show that an actual conflict of interest was manifested at trial. Thus, the defendant must point to some specific defect in counsel's strategy, tactics, or decisionmaking due to the conflict.

2. Here, the post-conviction petitioner failed to establish an actual conflict of interest in counsel's joint representation of the petitioner and his brother. Although counsel failed to call witnesses who would have testified that only the brother had been involved in the crime, the court found that counsel's failure to call those witnesses created at most a possibility that the interests of the defendant and his brother might diverge. Because counsel vigorously cross-examined the State's witnesses, impeached their credibility, and argued that the State failed to meet its burden of proof, and because both defendant and his brother denied their guilt without implicating each other, an actual conflict was never manifested. "The mere availability of a strategy that would have helped one criminal co-defendant at the expense of another does not create hostility between their interests."

The court also stressed that the record failed to show any specific adverse effect in counsel's performance which could be attributed to the alleged conflict. At the post-conviction

hearing, counsel testified that he did not believe there was a conflict of interest and that he decided not to call the witnesses because he felt they were weak, unbelievable, and would have offered inconsistent testimony.

The trial judge found that counsel's testimony was more credible than that of the petitioner, and the Supreme Court found that the finding was not contrary to the manifest weight of the evidence. Because the petitioner failed to establish an actual conflict of interest, the order denying post-conviction relief was affirmed.

(Defendant was represented by Assistant Defender Emily Atwood, Chicago.)

In re Austin M., 403 Ill.App.3d 667, 941 N.E.2d 903 (4th Dist. 2010)

1. A *per se* conflict of interest arises when counsel has ties to an entity that would benefit from a verdict that is unfavorable to the defendant. Where a *per se* conflict exists, reversal is automatic unless the record shows that the defendant was aware of the conflict and intentionally waived it.

The respondent expressly waived any *per se* conflict of interest resulting from claims that he and his co-defendant were each the victim of sex offenses committed by the other. Furthermore, representation by a single attorney did not constitute a conflict where neither of the minors claimed to have been abused by his co-respondent; both consistently maintained that the allegations were completely fabricated and that no sexual offenses had occurred.

2. The court rejected the argument that defense counsel labored under an actual conflict of interest because the respondent's parents directed counsel's representation in a way that was contrary to the respondent's interests. Defense counsel represented only the respondent; in fact, the trial court specifically admonished the parents that counsel was not representing them. Furthermore, counsel's remarks during the proceedings did not suggest that his consultation with the parents in any way contradicted the interests of the minor.

The court also stated that in juvenile cases, defense counsel must not only protect the juvenile's legal rights but also recommend a disposition that is in the juvenile's best interest. The latter duty may require consultation between counsel and the parents.

3. There was no conflict of interest in counsel's dual role as defense attorney and guardian *ad litem*. First, the court rejected the State's argument that counsel did not act as guardian *ad litem*. Although the trial judge never expressly appointed counsel as guardian *ad litem*, both the trial court and defense counsel conceived the attorney's role as guardian *ad litem* (i.e., safeguarding the interests of both the minor and society), rather than as a traditional defense attorney. Because counsel in fact functioned as a guardian *ad litem*, the Appellate Court elected to reach the issue although defense counsel was never formally appointed.

Because 705 ILCS 405/1 contemplates that a single attorney can be both guardian *ad litem* and defense counsel "unless the court finds that the minor's interests are in conflict with what the guardian *ad litem* determines to be in the interest of the minor," the court rejected the argument that it is necessarily a conflict of interest for an attorney to act both as guardian *ad litem* and defense counsel. The court acknowledged that other jurisdictions hold that a *per se* conflict exists where one person is both guardian *ad litem* and defense counsel, but concluded that Illinois follows a different rule.

Furthermore, counsel's dual role did not constitute an actual conflict in this case. An actual conflict exists when some specific defect in defense counsel's strategy, tactics or decision making is attributable to a conflict of interest.

Although defense counsel allowed certain testimony to be presented by videotape and waived cross-examination of the witnesses who had been videotaped, the minor expressly

waived any objection to that procedure. Furthermore, counsel's actions did not prejudice the minor where the trial court deemed the videotaped testimony unworthy of belief. The court also noted that by agreeing to the videotaped testimony, counsel gained an advantage for the defense by depriving the State of "more persuasive" live testimony.

4. Defense counsel was not ineffective although he failed to move to suppress a statement made by the minor to police. In determining whether a confession is voluntary, the totality of the circumstances are to be considered, including: (1) the respondent's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning, (2) the legality and duration of the detention, (3) the duration of the questioning, and (4) any physical or mental abuse by the police. No single factor controls – whether a statement is voluntary depends on whether the respondent made the statement freely, voluntarily and without compulsion or inducement of any sort.

Because the statement would likely have been deemed voluntary had a motion to suppress been filed, counsel was not ineffective. The respondent was 16 years old, arrived at the police station voluntarily, signed a form acknowledging his **Miranda** rights, and submitted to police questioning in the presence of his father. Although the father testified that the minor made no statements and that the police chief employed "psychologically coercive tactics," the record contained a basis on which a reasonable judge could have viewed the officers' testimony as more persuasive.

5. The court rejected respondent's argument that counsel was ineffective because he stipulated to the admissibility of videotaped statements of three children, without challenging the statements as hearsay or exercising defendant's right to confrontation. The respondent was specifically advised by the trial court of his right to cross-examine the witnesses, and waived that right. In addition, whether to admit the evidence by way of videotape was a matter of trial strategy which had the beneficial effect of depriving the State of the ability to present "more persuasive" live testimony.

(The respondent was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Gabrys, 2013 IL App (3d) 110912 (No. 3-11-0912, 11/14/13)

1. A *per se* conflict arises where defense counsel has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant. A *per se* conflict does not exist merely because defense counsel's competence is questioned by his client during post-trial proceedings. The underlying allegations determine whether an actual conflict exists.

Defendant's post-plea allegation that defense counsel was ineffective because he failed to meet with him prior to the day on which he pleaded guilty and that he had a defense was insufficient to establish that counsel labored under a *per se* conflict of interest in representing defendant at the post-plea proceedings.

2. The court is not required to automatically appoint new counsel when defendant makes a post-trial claim of ineffective assistance of counsel. The court is only required to examine the factual basis of defendant's claim. If the court determines that the claim lacks merit or pertains only to matters of trial strategy, the court need not appoint new counsel and may deny the post-trial motion. If the allegations show possible neglect of the case, new counsel should be appointed. This rule applies in the post-plea context as well.

The court made an adequate inquiry into defendant's post-plea allegations of ineffective assistance of counsel. Defendant alleged that he had a defense. Defense counsel explained that the name and phone number defendant gave him turned up no one. Defendant alleged that defense counsel did not meet with him prior to the plea. Defense counsel explained that she

did not recall if she had told defendant if she would meet with him prior to the trial date, but she had met with the defendant a number of times. The court did not abuse its discretion in finding that the allegations lacked merit and denying the motion to withdraw the guilty plea.

(Defendant was represented by Assistant Defender Benjamin Wolowski, Chicago.)

People v. Gacho, 2012 IL App (1st) 091675 (No. 1-09-1675, 4/16/12)

Defendant is constitutionally guaranteed the assistance of an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations. Illinois recognizes two classes of impermissible attorney conflicts of interest.

Per se conflicts exist where certain facts engender, by themselves, a disabling conflict, usually the defense attorney's prior or contemporaneous association with either the prosecution or the victim. The justification for treating these conflicts as *per se* is that defense counsel has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant. In such cases, the defendant need not show prejudice to secure reversal of his conviction.

Actual conflicts describe something short of a *per se* conflict. In such cases, defendant's conviction may be reversed if the trial court was informed of the problem and failed to take adequate protective steps, or where the defendant can show that an actual conflict of interest adversely affected counsel's performance.

Defendant's post-conviction petition adequately alleged a conflict of interest where he alleged that defense counsel represented a family member of one of the victims at the same time that he represented the defendant. Although defendant did not indicate the nature of defense counsel's representation of the victim's family member, he explained in his petition that counsel did not inform him of the nature of the representation. The nature of the family member's relationship to the victim's family might bear on the intensity of counsel's conflict, but the absence of that information from the petition did not affect the sufficiency of the claim because it was still evident that counsel owed a duty of loyalty to the victim's family. The Appellate Court left for resolution on remand the question of whether the conflict was *per se* or actual.

(Defendant was represented by Assistant Defender Brett Zeeb, Chicago.)

People v. Perkins, 408 Ill.App.3d 752, 945 N.E.2d 1228 (1st Dist. 2011)

A criminal defendant's Sixth Amendment right to effective assistance of counsel includes the right to conflict-free representation. There are two categories of conflict of interest recognized by the Illinois Supreme Court: *per se* and actual. A *per se* conflict exists where: (1) defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) defense counsel contemporaneously represents a prosecution witness; or (3) defense counsel is a former prosecutor who had been personally involved in the prosecution of the defendant. If a *per se* conflict is found, there is no need to show that the conflict affected the attorney's actual performance. Unless a defendant waives his right to conflict-free representation, a *per se* conflict of interest is grounds for automatic reversal.

Cases hold that defendant has not forfeited a claim of counsel's ineffectiveness where the attorney whose effectiveness is at issue represented defendant in a proceeding at which counsel's effectiveness could or should have been challenged. It does not follow, however, that a *per se* conflict of interest exists any time an attorney argues his own effectiveness. A *per se* conflict has not been found where defendant challenges his attorney's competence during post-trial proceedings; rather, the underlying allegation of incompetence determines whether an

actual conflict exists, requiring appointment of new counsel.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

People v. Stanford, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-09-0420, 6/16/11)

Generally, in order to prevail on a claim of ineffective assistance of counsel, defendant must satisfy the two-prong test of **Strickland v. Washington**, 466 U.S. 668 (1984).

There are some circumstances so likely to prejudice the accused that prejudice need not be demonstrated under the second prong of **Strickland**, but can be presumed. Situations warranting a presumption of prejudice include cases in which: (1) there is a complete denial of counsel at a critical stage of the proceedings; or (2) counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.

A more limited presumption of prejudice exists where counsel has a genuine conflict of interest. Prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his counsel's performance.

Defendant was not excused from the requirement of showing prejudice based on his complaint that communication had eroded between him and his appointed counsel to the point that they were engaged in an irreconcilable conflict. Defendant was not denied counsel at any critical stage of the proceedings and counsel had not failed to subject the State's case to meaningful adversarial testing. Bickering between defendant and his counsel did not amount to an actual conflict of interest. Defendant articulated no legitimate reason for his conflict with counsel, and the court did not summarily dismiss defendant's complaints about counsel, but appointed independent counsel to investigate, who concluded that nothing alleged by defendant rose to the level of ineffective assistance of counsel.

(Defendant was represented by Assistant Defender Kathleen Weck, Elgin.)

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§13-5(b)
Conflict Between Current Clients

§13-5(b)(1)
Generally

People v. Fountain, 2012 IL App (3d) 090558 (No. 3-09-0558, 3/6/12)

A criminal defendant has a Sixth Amendment right to the effective assistance of counsel during probation-revocation proceedings, which includes the right to conflict-free counsel. A *per se* conflict of interest exists where facts about an attorney's status engender, by themselves, a disabling conflict. Defense counsel's prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution constitutes a *per se* conflict of interest. If one member of a private law firm has a *per se* conflict of interest, that conflict is imputed to all other members of the law firm, regardless of whether those other members had any personal involvement in the conflicting representation. Where a *per se* conflict exists, prejudice is presumed and reversal is automatic. Defendant is not required to show that his counsel's actual performance was affected by the existence of the conflict. Where the facts are not disputed, the question of whether a *per se* conflict exists is a legal question reviewed *de novo*.

Either prior to or during the probation-revocation proceedings, an attorney in defense counsel's law firm represented the estate of the victim of the crime for which defendant was convicted and placed on probation. These facts, standing alone, established that defense counsel had a *per se* conflict of interest during the revocation proceedings. The mere fact that defendant admitted to the allegations of the revocation petition did not eliminate the *per se* conflict. The court noted that defendant's admission that he had not paid any of the restitution owed to the estate could have resulted in a sentence that would have benefitted the estate. At the very least, individuals associated with the estate might have wanted defendant to be punished for his failure to pay restitution.

After reversing and remanding for a new probation-revocation proceeding, the Appellate Court expressed its opinion that the Illinois rule of automatic reversal for *per se* conflicts of interest conflicts with the ruling of the United States Supreme Court in **Mickens v. Taylor**, 535 U.S. 162 (2002). **Mickens** held that a mere theoretical division of counsel's loyalties is not sufficient to require reversal; defendant must demonstrate counsel's conflict of interest adversely affected his performance. However, because the Illinois Supreme Court has expressly rejected the argument that its *per se* rule conflicts with **Mickens**, the Appellate Court was bound by that conclusion unless and until it was revisited by the Illinois Supreme Court or overruled by the United States Supreme Court.

O'Brien, J., specially concurred. She did not join in the majority's "discussion of a conflict between the Illinois Supreme Court and the United States Supreme Court since that discussion is not necessary to the disposition."

Schmidt, J., dissented. The Appellate Court was bound to follow United States Supreme Court precedent in **Mickens**, and defendant could not demonstrate an actual conflict of interest affecting his attorney's performance.

(Defendant was represented by Panel Attorney Kenneth Hogan, Galesburg.)

People v. Gacho, 2012 IL App (1st) 091675 (No. 1-09-1675, 4/16/12)

Defendant is constitutionally guaranteed the assistance of an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations. Illinois recognizes two classes of impermissible attorney conflicts of interest.

Per se conflicts exist where certain facts engender, by themselves, a disabling conflict, usually the defense attorney's prior or contemporaneous association with either the prosecution or the victim. The justification for treating these conflicts as *per se* is that defense counsel has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant. In such cases, the defendant need not show prejudice to secure reversal of his conviction.

Actual conflicts describe something short of a *per se* conflict. In such cases, defendant's conviction may be reversed if the trial court was informed of the problem and failed to take adequate protective steps, or where the defendant can show that an actual conflict of interest adversely affected counsel's performance.

Defendant's post-conviction petition adequately alleged a conflict of interest where he alleged that defense counsel represented a family member of one of the victims at the same time that he represented the defendant. Although defendant did not indicate the nature of defense counsel's representation of the victim's family member, he explained in his petition that counsel did not inform him of the nature of the representation. The nature of the family member's relationship to the victim's family might bear on the intensity of counsel's conflict, but the absence of that information from the petition did not affect the sufficiency of the claim because it was still evident that counsel owed a duty of loyalty to the victim's family. The

Appellate Court left for resolution on remand the question of whether the conflict was *per se* or actual.

(Defendant was represented by Assistant Defender Brett Zeeb, Chicago.)

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§13-5(b)(2)
Representing Co-defendants

Taylor v. Grounds, ___ F. 3d ___ (7th Cir. 2013) (No. 12-2632, 7/3/13)

To prevail on a Sixth Amendment conflict-of-interest claim, a defendant who raised no objection at trial must demonstrate that (1) the defendant's interests conflicted with those of a co-defendant represented by the same attorney; and (2) the conflict adversely affected his attorney's performance. The defendant must show that his attorney was influenced by the conflict in making basic strategic decisions in a manner adverse to the defendant. A defendant who shows that a conflict actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief. **Cuyler v. Sullivan**, 446 U.S. 335 (1980).

The presentation of a united front may not be consistent with one defendant's interests if it requires the abandonment of a plausible defense that benefits him at the expense of a co-defendant. To determine if the co-defendants' interests were both served by the pursuit of a common defense, the court must evaluate the strength of the putative defense discarded by the attorneys and whether its presentation would harm the interests of the co-defendant. The test is not whether the defenses actually chosen were consistent, but whether in making the choice of the defenses the interests of the co-defendants were in conflict. The abandoned defense need not be a winning one.

Defendant and his brother were represented by a single attorney at simultaneous bench and jury trials on charges of first-degree murder. Prosecution eyewitnesses testified that defendant passed the murder weapon to his brother, who shot the deceased. In a post-conviction proceeding, defendant asserted that counsel's joint representation of defendant and his brother violated the Sixth Amendment due to a conflict of interest.

Three eyewitnesses to the shooting testified at an evidentiary hearing conducted on the petition that they informed defense counsel that they had seen defendant's brother shoot the deceased, but had not seen defendant hand his brother a gun. Two of the witnesses had reported to the police shortly after the shooting that defendant's brother had shot the deceased. The witnesses and defendant's mother testified that defense counsel told them he would not call the exculpatory eyewitnesses to testify because their testimony would hurt the brother's case. Defense counsel testified and conceded that the defendant and his brother had divergent interests with regard to their defenses, but contended that his decision not to call the eyewitnesses was based on strategic considerations unrelated to the conflict.

The post-conviction hearing court denied relief, finding defendant "did not receive any substantial deviation of his constitutional rights." Defendant appealed, and ultimately the Illinois Supreme Court affirmed the ruling. Defendant filed a federal habeas petition, which the district court denied.

The Seventh Circuit concluded that defendant's interest in presenting the exculpatory eyewitnesses was directly at odds with his brother's interest in excluding their testimony. The testimony of the eyewitnesses constituted a potentially successful strategy for defendant but posed a significant threat to his brother's case. Defense counsel's procedural maneuver of

electing to have defendant and his brother simultaneously tried before separate triers of fact did not cure the conflict because any witness called by the defendant would have been available to the prosecution for use in the trial of defendant's brother.

To demonstrate that this conflict adversely affected his attorney's performance, defendant must show that his counsel's failure to call the exculpatory eyewitnesses was in fact caused by a desire to protect the brother's interests. There was conflicting testimony at the post-conviction hearing on this question. The post-conviction hearing court's conclusory ruling contained no indication that its decision was based on a credibility determination. The Illinois Supreme Court unreasonably assumed that the circuit court had found defense counsel's explanation for his decision not to call the eyewitnesses credible where at issue was not only whether the conflict adversely affected counsel's performance, but also whether a conflict existed. The determination of whether a conflict existed did not require the court to resolve any credibility issue. The post-conviction hearing court's ruling could have been based on either or both grounds.

Because the state court did not make a critical factual finding to which the federal court could defer, the Seventh Circuit remanded to the district court for an evidentiary hearing to determine if the conflict of interest adversely affected counsel's performance. If the evidence shows that counsel refrained from presenting the eyewitnesses for fear that the State would call them at the brother's trial, then counsel labored under an actual conflict of interest in violation of defendant's Sixth Amendment rights. If, however, counsel made this decision based on strategic considerations and without regard to their potential harm to the brother's interests, no constitutional violation occurred.

(Defendant was represented by Supervisor Patricia Mysza, Chicago.)

People v. Taylor, 237 Ill.2d 356, 930 N.E.2d 959 (2010)

1. Illinois law identifies two types of conflicts of interest: *per se* and actual. A *per se* conflict exists where certain facts about a defense attorney's status, in and of themselves, engender a disabling conflict. *Per se* conflicts of interest exist in three situations, including where: (1) defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) defense counsel contemporaneously represents a prosecution witness; and (3) defense counsel is a former prosecutor who was personally involved in the defendant's prosecution.

If a *per se* conflict of interest is found, the defendant need not show that the conflict actually affected counsel's performance. Unless the defendant waived the right to conflict-free representation, a *per se* conflict of interest requires reversal.

Actual conflicts of interest frequently involve joint representation of co-defendants. Although the representation of co-defendants does not necessarily constitute a conflict of interest, in a particular case the circumstances may create a conflict.

Unless a potential conflict of interest was brought to the trial court's attention, the defendant is entitled to relief only if he shows that an actual conflict of interest adversely affected his lawyer's performance. The defendant need not prove prejudice or that the conflict contributed to the conviction; however, he must show that an actual conflict of interest was manifested at trial. Thus, the defendant must point to some specific defect in counsel's strategy, tactics, or decisionmaking due to the conflict.

2. Here, the post-conviction petitioner failed to establish an actual conflict of interest in counsel's joint representation of the petitioner and his brother. Although counsel failed to call witnesses who would have testified that only the brother had been involved in the crime, the court found that counsel's failure to call those witnesses created at most a possibility that

the interests of the defendant and his brother might diverge. Because counsel vigorously cross-examined the State's witnesses, impeached their credibility, and argued that the State failed to meet its burden of proof, and because both defendant and his brother denied their guilt without implicating each other, an actual conflict was never manifested. "The mere availability of a strategy that would have helped one criminal co-defendant at the expense of another does not create hostility between their interests."

The court also stressed that the record failed to show any specific adverse effect in counsel's performance which could be attributed to the alleged conflict. At the post-conviction hearing, counsel testified that he did not believe there was a conflict of interest and that he decided not to call the witnesses because he felt they were weak, unbelievable, and would have offered inconsistent testimony.

The trial judge found that counsel's testimony was more credible than that of the petitioner, and the Supreme Court found that the finding was not contrary to the manifest weight of the evidence. Because the petitioner failed to establish an actual conflict of interest, the order denying post-conviction relief was affirmed.

(Defendant was represented by Assistant Defender Emily Atwood, Chicago.)

In re Austin M., 403 Ill.App.3d 667, 941 N.E.2d 903 (4th Dist. 2010)

1. A *per se* conflict of interest arises when counsel has ties to an entity that would benefit from a verdict that is unfavorable to the defendant. Where a *per se* conflict exists, reversal is automatic unless the record shows that the defendant was aware of the conflict and intentionally waived it.

The respondent expressly waived any *per se* conflict of interest resulting from claims that he and his co-defendant were each the victim of sex offenses committed by the other. Furthermore, representation by a single attorney did not constitute a conflict where neither of the minors claimed to have been abused by his co-respondent; both consistently maintained that the allegations were completely fabricated and that no sexual offenses had occurred.

2. The court rejected the argument that defense counsel labored under an actual conflict of interest because the respondent's parents directed counsel's representation in a way that was contrary to the respondent's interests. Defense counsel represented only the respondent; in fact, the trial court specifically admonished the parents that counsel was not representing them. Furthermore, counsel's remarks during the proceedings did not suggest that his consultation with the parents in any way contradicted the interests of the minor.

The court also stated that in juvenile cases, defense counsel must not only protect the juvenile's legal rights but also recommend a disposition that is in the juvenile's best interest. The latter duty may require consultation between counsel and the parents.

3. There was no conflict of interest in counsel's dual role as defense attorney and guardian *ad litem*. First, the court rejected the State's argument that counsel did not act as guardian *ad litem*. Although the trial judge never expressly appointed counsel as guardian *ad litem*, both the trial court and defense counsel conceived the attorney's role as guardian *ad litem* (i.e., safeguarding the interests of both the minor and society), rather than as a traditional defense attorney. Because counsel in fact functioned as a guardian *ad litem*, the Appellate Court elected to reach the issue although defense counsel was never formally appointed.

Because 705 ILCS 405/1 contemplates that a single attorney can be both guardian *ad litem* and defense counsel "unless the court finds that the minor's interests are in conflict with what the guardian *ad litem* determines to be in the interest of the minor," the court rejected the argument that it is necessarily a conflict of interest for an attorney to act both as guardian

ad litem and defense counsel. The court acknowledged that other jurisdictions hold that a *per se* conflict exists where one person is both guardian *ad litem* and defense counsel, but concluded that Illinois follows a different rule.

Furthermore, counsel's dual role did not constitute an actual conflict in this case. An actual conflict exists when some specific defect in defense counsel's strategy, tactics or decision making is attributable to a conflict of interest.

Although defense counsel allowed certain testimony to be presented by videotape and waived cross-examination of the witnesses who had been videotaped, the minor expressly waived any objection to that procedure. Furthermore, counsel's actions did not prejudice the minor where the trial court deemed the videotaped testimony unworthy of belief. The court also noted that by agreeing to the videotaped testimony, counsel gained an advantage for the defense by depriving the State of "more persuasive" live testimony.

4. Defense counsel was not ineffective although he failed to move to suppress a statement made by the minor to police. In determining whether a confession is voluntary, the totality of the circumstances are to be considered, including: (1) the respondent's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning, (2) the legality and duration of the detention, (3) the duration of the questioning, and (4) any physical or mental abuse by the police. No single factor controls – whether a statement is voluntary depends on whether the respondent made the statement freely, voluntarily and without compulsion or inducement of any sort.

Because the statement would likely have been deemed voluntary had a motion to suppress been filed, counsel was not ineffective. The respondent was 16 years old, arrived at the police station voluntarily, signed a form acknowledging his **Miranda** rights, and submitted to police questioning in the presence of his father. Although the father testified that the minor made no statements and that the police chief employed "psychologically coercive tactics," the record contained a basis on which a reasonable judge could have viewed the officers' testimony as more persuasive.

5. The court rejected respondent's argument that counsel was ineffective because he stipulated to the admissibility of videotaped statements of three children, without challenging the statements as hearsay or exercising defendant's right to confrontation. The respondent was specifically advised by the trial court of his right to cross-examine the witnesses, and waived that right. In addition, whether to admit the evidence by way of videotape was a matter of trial strategy which had the beneficial effect of depriving the State of the ability to present "more persuasive" live testimony.

(The respondent was represented by Assistant Defender Jacqueline Bullard, Springfield.)

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§13-5(c)
Conflict Between Current and Past Clients

People v. Fields, 2012 IL 112438 (No. 112438, mod. op. 11/26/12)

1. *Per se* conflicts of interest have been recognized where: (1) defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) defense counsel contemporaneously represents the defendant and a

prosecution witness; or (3) defense counsel is a former prosecutor who was personally involved in prosecuting the defendant. If a *per se* conflict exists, the defendant need not show that the conflict actually affected his attorney's performance. Thus, unless defendant waived his right to conflict-free representation, the existence of a *per se* conflict requires reversal.

2. The Appellate Court erred by finding that at defendant's trial for a sexual assault against his stepdaughter, defense counsel had a *per se* conflict of interest because several years earlier, he had been guardian *ad litem* for the complainant in a previous sexual assault which was admitted to show defendant's propensity to commit sex offenses. The complainant from the earlier case testified as a State's witness in the instant matter.

In rejecting the Appellate Court's finding, the Supreme Court noted that its precedent holds that defense counsel's representation of a State witness creates a *per se* conflict only if the professional relationship between the attorney and the witness is contemporaneous with counsel's representation of the defendant. Because the guardian *ad litem* relationship with the State's witness ended several years before defense counsel represented defendant, no *per se* conflict occurred.

3. The court rejected the argument that whether or not counsel had a contemporaneous relationship with the State's witness, a *per se* conflict of interest existed under the first alternative above because a prosecution witness is an "entity assisting the prosecution." The court noted that the only Illinois Supreme Court case to find a *per se* conflict based on counsel's relationship with an "entity" involved a defense attorney who was also a part-time attorney for the municipality where the defendant was being prosecuted. Accordingly, the court concluded that Illinois conflict of interest law recognizes a distinction between a person and an "entity assisting the prosecution."

The court also noted that if merely testifying for the prosecution constitutes a *per se* conflict under the first alternative, the second alternative, which requires that defense counsel contemporaneously represent the defendant and a prosecution witness, would be meaningless.

The court noted, however, that defendant was not without recourse even if there was no *per se* conflict of interest. In the absence of a *per se* conflict, a criminal defendant may show that his right to effective assistance of counsel was violated by an actual conflict of interest that adversely affected counsel's performance.

4. The court acknowledged that Supreme Court precedent states that a *per se* conflict of interest may exist due to the simultaneous representation of the defendant and a person who would benefit from an unfavorable verdict for the defendant. The court concluded that such statements do not create a fourth category of conflict of interest, but are merely descriptions of the rationale for the *per se* conflict of interest rule. Thus, there was not a *per se* conflict based on the theory that the State's witness would benefit because her assailant would be incarcerated, her claim of having been sexually abused would be vindicated, or her testimony would aid another person who had been sexually abused by the same offender.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Glenn Sroka, Ottawa.)

People v. Cleveland, 2012 IL App (1st) 101631 (No. 1-10-1631, 11/30/12)

1. The right of the defendant to effective assistance of counsel includes assistance by an attorney whose allegiance to his client is not burdened by conflicting interests or inconsistent obligations. Some conflicts of interest are *per se* conflicts because they fundamentally interfere with effective representation. One type of *per se* conflict is where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution. When a *per se* conflict exists, a defendant need not show

actual prejudice because the manner in which prejudice arises from conflicting obligations is difficult to detect and demonstrate. For this reason, unless the defendant waives his right to conflict-free counsel, a *per se* conflict is grounds for automatic reversal.

2. The Illinois *per se* conflicts rule has not been superceded by **Mickens v. Taylor**, 535 U.S. 162 (2002), which requires that defendant demonstrate that the attorney's conflict of interest adversely affected his performance in order to be entitled to relief. The Illinois Supreme Court has rejected the argument that its *per se* conflict rule conflicts with **Mickens** and the Appellate Court is bound to follow that decision by the Illinois Supreme Court.

3. Defendant's post-conviction petition made a substantial showing that his attorney suffered under a *per se* conflict of interest based on his prior representation of the murder victim. Defendant attached his affidavit to the *pro se* petition averring that defense counsel did not inform him of this conflict until after his trial and sentencing. Post-conviction counsel supplemented the petition with exhibits showing that several years prior to defendant's trial, defense counsel had represented a person with a name similar to the name of the victim at a preliminary hearing on a drug possession case, as well as police reports showing that the person counsel had represented and the victim were one and the same person. Defense counsel should have disclosed that representation before undertaking the representation of the defendant. The claim is not defeated by either the remoteness of the attorney-client relationship or its limited nature.

It is not certain that defense counsel's long-ended representation of the murder victim has established a *per se* conflict of interest. Whether defense counsel's representation of the murder victim in fact gives rise to a *per se* conflict of interest will depend on facts adduced at a third-stage evidentiary hearing. An evidentiary hearing is necessary to determine whether defense counsel was in a duplicitous position where his full talents – as a vigorous advocate having the single aim of acquittal by all means fair and honorable – are hobbled or fettered or restrained by commitments to others to permit a court to conclude that effective assistance of counsel is lacking.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Dopson, 2011 IL App (4th) 100014 (No. 4-10-0014, 9/28/11)

The Sixth Amendment guarantees defendants the right to the effective assistance of counsel, which includes the right to conflict-free representation. If the record shows a *per se* conflict of interest, there is no need to show that the attorney's actual performance was in any way affected by the existence of the conflict.

A *per se* conflict exists where the risk of prejudice against the defendant is inherent in counsel's prior or contemporaneous representation of defendant and a State's witness. In such a circumstance, the deficient performance will often manifest itself only in the form of omissions, and therefore the mere existence of the conflict is sufficient to violate defendant's rights, whether or not it in fact influences the attorney or the outcome of the case.

Defendant's attorney represented the State's witness during the period of time that the witness's cooperation with the police led to the defendant's arrest. The witness participated as a confidential informant in a controlled buy of drugs from the defendant, and was the only witness who directly observed the transaction. In return for her testimony against defendant, the State promised not to prosecute her for other drugs charges for which she had been arrested. She also hoped for favorable treatment from the State on other pending charges. After defendant's arrest, counsel appeared twice on behalf of both the defendant and the witness on her pending charges. Counsel withdrew from representation of the witness less

than four weeks before defendant's trial, and never informed defendant that he had previously represented the witness.

The court held that these circumstances created a *per se* conflict of interest, even though the dual representation was not ongoing at the time of trial and the charges on which counsel represented the witness were not "commingled" with defendant's case. Defense counsel's vigorous cross-examination of the State's witness should be unhindered by the need to avoid privileged attorney-client information. Even though counsel did not represent the witness at the time of defendant's trial, the attorney-client privilege continues even after formal representation ends, and therefore did not permit counsel to elicit privileged information obtained during the prior representation. Whether such information existed or would have been helpful to the defense is irrelevant, because such questions relate to whether the conflict resulted in prejudice, which is beyond the scope of the *per se* conflict rule.

The motivation of the witness in testifying against the defendant was relevant to her credibility, and defense counsel's inquiry into those motivations to testify should be thorough and unconstrained. The witness had three misdemeanor and three felony cases pending against her at the time she testified, and the same prosecutor who represented the State at defendant's trial appeared for the State on the witness's pending charges. Although these facts indicate the testimony of the witness might be influenced by bias, interest, or motive to testify falsely to garner favor with the prosecution, counsel's attack on the witness at trial was mild at best. Because of the *per se* conflict-of-interest rule, the court concluded that it did not need to determine whether counsel's limited cross-examination was sound trial strategy, or the result of an effort to avoid eliciting testimony regarding his prior representation of the witness.

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

People v. Fields, 409 Ill.App.3d 398, 948 N.E.2d 290 (3d Dist. 2011)

1. The Sixth Amendment right to effective assistance of counsel includes the right to conflict-free representation. A *per se* conflict of interest exists where defense counsel: (1) has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) contemporaneously represents a prosecution witness; or (3) is a former prosecutor who was personally involved in the prosecution of the defendant. Where a *per se* conflict exists, defendant is entitled to reversal of his conviction without any showing that his attorney's performance was actually affected by the conflict, unless the defendant waived his right to conflict-free counsel.

A *per se* conflict of interest existed based on defense counsel's prior association with "an entity assisting the prosecution," where defense counsel had previously appeared as the guardian *ad litem* for the prosecution's other-crime witness in an unrelated juvenile proceeding.

The other-crime witness assisted the prosecution because she testified for the State and against defendant. She also qualified as an "entity. The plain, ordinary, and popular meaning of "entity," as defined by Black's Law Dictionary and West's Legal Thesaurus and Dictionary, includes persons and individuals, as well as organizations, municipalities, and companies. It would be arbitrary and illogical to allow defense counsel who previously represented an individual who is assisting the prosecution to represent the defendant, but not allow defense counsel who previously represented a municipality or organization that is assisting the prosecution to represent defendant.

2. A *per se* conflict exists where defense counsel has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant.

Even if the other-crime witness did not qualify as an "entity," a *per se* conflict existed.

The witness had an interest in convicting defendant where he was charged with the same conduct that he previously was found to have committed on the witness, and the present complainant was a friend of the witness. The witness received three intangible benefits from the conviction of the defendant: (1) the incarceration of her assailant; (2) the validation of her own claim of sexual abuse against defendant; and (3) the opportunity to help another young girl who had been subject to the same horrific behavior that she endured.

There can be no confidence that counsel's representation of defendant was not affected by his prior commitment to the witness. Any information counsel learned regarding the family situation of the witness, her credibility, or her lifestyle in the course of his prior representation was protected by the attorney-client privilege, and could have impacted his ability to effectively cross-examine the witness or attack her credibility. The record may not reveal any hindrance to counsel's performance precisely because counsel was still ethically bound to the witness.

The court reversed defendant's conviction because counsel labored under a *per se* conflict of interest.

Schmidt, J., dissented on the ground that the law is clear that prior representation of a prosecution witness is not a *per se* conflict of interest.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Fountain, 2012 IL App (3d) 090558 (No. 3-09-0558, 3/6/12)

A criminal defendant has a Sixth Amendment right to the effective assistance of counsel during probation-revocation proceedings, which includes the right to conflict-free counsel. A *per se* conflict of interest exists where facts about an attorney's status engender, by themselves, a disabling conflict. Defense counsel's prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution constitutes a *per se* conflict of interest. If one member of a private law firm has a *per se* conflict of interest, that conflict is imputed to all other members of the law firm, regardless of whether those other members had any personal involvement in the conflicting representation. Where a *per se* conflict exists, prejudice is presumed and reversal is automatic. Defendant is not required to show that his counsel's actual performance was affected by the existence of the conflict. Where the facts are not disputed, the question of whether a *per se* conflict exists is a legal question reviewed *de novo*.

Either prior to or during the probation-revocation proceedings, an attorney in defense counsel's law firm represented the estate of the victim of the crime for which defendant was convicted and placed on probation. These facts, standing alone, established that defense counsel had a *per se* conflict of interest during the revocation proceedings. The mere fact that defendant admitted to the allegations of the revocation petition did not eliminate the *per se* conflict. The court noted that defendant's admission that he had not paid any of the restitution owed to the estate could have resulted in a sentence that would have benefitted the estate. At the very least, individuals associated with the estate might have wanted defendant to be punished for his failure to pay restitution.

After reversing and remanding for a new probation-revocation proceeding, the Appellate Court expressed its opinion that the Illinois rule of automatic reversal for *per se* conflicts of interest conflicts with the ruling of the United States Supreme Court in **Mickens v. Taylor**, 535 U.S. 162 (2002). **Mickens** held that a mere theoretical division of counsel's loyalties is not sufficient to require reversal; defendant must demonstrate counsel's conflict of interest adversely affected his performance. However, because the Illinois Supreme Court has expressly rejected the argument that its *per se* rule conflicts with **Mickens**, the Appellate

Court was bound by that conclusion unless and until it was revisited by the Illinois Supreme Court or overruled by the United States Supreme Court.

O'Brien, J., specially concurred. She did not join in the majority's "discussion of a conflict between the Illinois Supreme Court and the United States Supreme Court since that discussion is not necessary to the disposition."

Schmidt, J., dissented. The Appellate Court was bound to follow United States Supreme Court precedent in **Mickens**, and defendant could not demonstrate an actual conflict of interest affecting his attorney's performance.

(Defendant was represented by Panel Attorney Kenneth Hogan, Galesburg.)

People v. Murphy, 2013 IL App (4th) 111128 (No. 4-11-1128, 5/9/13)

A *per se* conflict of interest exists where defense counsel contemporaneously represents a prosecution witness and the defendant. There is no requirement that the contemporaneous representation occur during the defendant's trial as opposed to the pretrial phase of the defendant's case. The defendant has a Sixth Amendment right to unconflicted counsel from the very initiation of criminal proceedings. The pretrial phase and the trial do not exist in separate watertight compartments; what happens during the pretrial phase affects what happens at trial. If a conflicting loyalty to a prosecution witness inhibits defense counsel's trial preparation, the defense could suffer at trial.

Defense counsel represented a prosecution witness on unrelated charges that were resolved with a plea agreement that resulted in dismissal of the most serious charges against the witness during the pretrial phase of defendant's prosecution. At trial, defense counsel confined his cross-examination of the witness to prior inconsistent statements made by the witness.

The Appellate Court found that the contemporaneous representation created a *per se* conflict of interest because defense counsel's performance may have been subliminally affected by the conflict. In particular, the court noted that it was in defendant's best interests that the witness be convicted of every felony with which he was charged in order to maximize impeachment of his credibility should he testify, while it was in the best interests of the witness that he be convicted of the fewest felonies in order to minimize his potential punishment. Defense counsel may have failed to impeach the witness with his felony convictions at defendant's trial because it "would be rather crass" for defense counsel to recommend that the witness plead guilty to felony charges and then turn around and use those convictions against him.

The Appellate Court granted defendant's motion for summary reversal and remand for a new trial due to defense counsel's *per se* conflict of interest.

(Defendant was represented by Supervisor Charles Hoffman, Chicago.)

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People v. Perkins, 408 Ill.App.3d 752, 945 N.E.2d 1228 (1st Dist. 2011)

A criminal defendant's Sixth Amendment right to effective assistance of counsel includes the right to conflict-free representation. There are two categories of conflict of interest recognized by the Illinois Supreme Court: *per se* and actual. A *per se* conflict exists where: (1) defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) defense counsel contemporaneously represents a prosecution witness; or (3) defense counsel is a former prosecutor who had been personally involved in the prosecution of the defendant. If a *per se* conflict is found, there is no need to show that the conflict affected the attorney's actual performance. Unless a defendant waives his right to conflict-free representation, a *per se* conflict of interest is grounds for automatic reversal.

Cases hold that defendant has not forfeited a claim of counsel's ineffectiveness where the attorney whose effectiveness is at issue represented defendant in a proceeding at which counsel's effectiveness could or should have been challenged. It does not follow, however, that a *per se* conflict of interest exists any time an attorney argues his own effectiveness. A *per se* conflict has not been found where defendant challenges his attorney's competence during post-trial proceedings; rather, the underlying allegation of incompetence determines whether an actual conflict exists, requiring appointment of new counsel.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

People v. Short, 2014 IL App (1st) 121262 (No. 1-12-1262, mod. op. 12/3/14)

At defendant's trial for attempt first degree murder, unlawful possession of a firearm by a gang member, aggravated unlawful use of a weapon, and aggravated battery with a firearm, the trial court admonished the venire that evidence of gang membership might be presented and asked whether the veniremembers would be able to afford defendant a fair trial in light of such testimony. After the jury was selected, defendant pleaded guilty to unlawful possession of a firearm by a gang member - the only charge to which the gang membership evidence was relevant - and aggravated unlawful use of a weapon. The trial court denied defense counsel's request to have the venire dismissed and a new jury selected, but informed the jury that contrary to the earlier statements no gang evidence would be presented.

In the post-trial motion, defense counsel argued that he had been ineffective for failing to object to the questioning of veniremembers to determine whether they would be unable to afford defendant a fair trial if gang-related evidence was admitted. The Appellate Court rejected the argument that defense counsel suffered from a conflict of interest because he was required to argue his own ineffectiveness.

1. Whether an attorney has a conflict of interest is a question of law which is reviewed *de novo*. Two categories of conflicts are recognized in Illinois: *per se* conflicts, and actual conflicts.

A *per se* conflict exists where certain facts about a defense attorney's status create, by themselves, a conflict of interest. *Per se* conflicts have been recognized in three situations: (1)

where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel is a former prosecutor who was personally involved in the prosecution. Because arguing one's own ineffectiveness does not fall into any of these three categories, the court rejected the argument that a *per se* conflict of interest existed.

The court also concluded that no actual conflict of interest was shown. To show an actual conflict, defendant must show some specific defect in counsel's strategy, tactics, or decision making that is attributable to the conflict. Because the trial court was aware of the conduct from which the claimed conflict arose, the claim could be resolved based on the record and without any argument by counsel beyond what was presented in the post-trial motion. Thus, counsel was not required to argue his own ineffectiveness.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Jessica Ware, Chicago.)

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People v. Jocko, 239 Ill.2d 87, 940 N.E.2d 59 (2010)

1. To establish ineffective assistance of counsel, a criminal defendant must demonstrate that: (1) counsel's actions were unreasonable and (2) there is a reasonable probability that, had counsel acted competently, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

2. Under **People v. Krankel**, 102 Ill.2d 181, 464 N.E.2d 1045 (1984), the trial court must inquire into claims of ineffective assistance which a defendant raises *pro se* after trial. If the trial court concludes that the claims lack merit or concern only matters of trial strategy, new counsel need not be appointed. However, if the allegations show possible neglect of the case, new counsel is required.

The court concluded that **Krankel** does not apply to pretrial allegations of ineffective assistance, because there is no way for the trial judge to determine whether the alleged defects in counsel's actions undermine confidence in the outcome of the case. "Because there is no way to determine if counsel's errors have affected an outcome that has not yet occurred, the circuit court cannot engage in this analysis prior to trial."

3. The court acknowledged that a *pro se* defendant is not obligated to renew claims of ineffective assistance which he has made known to the trial court, and that a trial judge could at the end of the trial choose to address *pro se* claims of ineffective assistance raised earlier in the proceedings. Here, however, the trial court cannot be faulted for failing to inquire further into defendant's allegations. First, the allegations which were brought to the judge's attention were rebutted by the record. Second, defendant's subsequent letter and affidavit, which he filed with the clerk's office, were at his request merely placed in the record "in case I have to argue on appeal." The court stated, "We cannot criticize the circuit court for failing to take action on defendant's concerns when there is no indication that the court was ever made aware of them."

(Defendant was represented by Assistant Defender Katherine Donahoe, Chicago.)

People v. Jolly, 2014 IL 117142 (No. 117142, 12/4/14)

1. Under **People v. Krankel**, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), where the defendant raises a *pro se* claim of ineffective assistance of counsel the trial court must conduct an inquiry into the factual basis for the claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, new counsel need not be appointed. However, new counsel must be appointed if the allegations show possible neglect of the case.

The goal of the **Krankel** proceeding is to facilitate full consideration by the trial court of defendant's *pro se* claims of ineffective assistance, limit the issues on appeal, and create a record on which those issues can be resolved. A preliminary **Krankel** inquiry is intended to be a neutral and non-adversarial proceeding.

2. Noting a conflict in Appellate Court authority, the court concluded that the purpose of a **Krankel** hearing cannot be achieved if the State is allowed to participate in more than a *de minimis* role. "Certainly, the State should never be permitted to take an adversarial role against a *pro se* defendant at the preliminary **Krankel** inquiry."

3. The Supreme Court accepted the State's concession that the trial court erred at the **Krankel** hearing by permitting the State's Attorney to question the *pro se* defendant and the trial attorney, whose effectiveness was questioned by the *pro se* motion and who was no longer representing defendant. Defendant was without representation after his successor counsel,

who like the trial attorney was part of the Public Defender's office, was excused when the proceeding started.

The trial court reviewed defendant's claim and allowed defendant to explain but not argue them. The prosecutor was then allowed to question trial counsel at length concerning defendant's *pro se* claims. Defendant was prohibited from cross-examining trial counsel, however, because "the proceeding was not intended to be an evidentiary hearing."

4. Although it accepted the State's concession, the court rejected the argument that the State's participation in the **Krankel** hearing was harmless beyond a reasonable doubt. The court concluded that the appropriate remedy was to remand the cause for a new **Krankel** inquiry without the State's adversarial participation.

(Defendant was represented by Supervisor Martin Ryan, Springfield.)

People v. Patrick, 2011 IL 111666 (No. 111666, 12/30/11)

1. Where a defendant raises a *pro se* post-trial motion alleging ineffective assistance of counsel, the trial court is required to examine the factual basis of the claim and to appoint new counsel if the allegations show possible neglect of the case. However, if the claim lacks merit or pertains only to matters of trial strategy, new counsel need not be appointed. (See **People v. Krankel**, 102 Ill.2d 181, 464 N.E.2d 1045 (1984)). The **Krankel** rule is intended to allow the trial court to decide whether to appoint independent counsel to argue *pro se*, post-trial claims of ineffective assistance, so that *pro se* ineffective assistance claims will be considered in the trial court rather than on appeal.

2. The trial judge erred by refusing to consider defendant's **Krankel** motion on the ground that it was untimely. Under 725 ILCS 5/116-1, a motion for a new trial must be filed in writing within 30 days following the entry of a finding or return of a verdict. A **Krankel** motion is not a motion for a new trial under §116-1, however, as it is part of the common law procedure developed under **Krankel** and its progeny. The court noted that if **Krankel** motions were subject to the 30-day requirement of §116-1(b), a defendant would be precluded from raising *pro se* ineffective assistance claims based upon sentencing, because those claims could not be filed within the 30-day statutory time period.

The court noted, however, that the trial court loses jurisdiction of the case once a notice of appeal is filed, and therefore may not consider a **Krankel** motion which is first presented after a notice of appeal has been filed.

3. Here, defendant's *pro se* motion alleging ineffective assistance of counsel was filed more than 30 days after the guilty verdict, but while a timely motion to reconsider the sentence was pending. Under these circumstances, the trial court erred by refusing to conduct an inquiry into defendant's claims. The cause was remanded to the trial court to conduct a preliminary inquiry.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Phipps, 238 Ill.2d 54, 933 N.E.2d 1186 (2010)

1. Waiver is an intentional relinquishment or abandonment of a known right.

After defendant filed a motion to withdraw his guilty plea, defense counsel informed the court that defendant might want to claim counsel's ineffectiveness. The court appointed new counsel to determine whether defendant wanted to pursue a claim of ineffective assistance of counsel. At the next hearing date, plea counsel informed the court that defendant had mentioned a mechanical problem that he thought should have explored at sentencing. Appointed counsel stated that he had consulted with defendant, gone over the issues, and spoken with plea counsel, and defendant did not want to raise any ineffectiveness claim, but

wanted to proceed on his motion with plea counsel. The court allowed defendant to proceed on his motion with plea counsel, and no challenge was made until appeal to plea counsel's effectiveness.

The Supreme Court concluded that defendant had not waived any claim of ineffective assistance of counsel other than the one claim specifically mention by plea counsel. Appointed counsel's statement could not be construed as a general waiver of any ineffectiveness claim due to the context in which it was made. Any ambiguity in appointed counsel's statement must be interpreted narrowly as waiver principles are construed liberally in favor of the defendant.

2. To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate that his counsel's performance was deficient and that he was prejudiced by that deficient performance.

The State charged defendant with reckless homicide, but based on a version of the statute not in effect at the time of the offense. The defendant pled guilty to that offense in return for a promise of a sentence cap of 12 years. Before the defendant was sentenced, the State realized its error and moved to vacate the defendant's plea and substitute a charge of aggravated DUI. With defense counsel's agreement, the court vacated the plea, and defendant entered a guilty plea to the new charge, subject to the same 12-year cap. The court sentenced defendant to 12 years' imprisonment.

The defendant charged that his counsel was ineffective for agreeing to vacate the plea and substitute the aggravated DUI charge, which was barred by the speedy-trial term. Under the reckless homicide statute in effect at the time of the offense, defendant could be sentenced to a maximum of five years' imprisonment, whereas the maximum for aggravated DUI was 14 years. The Supreme Court rejected that argument based on its conclusion that the substitution of the aggravated DUI charge did not violate the speedy-trial statute. (See also **SPEEDY TRIAL,** §47-1(b)).

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Taylor, 237 Ill.2d 68, 927 N.E.2d 1172 (2010)

1. Under **People v. Krankel**, 102 Ill.2d 181, 464 N.E.2d 1045 (1984), the trial court should examine the factual basis for a *pro se* post-trial motion alleging ineffective assistance of counsel, and appoint counsel only if the allegations show possible neglect of the case. If the court determines that the claim lacks merit or involves trial strategy, new counsel need not be appointed.

2. Although a defendant is not required to do anything more than bring his or her claim to the trial court's attention, defendant's ambiguous statement in allocution - that he "had no idea" he was facing a mandatory Class X sentence due to his prior record and would have accepted the State's plea offer had he known of the possibility of a Class X sentence - was insufficient to allege ineffective assistance of counsel. The court noted that the statement made no reference to counsel's performance and in fact failed to mention the attorney at all. The court concluded, "If defendant's statement . . . were deemed sufficient to require a **Krankel** inquiry, few statements would be insufficient."

3. The court declined to reach a second issue – whether the **Krankel** rule applies when the defendant is represented by privately retained counsel. In a concurring opinion, Justice Burke noted a conflict in appellate authority on this point and concluded that Illinois Supreme Court precedent does not exempt privately retained counsel from the **Krankel** rule.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Allen, 409 Ill.App.3d 1058, 950 N.E.2d 1164 (4th Dist. 2011)

1. Under **People v. Krankel**, 102 Ill.2d 181, 464 N.E.2d 1045 (1984), the trial court is required to investigate a post-trial, *pro se* claim of ineffective assistance of counsel. New counsel must be appointed only if the inquiry shows that defense counsel may have neglected the case. If the inquiry shows that the claim lacks merit or pertains to matters of trial strategy which are left to counsel's judgment, new counsel need not be appointed.

The trial court may conduct a **Krankel** inquiry by questioning trial counsel, questioning the defendant, and relying on its knowledge of trial counsel's performance at trial.

2. A defendant who brings a *pro se* claim of ineffectiveness by a letter to the judge forfeits the claim where he fails to bring it to the court's attention at a subsequent hearing. Here, defendant waived claims that he raised by letter but failed to mention at the sentencing hearing or at the hearing on the post-trial motion.

3. Furthermore, if considered on the merits, defendant's claims would have been rejected because they concerned matters of trial strategy which were left to counsel's discretion. In addition, the trial court responded appropriately to defendant's earlier complaints about counsel by granting a continuance to allow defendant to apply for new counsel through the public defender's office. Finally, defense counsel filed a motion which had been requested by the defendant and which was a subject of disagreement between them, and the record rebutted defendant's claim that counsel failed to present a defense.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Bomar, 405 Ill.App.3d 139, 937 N.E.2d 1173, 2010 WL 4123996 (3d Dist. 2010)

When defendant presents a *pro se* post-trial claim of ineffective assistance of counsel, the trial court should examine the factual basis for the claim. If the court determines that the claim lacks merit or pertains to trial strategy, the court need not appoint new counsel and may deny the motion. If no adequate inquiry is made into defendant's allegations, a reviewing court may not affirm on the ground that the allegations lack merit.

At his sentencing hearing, defendant attempted to complain about his attorney's representation. The court told defendant his allegations were unsworn and came too late. Because the court had conducted no inquiry into defendant's allegations, the court rejected the State's argument that defendant received effective assistance of counsel.

The court remanded for an inquiry into defendant's allegations.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Boose, 2014 IL App (2d) 130810 (No. 2-13-0810, 9/26/14)

1. When a defendant raises a *pro se* post-trial claim that his trial counsel was ineffective, the trial court must inquire into and examine the basis of the claim. **People v. Krankel**, 102 Ill. 2d 181 (1984). The court may conduct this preliminary examination (known as a **Krankel** hearing) by: (1) questioning trial counsel about the facts and circumstances surrounding defendant's allegations; (2) requesting more specific information from defendant; and (3) relying on its own knowledge of counsel's performance during trial and the insufficiency of defendant's allegations on their face.

If after conducting a preliminary **Krankel** examination, the court concludes that defendant's claim lacks merit, the court may deny the claim. If defendant's claim shows possible neglect of the case, the court should appoint new counsel to argue defendant's claim.

A trial court's method of inquiry during the preliminary **Krankel** examination is somewhat flexible, and it may be permissible in some situations to allow the State to offer concrete and easily verifiable facts. But the State should never be an active participant during the hearing. If the State's participation is anything more than *de minimis*, there is a risk of

turning the hearing into an adversarial proceeding with both the State and defense counsel opposing defendant.

2. Here the State was a very active participant during the preliminary **Krankel** hearing. Of defendant's 10 *pro se* allegations of ineffectiveness, the State made comments and arguments about seven of them. On appeal, the State conceded that its participation was error, but argued that the error was harmless because the trial court fully explored defendant's claims and could have easily found that they were meritless based solely on its own investigation.

The Appellate Court rejected the State's argument that this type of error could be harmless. The court found that the State's participation in this case effectively required defendant to argue against both his own defense counsel and the State. The proceeding thus changed from a preliminary **Krankel** examination to an adversarial hearing at which defendant was required to represent himself and argue the merits of his claims. The court would not deem this kind of error harmless.

The case was remanded for a new preliminary **Krankel** hearing before a different judge.

(Defendant was represented by Assistant Defender Jessica Arizo, Elgin.)

People v. Buchanan, 2013 IL App (2d) 120447 (No. 2-12-0447, 4/25/13)

1. When a defendant makes a *pro se* post-trial claim that defense counsel was ineffective, the trial court must adequately inquire into the claim. The court may examine the factual basis of the claim by either: (1) asking defense counsel about the claim and allowing counsel to address the claim; (2) discussing the claim with the defendant; or (3) considering its knowledge of defense counsel's performance at trial and the insufficiency of defendant's allegations on their face. If defendant's allegations show possible neglect of the case, the court should appoint new counsel to argue defendant's claim. If the court determines that the claim lacks merit or pertains to matters of trial strategy, the court may deny the claim.

2. Defendant made a post-plea claim that counsel who represented him at his guilty plea was ineffective, after counsel had filed a written motion to withdraw the plea. The court properly allowed defendant to proceed *pro se* on his ineffectiveness allegations, but did not treat his request to proceed *pro se* as a complete waiver of his right to counsel on the post-plea motion.

The court adequately examined defendant's allegations of ineffectiveness by questioning defendant at length concerning the claims and allowing defense counsel to explain the facts and circumstances surrounding the claims. Upon determining that the ineffectiveness claims lacked merit, the trial court denied the post-plea motion.

3. Upon determining that the *pro se* claims had no merit, the trial court should have clearly informed defendant that he was not entitled to conflict counsel and, rather than denying the post-plea motion, should have allowed counsel to argue the remaining claims or obtained a waiver of counsel from the defendant before ruling on the post-plea motion.

The cause was remanded for further proceedings on the post-plea motion. Because the court appointed new counsel for defendant on another matter, that counsel or other new counsel may represent the defendant at the post-plea proceedings on remand. That counsel must file a new Rule 604(d) certificate, and counsel is free to file an amended motion to withdraw plea.

(Defendant was represented by Assistant Defender Kathleen Weck, Chicago.)

People v. Dean, 2012 IL App (2d) 110505 (No. 2-11-0505, 9/7/12)

When defendant has set forth a colorable claim of ineffective assistance of counsel, new counsel should be appointed before a hearing is conducted on that claim. New counsel is not automatically required merely because defendant presents a *pro se* post-trial claim that counsel was ineffective, however. The trial court must first examine the factual basis for the claim. If the defendant's allegations show possible neglect of the case, the court should appoint new counsel to argue the defendant's claim of ineffective assistance. If the court concludes that the defendant's claim lacks merit or pertains only to matters of trial strategy, the court may deny the claim.

Defense counsel filed a motion to vacate defendant's guilty plea that included an allegation that the plea was induced by his attorney's unwillingness to try to the case and that he was never informed that a jury could return a verdict finding him guilty only of second-degree murder. Before denying the motion, the court questioned defense counsel about these allegations, had a discussion with the defendant, relied on its own recollection of the proceedings, and reviewed the transcript of the plea proceedings.

The Appellate Court concluded that a *per se* conflict of interest did not exist merely because the motion to vacate plea raised a question about the defense attorney's competence. Because the trial court sufficiently inquired into the factual basis for the allegations in the motion before denying the motion, no error occurred.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Fields, 2013 IL App (2d) 120945 (No. 2-12-0945, 9/27/13)

When a defendant files a *pro se* motion alleging ineffective assistance of counsel, the trial court must first examine the bases of defendant's claims to determine if they lack merit or demonstrate that counsel possibly neglected the defendant's case. Defendant is entitled to appointment of new counsel to represent him on the motion only if the court determines that there is possible neglect.

In conducting the preliminary inquiry, the trial court may (1) ask the defendant's trial counsel questions; (2) briefly discuss the allegations with defendant; or (3) rely on its own knowledge of trial counsel's performance. Although the State may be asked to offer concrete and easily verifiable facts at the hearing, and the court's method of inquiry is somewhat flexible, the State should not be an active participant. If the State's participation is anything more than *de minimis*, there is a risk that the preliminary inquiry will turn into an adversarial proceeding, with both the State and defense counsel opposing the defendant.

Review of the manner in which the court conducted the preliminary inquiry is *de novo*.

The trial court invited equal participation by the State into the preliminary inquiry of defendant's *pro se* claims. Going through the claims one-by-one, the court allowed the State to comment and offer counter-arguments to the defendant. At one point, after defense counsel explained his actions, the State offered an additional possible explanation for counsel's actions, which counsel then adopted. Both the State and defense counsel became advocates against defendant. The hearing became an adversarial proceeding where defendant, without waiving his right to be represented, was forced to argue the merits of his claims without counsel.

The Appellate Court rejected the State's argument that the error was harmless because defendant's claims lacked merit. It remanded for a new preliminary inquiry, before a different judge and without adversarial participation by the State.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Fuller, 2013 IL App (3d) 110391 (No. 3-11-0391, 5/30/13)

Where the defendant makes a post-trial *pro se* claim of ineffective assistance of counsel,

the trial court must examine the factual basis of the claim to determine whether the allegations show possible neglect of the case. If so, new counsel should be appointed. The trial court must make such an inquiry if it has jurisdiction over the case.

Where a notice of appeal was premature because a properly filed post-sentencing motion had not been decided by the trial court, the Appellate Court lacked jurisdiction and appropriately dismissed the appeal and remanded the cause. Because the trial court's jurisdiction was not affected by the premature notice of appeal, the judge erred by finding that the remand had been for the limited purpose of hearing the post-sentencing motion and that a *pro se* allegation of ineffective assistance of counsel which defendant filed upon remand could not be considered.

The cause was remanded for the trial court to conduct an inquiry into defendant's allegations of ineffective assistance of counsel.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Gabrys, 2013 IL App (3d) 110912 (No. 3-11-0912, 11/14/13)

1. A *per se* conflict arises where defense counsel has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant. A *per se* conflict does not exist merely because defense counsel's competence is questioned by his client during post-trial proceedings. The underlying allegations determine whether an actual conflict exists.

Defendant's post-plea allegation that defense counsel was ineffective because he failed to meet with him prior to the day on which he pleaded guilty and that he had a defense was insufficient to establish that counsel labored under a *per se* conflict of interest in representing defendant at the post-plea proceedings.

2. The court is not required to automatically appoint new counsel when defendant makes a post-trial claim of ineffective assistance of counsel. The court is only required to examine the factual basis of defendant's claim. If the court determines that the claim lacks merit or pertains only to matters of trial strategy, the court need not appoint new counsel and may deny the post-trial motion. If the allegations show possible neglect of the case, new counsel should be appointed. This rule applies in the post-plea context as well.

The court made an adequate inquiry into defendant's post-plea allegations of ineffective assistance of counsel. Defendant alleged that he had a defense. Defense counsel explained that the name and phone number defendant gave him turned up no one. Defendant alleged that defense counsel did not meet with him prior to the plea. Defense counsel explained that she did not recall if she had told defendant if she would meet with him prior to the trial date, but she had met with the defendant a number of times. The court did not abuse its discretion in finding that the allegations lacked merit and denying the motion to withdraw the guilty plea.

(Defendant was represented by Assistant Defender Benjamin Wolowski, Chicago.)

People v. Jolly, 2013 IL App (4th) 120981 (No. 4-12-0981, 10/4/13, Mod. Op. 12/10/13)

When a defendant makes a *pro se* post-trial complaint of ineffective assistance of counsel, the court must conduct a preliminary investigatory hearing to determine whether there was possible neglect of the case, meriting appointment of new counsel.

Investigatory hearings are not meant to be adversarial or evidentiary. A court can conduct the inquiry by: (1) questioning trial counsel, (2) questioning the defendant, and (3) relying on its own knowledge of trial counsel's performance at trial. The court is not restricted to these three methods. The court is free to review the court file and transcripts, and may ask the State for specific and concrete information regarding defendant's allegations. It is not necessary to exclude counsel from the courtroom during the court's questioning of defendant,

or to swear counsel or the defendant. The proper scope of the hearing is a question of law reviewed *de novo*.

The court erred in allowing the State to question defendant's trial counsel under oath during the preliminary investigatory hearing while barring defendant from asking counsel any questions. Questioning by the State turned the hearing from investigatory to adversarial. While a court may question the parties, it does so as an impartial tribunal whose only mission is to get the facts and follow the law, not as an advocate. The court also erred in relying on its knowledge of counsel's performance in other cases. Only counsel's performance in the case at issue is relevant.

While finding error, the Appellate Court concluded that the error was harmless beyond a reasonable doubt. The court's questioning of the defendant and defense counsel alone provided a basis for the court to deny defendant's request for new counsel.

On rehearing, the Appellate Court declined to remand for a new preliminary inquiry in light of **People v. Fields**, 2013 IL App (2d) 120945, where the Appellate Court had remanded for a new preliminary inquiry into defendant's claims of counsel's ineffectiveness before a different judge after finding error in the manner in which the judge had conducted the inquiry. The Appellate Court declined to grant the same relief as in **Fields** because the trial court's own inquiry, without input from the State, elicited sufficient information to show defendant's claims were not colorable.

(Defendant was represented by Assistant Defender Marty Ryan, Springfield.)

People v. Mays, 2012 IL App (4th) 090840 (No. 4-09-0840, 8/30/12)

When a defendant alleges after trial that current defense counsel rendered ineffective assistance, the court should first examine the factual basis of defendant's claim to determine whether there was possible neglect of the case. If there was possible neglect of the case, the court should appoint new counsel to represent defendant at a post-trial hearing on the *pro se* claims. If after adequate inquiry into the factual basis of the claims, the court determines that the claims lack merit or pertain only to matters of trial strategy, the court may deny the *pro se* motion without appointing counsel.

The court's investigation has two steps: (1) understanding defendant's claims, and (2) evaluating them for potential merit. The court cannot attempt the second step without taking the first.

The court may consult several different sources of information when performing its preliminary inquiry. Some interchange between the court and counsel is permissible and usually necessary. A brief discussion between the court and defendant may be sufficient. The court can also base its evaluation of defendant's *pro se* claims on its knowledge of defense counsel's performance at trial and the sufficiency of defendant's allegations on their face.

Defendant alleged in a *pro se* motion for new trial that his trial counsel had been ineffective in bringing new information to the State's attention that defendant considered confidential, but which the State deemed sufficient to support what it considered to be new and additional charges. The trial court needed to investigate these claims by inquiring of defendant and counsel. Because the court conducted no such preliminary inquiry, the cause was remanded for that purpose.

(Defendant was represented by Assistant Defender Amber Gray, Springfield.)

People v. McLaurin, 2012 IL App (1st) 102943 (No. 1-10-2943, 12/10/12)

1. A trial court is not automatically required to appoint new counsel when defendant makes a *pro se* posttrial claim of ineffective assistance of counsel. Instead, the court must first

conduct an inquiry to examine the factual basis underlying the defendant's claim, known as a **Krankel** inquiry. Some interchange between the trial court and trial counsel is permissible and usually necessary in assessing what further action, if any, is warranted on defendant's claim.

A trial court may base its decision in a **Krankel** inquiry on: (1) the trial counsel's answers and explanations; (2) a brief discussion between the trial court and defendant; and (3) its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face. The Appellate Court reviews the adequacy of the trial court's inquiry.

If the trial court determines that defendant's claim lacks merit or pertains only to matters of trial strategy, the court need not appoint new counsel and may deny the *pro se* motion. A claim lacks merit if it is conclusory, misleading, or legally immaterial, or does not bring to the court's attention a colorable claim of ineffective assistance of counsel. If the defendant's claims indicate that trial counsel neglected defendant's case, the court must appoint new counsel.

2. Prior to defendant's first trial, which ended in a mistrial, the trial court granted defense counsel a continuance to subpoena an occurrence witness who would testify that defendant was not the offender and that a prosecution witness who identified defendant as the offender was not present during the shooting. While granting the continuance, the trial court concluded that defense counsel had not exercised due diligence. But defense counsel still made no effort to subpoena the witness, and the witness did not testify at the first trial, although he had contacted defense counsel and indicated his willingness to testify. The witness also did not testify at defendant's second trial, and the record was silent regarding the reason he was not called or whether he had been subpoenaed.

Defendant complained posttrial that his attorney was ineffective for failing to call the occurrence witness The trial court rejected defendant's posttrial complaint. Although defendant reminded the court that it had questioned defense counsel's diligence in securing the attendance of the witness prior to defendant's first trial, the court concluded that because the witness lived out of state, defense counsel could not subpoena the witness and therefore could not be faulted for failing to investigate.

3. The Appellate Court concluded that the trial court had failed to conduct an adequate inquiry into defendant's complaint and remanded for further proceedings. Defense counsel provided no clear explanation why he did not serve a subpoena on the witness. The trial court's conclusion that defense counsel could not subpoena the witness was inaccurate. The Witness Attendance Act (725 ILCS 220/3) creates a procedure to subpoena a material witness from out-of-state where the law of the state in which the witness resides contains a reciprocal provision. The state where the witness resided had such a reciprocal provision and the witness was material. Both the nature of the anticipated testimony of the witness and the on-the-record references to the defense desire to present his testimony indicate his testimony was crucial and could have affected the outcome of the case.

(Defendant was represented by Assistant Defender Jessica Arizo, Chicago.)

People v. Patrick, 406 Ill.App.3d 548, 956 N.E.2d 443 (2d Dist. 2010)

A defendant who is represented by counsel generally has no authority to file *pro se* motions, and the court should not consider them. An exception to this rule permits a defendant represented by counsel to raise *pro se* claims of ineffective assistance of counsel if they include supporting facts and specific claims. The court then has the duty to examine the factual basis of defendant's claim. If the court determines that the claim is meritless or

pertains only to matters of trial strategy, the court may deny the *pro se* motion. If the allegations show possible neglect of the case, new counsel should be appointed.

Defendant filed a *pro se* post-trial motion raising claims of ineffective assistance of counsel. The court refused to consider the motion. While some of the defendant's allegations pertained to matters of trial strategy, others might support an ineffectiveness claim. At a minimum the court was required to inquire into these allegations.

The court remanded for a hearing on defendant's motion.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Porter, 2014 IL App (1st) 123396 (No. 1-12-3396, 11/12/14)

1. When a defendant makes a *pro se* post-trial allegation of ineffective assistance of counsel, the trial court must conduct an adequate inquiry into the factual basis of the claim. If the court determines that the claim lacks merit or pertains solely to trial strategy, it need not appoint new counsel. By contrast, if the court finds possible neglect of the case, new counsel must be appointed. Where the trial court fails to conduct an inquiry into a *pro se* ineffective assistance claim, *de novo* review is applied.

In order to trigger the trial court's duty to inquire about counsel's representation, defendant must make more than a bald allegation that counsel was ineffective. In other words, the trial court is required to act only if the *pro se* defendant makes specific claims with supporting facts. The trial judge does not have a *sua sponte* duty to investigate merely because it learns that defendant has complained about counsel's actions.

2. Here, defendant's statements at sentencing did not trigger a duty on the part of the trial court to inquire as to ineffective assistance of counsel. Defendant made no overt claim of ineffective assistance, but continued to profess her innocence. The court concluded that to the extent defendant's statements referred to counsel's representation, those statements amounted to a disagreement over strategy and the nature of the State's evidence rather than an allegation of incompetence.

Furthermore, the court concluded that defendant's statements were "rambling" and ambiguous. Statements which are susceptible to more than one interpretation do not trigger a duty on the part of the trial court to inquire about counsel's representation. **People v. Taylor**, 237 Ill.2d 68, 927 N.E.2d 1172 (2010).

Because defendant failed to bring a specific claim of ineffective assistance to the trial court's attention, the court was not required to conduct an inquiry concerning counsel's representation.

(Defendant was represented by Assistant Defender Jessica Ware, Chicago.)

People v. Raney, 2014 IL App (4th) 130551 (No. 4-13-0551, 4/4/14)

Where the defendant makes a *pro se*, post-trial claim of ineffective assistance of counsel, the trial court must conduct an inquiry into the underlying factual basis of the claim. If the court determines that the allegations show possible neglect of the case, it should appoint new counsel to represent defendant in a hearing regarding the ineffective assistance of counsel claim. However, if the claim of ineffectiveness is spurious or pertains only to trial strategy, the court may deny the motion without further action.

Where defendant filed a post-trial *pro se* motion arguing that his sentence should be reduced because at sentencing counsel refused to subpoena witnesses, and the trial court made no inquiry concerning that claim, the cause was remanded for such an inquiry.

(Defendant was represented by Supervisor Larry Bapst, Springfield.)

People v. Remsik-Miller, 2012 IL App (2d) 100921-U (No. 2-10-0921, 3/8/12)

When a defendant brings a *pro se* claim of ineffective assistance of counsel, the trial court must adequately inquire into the claim by: (1) asking trial counsel about the facts and circumstances related to the defendant's allegations; (2) asking the defendant for more specific information; and (3) relying on its knowledge of counsel's performance at trial and the insufficiency of defendant's allegations on their face. If defendant's allegations show possible neglect of the case, the court should appoint new counsel to argue defendant's claim of ineffective assistance. If the court determines that the claim lacks merit or pertains only to matters of trial strategy, it may deny the claim. If the court fails to conduct the necessary preliminary inquiry into the factual basis of defendant's allegations, the case must be remanded for the limited purpose of allowing the court to do so. The threshold question of whether defendant's statement constitutes a *pro se* claim of ineffective assistance of counsel sufficient to trigger the court's duty to inquire is a question of law reviewed *de novo*.

At a hearing on defendant's *pro se* motion to reconsider sentence, defendant stated that she wanted to make sure that defense counsel was no longer listed as her attorney and expressed her belief that defense counsel "did [not] represent [her] to his fullest ability during [her] trial."

The Appellate Court acknowledged First District authority appearing to require a fair degree of specificity before a duty to inquire is triggered, but noted Second District authority suggesting even a bare claim of ineffectiveness warrants some degree of inquiry. Aside from this conflict, the First District authority appeared to disregard the holding of the Illinois Supreme Court in **People v. Moore**, 207 Ill.2d 68, 797 N.E.2d 631 (2003), that the court must conduct some type of inquiry into defendant's claim, even if it appears to lack merit. Therefore, where defendant's statements made clear that she was complaining about her attorney, the court should have at least asked a follow-up question.

The court rejected the State's argument that defendant's statement related back to defendant's *pro se* motion for new trial wherein defendant had expressed her desire to call additional witnesses. Nothing in the transcript supports that conclusion and the trial court had not treated the motion for new trial as having raised an ineffectiveness claim.

(Defendant was represented by Assistant Defender Kathleen Weck, Chicago.)

People v. Rippatoe, 408 Ill.App.3d 1061, 945 N.E.2d 132 (3d Dist. 2011)

In rejecting a *pro se* post-trial motion claiming ineffective assistance of trial counsel, the trial court erred by considering its knowledge of defense counsel's performance in other cases. The trial judge may consider only the record before it when ruling on a motion, and may not base its determination on a private investigation or private knowledge.

The error did not require reversal, however. Unlike **People v. Steidl**, 177 Ill.2d 239, 685 N.E.2d 1335 (1997), in which the Illinois Supreme Court found reversible error where the trial court considered its personal knowledge of defense counsel's actions in other cases, an evidentiary hearing was held in this case. Thus, there was an independent basis for the court to determine that counsel had acted competently.

(Defendant was represented by Assistant Defender Charles Hoffman, Supreme Court Unit.)

People v. Scates, 393 Ill.App.3d 566, 914 N.E.2d 243 (4th Dist. 2009)

The trial court is required to examine the basis for a *pro se* allegation of ineffective assistance of counsel at trial. If the court determines that the claim lacks merit or pertains

only to matters of trial strategy, new counsel need not be appointed. However, if the allegations show possible neglect of the case, new counsel should be appointed.

The trial court erred where it did not at any time consider defendant's *pro se* motion claiming that defense counsel had been ineffective for failing to: (1) present defendant's theory of the case, (2) present jury instructions on lesser included offenses, (3) make relevant objections, (4) object to the removal of an African-American, female juror, (5) contest the State's evidence, (6) move to substitute judge and change venue, and (7) call the alleged victim of the crime. The cause was remanded for the motion to be considered. (See also **DISORDERLY, ESCAPE, RESISTING & OBSTRUCTING OFFENSES**, §16-1(e)).

(Defendant was represented by Assistant Defender Erica Clinton, Springfield.)

People v. Tolefree, 2011 IL App (1st) 100689 (No. 1-10-0689, 8/12/11)

A trial court is not automatically required to appoint new counsel when a defendant makes a *pro se* claim of ineffective assistance of counsel post-trial. Instead, the trial court must first conduct an inquiry to examine the factual basis underlying the claim. A trial court may consider: (1) trial counsel's answers and explanations; (2) a brief discussion between the court and defendant; or (3) its knowledge of defense counsel's performance at trial and the insufficiency of defendant's allegations on their face. A claim lacks merit if it is conclusory, misleading, or legally immaterial, or does not bring to the court's attention a colorable claim of ineffective assistance of counsel. If a defendant's claim indicates the trial counsel neglected the case, new counsel must be appointed. If the court determines that the claim lacks merit or only pertains to matters of trial strategy, the court need not appoint new counsel and may deny the *pro se* motion. A reviewing court may find the failure to appoint new counsel harmless beyond a reasonable doubt if there is enough of a record made concerning defendant's claim for the Appellate Court to evaluate the trial court's ruling.

Defendant was convicted of driving on a suspended license and driving without insurance. Post-trial, he complained that trial counsel failed to cross-examine the arresting officer about his search of defendant's vehicle for drugs and whether defendant had a valid driver's license. The trial court's decision to not conduct further inquiry into defendant's complaints was not manifestly erroneous, and, even if error, was harmless, as defendant's claims either lacked relevance or related to trial strategy.

Defendant testified at trial that the arresting officer searched his vehicle for drugs. Whether the officer conducted a search of defendant's vehicle for drugs was irrelevant because it did not make it any more or less likely that defendant drove on a suspended license or without insurance. Counsel's failure to conduct any further inquiry on the subject of a search for drugs was harmless because the search was not relevant to the charges.

With respect to the failure to cross-examine the officer about whether he had a valid license, the officer testified that defendant admitted having a suspended license, and that the officer verified through the LEADS computer system that defendant had no valid license. The State also produced defendant's certified driving abstract at trial. Defense counsel's decision to ask no questions of the officer about whether defendant had a valid license was reasonable in light of this evidence. Counsel did examine the officer about whether he approached defendant's vehicle when it was parked to support defendant's theory that he had not been driving. Defendant was unable to show that counsel's decision was not valid trial strategy or how it could have affected the outcome of the case.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

People v. Vargas, 409 Ill.App.3d 790, 949 N.E.2d 238 (1st Dist. 2011)

1. Where the defendant presents a *pro se* post-trial claim that trial counsel is ineffective, the trial court must examine the claim and its factual basis. **People v. Krankel**, 102 Ill.2d 181, 464 N.E.2d 1045 (1984). If the *pro se* claim is without merit or obviously concerns trial strategy, new counsel need not be appointed. If the allegations demonstrate the possibility that defense counsel neglected the case, new counsel must be appointed. The adequacy of the trial court's inquiry into a *pro se* claim of ineffectiveness is reviewed *de novo*.

2. The trial court erred where it ignored defendant's *pro se* claim of ineffectiveness except to conclude that by criticizing his attorney, defendant failed to show remorse for the offense. Although the defendant's complaint did not contain a great deal of detail, it contained sufficient information to trigger a need for further questioning. The court concluded that the trial judge's failure to inquire raised a question whether the judge was even familiar with **Krankel**.

The court also criticized the State for arguing that defendant's failure to raise an ineffectiveness issue on appeal showed that the issue lacked merit. The absence of an ineffectiveness argument by appellate counsel "is irrelevant to an assessment of the adequacy of the trial court's response to defendant's motion."

3. The court acknowledged that the trial judge may evaluate a *pro se* ineffectiveness motion based upon the judge's knowledge of counsel's performance and the merits of the claims on their face. Here, however, defendant's claims related to counsel's failure to investigate matters outside the record. The validity of such claims would not have been apparent from counsel's conduct of the trial, and could not have been evaluated without further inquiry.

The cause was remanded with instructions to the trial court to conduct a **Krankel** inquiry, and to order a new trial if that inquiry reveals that defense counsel was ineffective.

(Defendant was represented by Assistant Defender Elena Penick, Chicago.)

People v. Vargas, ___ Ill.App.3d ___, 919 N.E.2d 414 (1st Dist. 2009) (No. 1-08-0383, 11/20/09)

1. Under **People v. Krankel**, 102 Ill.2d 181, 464 N.E.2d 1045 (1984), counsel need not be appointed merely because a defendant presents a *pro se* claim that his attorney is ineffective. However, the trial court is required to consider the defendant's complaint and its factual basis. If the claim appears to be without merit or concerns a matter of trial strategy, new counsel need not be appointed. If the allegations demonstrate the possibility that the case has been neglected, however, new counsel is required.

Some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the representation is permissible, and is usually necessary for the trial judge to fulfill its duty under **Krankel**.

2. Where the defendant clearly alleged that counsel had not investigated certain matters, and the trial court made no inquiry concerning the allegations but instead criticized the defendant for asserting counsel's shortcomings, the judge clearly failed to comply with **Krankel**. The cause was remanded with instructions for the trial court to conduct the **Krankel** inquiry.

(Defendant was represented by Assistant Defender Elena Penick, Chicago.)

People v. Walker, 2011 IL App (1st) 072889 (No. 1-07-2889, 9/1/11)

1. Under **People v. Krankel**, 102 Ill.2d 181, 464 N.E.2d 1045 (1984), the trial court is required to inquire into a *pro se* defendant's claim of ineffectiveness by his trial attorney. If the inquiry shows possible neglect of the case by defense counsel, new counsel must be appointed.

An inquiry is not required merely on a bald assertion of ineffectiveness. Instead, the defendant triggers the duty to inquire by raising specific claims with supporting facts.

2. Here, defendant did not raise a sufficient claim of ineffective assistance to trigger a duty on the part of the trial court to inquire. When defense counsel informed the trial court at a pretrial hearing that defendant intended to reject a plea offer, defendant said, "I'm rejecting you. I don't trust you. You are the devil." Defendant was receiving medication for a psychiatric condition, and had been found fit for trial with medication.

Noting that defendant raised no further concerns about defense counsel throughout the five month-pretrial period or during trial, the Appellate Court concluded that defendant's comments did not present a specific claim concerning ineffective assistance. Thus, the trial court did not err by failing to inquire into defense counsel's performance.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People v. Washington, 2012 IL App (2d) 101287 (No. 2-10-1287, 5/22/12)

Excluding instances where prejudice is irrelevant, a circuit court is not obligated to address *pro se* claims of ineffective assistance of counsel before trial, as is required post-trial by **People v. Krankel**, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), and its progeny. **People v. Jocko**, 239 Ill. 2d 87, 940 N.E.2d 59 (2010). **Jocko** reasoned that claims requiring a demonstration that counsel's performance prejudiced the defendant cannot be resolved prior to trial. Examples of instances where prejudice is irrelevant include a claim of a potential conflict of interest, **Holloway v. Arkansas**, 435 U.S. 475 (1978), or the complete deprivation of counsel. **United States v. Cronic**, 466 U.S. 648 (1984).

Therefore, when a *pro se* claim of ineffective assistance of counsel is made prior to trial, the court, at a minimum, must review the defendant's assertions to assess whether or not the court would be required to consider the prejudicial effect of counsel's performance on the outcome of the proceeding in order to assess whether counsel was ineffective. If the court determines that resolution of the defendant's claims does not require that it consider prejudice, then it must conduct an inquiry in accordance with **Krankel** and its progeny before trial. If the court determines that it must consider prejudice, then it is not obligated to conduct any hearing, although, at the end of trial, the court should address the defendant's previously-raised claims.

Defendant complained prior to trial that counsel failed to file a motion to dismiss when defendant was indicted more than 30 days after the date he was taken into custody. Because any such dismissal would not bar the filing of new charges, a claim of ineffective assistance of counsel based on the failure to file such a motion would require a showing of prejudice based on the outcome of trial, and not just the failure to obtain a temporary dismissal. Therefore, the court was not required to address that complaint prior to trial. The court committed no error in failing to inquire further after trial, as nothing suggested prejudice resulted from the delayed indictment. Similarly, defendant's complaints that he was not brought to court on a status date and counsel failed to show him discovery materials were not cognizable prior to trial without a demonstration of prejudice, and in any event, do not describe deficient conduct of counsel.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

People v. Washington, 2015 IL App (1st) 131023 (No. 1-13-1023, 6/30/15)

1. Where defendant makes a *pro se* post-trial allegation of ineffective assistance of counsel, the trial court must conduct an adequate inquiry into the factual basis for the claim. **People v. Krankel**, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). To invoke the **Krankel** rule,

defendant must allege ineffective assistance of counsel and provide some factual support for the allegation. The pleading requirements for raising a *pro se* claim of ineffectiveness are relaxed, but the defendant must satisfy "minimum requirements."

Mere awareness by the trial court that defendant has complained about counsel's representation imposes no duty to *sua sponte* investigate defendant's concerns. However, there is no requirement that **Krankel** motions be placed in writing.

2. When asked if he wanted to make a statement in allocution at sentencing, defendant replied that he wanted to make a "verbal motion" of ineffective assistance of counsel and that he did not have access to the law library. The trial court responded by stating that "all motions are required to be in writing" and that defense counsel "did a fine job for you." The judge added that although defense counsel "has been anything but ineffective," defendant could not be prevented from filing a written motion.

The trial judge did not ask defendant for the basis of his claim of ineffectiveness. Defendant responded to the judge's statements by saying that he would "have to" withdraw the motion and proceed to sentencing.

The Appellate Court concluded that the trial judge erred by stating that a **Krankel** motion must be in writing and by failing to question defendant about his claim. An oral motion is permissible so long as it sufficiently brings the claim to the trial court's attention. Here, defendant's statement was sufficient to bring the claim to the trial court's attention and to trigger a duty to ascertain the basis for the claim.

Because the trial court failed to conduct any inquiry, there is no way to know the nature of the defendant's complaint or whether further inquiry or appointment of counsel was required. Thus, a remand for a proper **Krankel** inquiry was required.

3. The court rejected the State's argument that the trial court conducted an adequate **Krankel** hearing when it stated that counsel's performance was "anything but ineffective." Although a trial court may make a determination of counsel's performance based on its knowledge of counsel's performance at trial, such action is possible only where the trial judge is aware of the specific basis for the defendant's complaint. Where the trial court failed to make any inquiry to determine the basis of the complaint, and instead informed defendant that he would have to raise his motion in writing, the judge lacked a sufficient basis to determine whether counsel had been ineffective.

4. The court also rejected the State's argument that defendant waived the **Krankel** claim by withdrawing his motion after the trial court stated that a written motion was required. The court found that the withdrawal was not voluntary where it was made in response to the judge's erroneous statement that a written motion was required. "We cannot find waiver where a defendant acquiesces to an erroneous filing requirement insisted upon by the court."

(Defendant was represented by Assistant Defender Ben Wolowski, Chicago.)

People v. Whitaker, 2012 IL App (4th) 110334 (No. 4-11-0334, 8/22/12)

1. When a defendant raises a *pro se* allegation of ineffective assistance of counsel, the trial court must examine the factual basis of the claim before deciding whether new counsel must be appointed. New counsel need not be appointed if a claim lacks merit or concerns only trial strategy. If the inquiry shows possible neglect of the case by defense counsel, however, a different attorney should be appointed to argue the claim of ineffective assistance of counsel.

In order to raise a claim of ineffective assistance of counsel, a *pro se* defendant need only bring the claim to the trial court's attention. Illinois case law recognizes that a claim of ineffectiveness may be brought to the trial court's attention through correspondence, so long

as the court is made aware of the defendant's complaint. A letter is sufficient to trigger the trial court's duty to inquire if it "expressly complain[s] about counsel's performance."

2. The trial court did not err by failing to inquire into a claim that based upon defense counsel's representations, defendant believed that he would receive an 18-month sentence in return for his guilty plea. The court concluded that the claim was adequately raised by defendant's testimony at the hearing on motion to withdraw the guilty plea. However, no inquiry was required where the claim was refuted by the transcript of the guilty plea proceeding, which showed that defendant answered in the affirmative when asked whether he understood that the sentence was entirely up to the sentencing judge, and in the negative when asked whether any promises had been made to induce his plea. The trial court is not required to inquire into a claim that is rebutted by the record. (See **People v. Jocko**, 239 Ill. 2d 87, 940 N.E.2d 59 (2010)).

3. Furthermore, the trial court was not required to inquire concerning claims which defendant raised in a letter to the trial judge. The court acknowledged that defendant did not waive the claim, although there was no indication that the trial judge or the parties were aware of the letter, where defendant tried to raise a *pro se* issue at the close of the postplea hearing but was prevented from doing so by the trial judge.

The court concluded, however, that an inquiry was not required because the letter was ambiguous and did not clearly raise a *pro se* claim of ineffectiveness. The court found that the letter could have been intended to explain defendant's reasons for wanting to ensure that he would be brought to court for the next hearing, and not to raise a claim of ineffectiveness. Because there was not a clear allegation of ineffectiveness, no inquiry was required.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

People v. Willis, 2013 IL App (1st) 110233 (No. 1-11-0233, 9/30/13)

When a defendant files a *pro se* post-trial motion complaining of ineffective assistance of counsel, the trial court must conduct a preliminary inquiry into the factual basis of the claim. Only if the trial court conducts a preliminary inquiry and determines that the claim lacks merit or pertains only to matters of trial strategy can the court deny the motion without appointing new counsel.

Retained counsel filed a post-trial motion alleging that he was ineffective in failing to use due diligence to ensure that a defense witness would testify at trial. When the prosecutor stated that it was a conflict of interest for counsel to argue his own ineffectiveness, defense counsel struck that allegation from his motion. The court made no inquiry into this allegation and it was not raised again.

The Appellate Court found these facts "unusual." It took note that the defendant was a minor at the time of trial and could not reasonably be expect to raise a claim of ineffective assistance of counsel on his own. It also concluded that Appellate Courts have not consistently interpreted **People v. Pecoraro**, 144 Ill. 2d 1,578 N.E.2d 942 (1991), to exclude cases in which the accused is represented by retained counsel from the requirement that the trial court conduct an inquiry into claims of ineffective assistance of counsel.

The conflict of interest faced by defense counsel when he alleged and then withdrew a claim of his own ineffectiveness is precisely the conflict that the mandated preliminary inquiry attempts to rectify. An attorney cannot be expected to argue his own ineffectiveness. In light of this conflict, the trial court has a duty to conduct an adequate inquiry when allegations of ineffective assistance arise. Because the trial court made no inquiry into counsel's withdrawn claim of his own ineffectiveness, the Appellate Court remanded for the limited purpose of conducting an adequate inquiry into the claim.

(Defendant was represented by Assistant Defender Darrel Oman, Chicago.)

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§13-5(d)(3)(a)(2)
New Counsel Required

People v. Yaworski, 2014 IL App (2d) 130327 (No. 2-13-0327, 10/6/14)

The right to counsel in post-conviction proceedings is statutory, not constitutional, and defendants are only entitled to a reasonable level of assistance. The right to reasonable assistance includes the right to conflict-free representation.

The court held that it was improper to appoint defendant's trial attorney to represent him in his post-conviction proceedings where defendant had alleged that he had been denied the effective assistance of trial counsel. In **People v. Hardin**, 217 Ill. 2d 289 (2005), the Illinois Supreme Court addressed the question of whether it is a conflict for an attorney from a public defender's office to represent a defendant in a post-conviction proceeding alleging the ineffectiveness of another attorney from that office. The Supreme Court held that such questions should be decided on a case-by-case basis, and depend on how closely post-conviction counsel's interests are aligned with those of trial counsel. Here, where post-conviction and trial counsel are the same, the interests are identical and the conflict is inherent.

The court rejected the State's argument that under **People v. Moore**, 207 Ill. 2d 68 (2003), defendant's right to different counsel depended on the merits of the underlying ineffectiveness claim. In **Moore** defendant raised a claim of ineffective assistance in a post-trial motion. Here, by contrast, defendant raised his claim in a *pro se* post-conviction petition. The trial court advanced the petition to the second-stage, finding that defendant had made an arguable claim of ineffectiveness. Once his *pro se* petition had cleared the first-stage hurdle, defendant was entitled to an attorney with undivided loyalty. There was no need to once again determine whether the claim had merit.

The case was remanded for further post-conviction proceedings with the appointment of new counsel.

The dissent would follow **Moore** and hold that there was no need to appoint new counsel where the underlying claim of ineffectiveness had no merit.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

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§13-5(d)(3)(a)(3)
New Counsel Not Required

People v. Tolefree, 2011 IL App (1st) 100689 (No. 1-10-0689, 8/12/11)

A trial court is not automatically required to appoint new counsel when a defendant makes a *pro se* claim of ineffective assistance of counsel post-trial. Instead, the trial court must first conduct an inquiry to examine the factual basis underlying the claim. A trial court may consider: (1) trial counsel's answers and explanations; (2) a brief discussion between the court and defendant; or (3) its knowledge of defense counsel's performance at trial and the insufficiency of defendant's allegations on their face. A claim lacks merit if it is conclusory,

misleading, or legally immaterial, or does not bring to the court's attention a colorable claim of ineffective assistance of counsel. If a defendant's claim indicates the trial counsel neglected the case, new counsel must be appointed. If the court determines that the claim lacks merit or only pertains to matters of trial strategy, the court need not appoint new counsel and may deny the *pro se* motion. A reviewing court may find the failure to appoint new counsel harmless beyond a reasonable doubt if there is enough of a record made concerning defendant's claim for the Appellate Court to evaluate the trial court's ruling.

Defendant was convicted of driving on a suspended license and driving without insurance. Post-trial, he complained that trial counsel failed to cross-examine the arresting officer about his search of defendant's vehicle for drugs and whether defendant had a valid driver's license. The trial court's decision to not conduct further inquiry into defendant's complaints was not manifestly erroneous, and, even if error, was harmless, as defendant's claims either lacked relevance or related to trial strategy.

Defendant testified at trial that the arresting officer searched his vehicle for drugs. Whether the officer conducted a search of defendant's vehicle for drugs was irrelevant because it did not make it any more or less likely that defendant drove on a suspended license or without insurance. Counsel's failure to conduct any further inquiry on the subject of a search for drugs was harmless because the search was not relevant to the charges.

With respect to the failure to cross-examine the officer about whether he had a valid license, the officer testified that defendant admitted having a suspended license, and that the officer verified through the LEADS computer system that defendant had no valid license. The State also produced defendant's certified driving abstract at trial. Defense counsel's decision to ask no questions of the officer about whether defendant had a valid license was reasonable in light of this evidence. Counsel did examine the officer about whether he approached defendant's vehicle when it was parked to support defendant's theory that he had not been driving. Defendant was unable to show that counsel's decision was not valid trial strategy or how it could have affected the outcome of the case.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

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§13-5(d)(3)(b)
Where Defendant Files an ARDC Complaint or Lawsuit

People v. Gilbert, 2013 IL App (1st) 103055 (No. 1-10-3055, 3/19/13)

1. Within 21 days after the entry of a final order of disbarment or suspension for more than six months, an attorney must notify his or her clients about the discipline and the client's right to retain another attorney. (Supreme Court Rule 764). On the other hand, an attorney who merely faces a possible suspension of his license due to a recommendation by the ARDC remains a licensed attorney and is qualified to represent clients until the Supreme Court acts on the recommendation. Attorneys are permitted to practice law until they are actually suspended or disbarred, and no *per se* rule grants a new trial to a criminal defendant merely because their attorney faces potential suspension or disbarment.

Although defense counsel was facing possible suspension due to an ARDC hearing board's recommendation, he was under no duty to inform defendant of the potential suspension until the Illinois Supreme Court acted on the recommendation. Thus, where no action had been taken at the time of trial and the Supreme Court did not enter a suspension

order until six months after trial, counsel was not ineffective for failing to advise defendant that he might be suspended.

2. The court rejected defendant's argument that trial counsel was ineffective because he suffered from dementia during the trial. Although defendant claimed that the records of the ARDC hearing board indicated that counsel suffered from "significant mental health problems," those records were not part of the record on appeal. Furthermore, psychological evaluations relied upon by the ARDC were conducted some two years before defendant's trial. The court also noted that the trial judge conducted a hearing on counsel's post-trial motion, and that the transcript of that hearing gave no indication that counsel suffered from dementia.

3. The court rejected defendant's argument that counsel committed several errors at trial which rendered his representation ineffective, including that counsel relied on an argument of jury nullification rather than compulsion or coercion. An attorney is not necessarily ineffective for relying on a defense that is unsupported by the evidence. Where the evidence of guilt is overwhelming, the defendant persists in pleading not guilty, and the circumstances of the case render other defensive strategies unavailable, counsel may reasonably elect to present a nonlegal defense. Although counsel may not argue that the jury should ignore the law, an attempt to invoke the empathy, compassion, understanding or sympathy of the jurors may create the possibility of jury nullification.

Because the evidence of guilt was overwhelming and there was no viable defense, counsel's trial strategy of arguing jury nullification was reasonable under the circumstances. Furthermore, even if counsel did act unreasonably, in light of the overwhelming evidence it is unlikely that defendant can satisfy the prejudice requirement of **Strickland.**

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

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§13-5(e)
Conflicts Due to Third Parties

In re Austin M., 403 Ill.App.3d 667, 941 N.E.2d 903 (4th Dist. 2010)

1. A *per se* conflict of interest arises when counsel has ties to an entity that would benefit from a verdict that is unfavorable to the defendant. Where a *per se* conflict exists, reversal is automatic unless the record shows that the defendant was aware of the conflict and intentionally waived it.

The respondent expressly waived any *per se* conflict of interest resulting from claims that he and his co-defendant were each the victim of sex offenses committed by the other. Furthermore, representation by a single attorney did not constitute a conflict where neither of the minors claimed to have been abused by his co-respondent; both consistently maintained that the allegations were completely fabricated and that no sexual offenses had occurred.

2. The court rejected the argument that defense counsel labored under an actual conflict of interest because the respondent's parents directed counsel's representation in a way that was contrary to the respondent's interests. Defense counsel represented only the respondent; in fact, the trial court specifically admonished the parents that counsel was not representing them. Furthermore, counsel's remarks during the proceedings did not suggest that his consultation with the parents in any way contradicted the interests of the minor.

The court also stated that in juvenile cases, defense counsel must not only protect the juvenile's legal rights but also recommend a disposition that is in the juvenile's best interest.

The latter duty may require consultation between counsel and the parents.

3. There was no conflict of interest in counsel's dual role as defense attorney and guardian *ad litem*. First, the court rejected the State's argument that counsel did not act as guardian *ad litem*. Although the trial judge never expressly appointed counsel as guardian *ad litem*, both the trial court and defense counsel conceived the attorney's role as guardian *ad litem* (i.e., safeguarding the interests of both the minor and society), rather than as a traditional defense attorney. Because counsel in fact functioned as a guardian *ad litem*, the Appellate Court elected to reach the issue although defense counsel was never formally appointed.

Because 705 ILCS 405/1 contemplates that a single attorney can be both guardian *ad litem* and defense counsel "unless the court finds that the minor's interests are in conflict with what the guardian *ad litem* determines to be in the interest of the minor," the court rejected the argument that it is necessarily a conflict of interest for an attorney to act both as guardian *ad litem* and defense counsel. The court acknowledged that other jurisdictions hold that a *per se* conflict exists where one person is both guardian *ad litem* and defense counsel, but concluded that Illinois follows a different rule.

Furthermore, counsel's dual role did not constitute an actual conflict in this case. An actual conflict exists when some specific defect in defense counsel's strategy, tactics or decision making is attributable to a conflict of interest.

Although defense counsel allowed certain testimony to be presented by videotape and waived cross-examination of the witnesses who had been videotaped, the minor expressly waived any objection to that procedure. Furthermore, counsel's actions did not prejudice the minor where the trial court deemed the videotaped testimony unworthy of belief. The court also noted that by agreeing to the videotaped testimony, counsel gained an advantage for the defense by depriving the State of "more persuasive" live testimony.

4. Defense counsel was not ineffective although he failed to move to suppress a statement made by the minor to police. In determining whether a confession is voluntary, the totality of the circumstances are to be considered, including: (1) the respondent's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning, (2) the legality and duration of the detention, (3) the duration of the questioning, and (4) any physical or mental abuse by the police. No single factor controls – whether a statement is voluntary depends on whether the respondent made the statement freely, voluntarily and without compulsion or inducement of any sort.

Because the statement would likely have been deemed voluntary had a motion to suppress been filed, counsel was not ineffective. The respondent was 16 years old, arrived at the police station voluntarily, signed a form acknowledging his **Miranda** rights, and submitted to police questioning in the presence of his father. Although the father testified that the minor made no statements and that the police chief employed "psychologically coercive tactics," the record contained a basis on which a reasonable judge could have viewed the officers' testimony as more persuasive.

5. The court rejected respondent's argument that counsel was ineffective because he stipulated to the admissibility of videotaped statements of three children, without challenging the statements as hearsay or exercising defendant's right to confrontation. The respondent was specifically advised by the trial court of his right to cross-examine the witnesses, and waived that right. In addition, whether to admit the evidence by way of videotape was a matter of trial strategy which had the beneficial effect of depriving the State of the ability to present "more persuasive" live testimony.

(The respondent was represented by Assistant Defender Jacqueline Bullard,

Springfield.)

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§13-5(f)
Waiving Conflicts of Interest

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§13-5(g)
Other Conflict Issues

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