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§13-1
Right to Counsel

§13-1(a)
Generally

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1961) Right to counsel at trial of serious crimes.

Nichols v. U.S., 511 U.S. 738, 114 S.Ct. 192, 128 L.Ed.2d 745 (1994) Overruling Baldasar v. Illinois, 446 U.S. 222 (1980), which prohibited enhancement of a misdemeanor to a felony based on a previous uncounseled misdemeanor conviction. Where a prior uncounseled conviction is valid because imprisonment was not imposed, enhancement of a subsequent sentence is not prohibited.

Misdemeanor defendants need not be warned that an uncounseled conviction might someday be used to enhance a subsequent crime; such a requirement would be unworkable because many misdemeanor convictions do not occur in courts of record, and most criminal defendants expect to be treated more harshly if convicted of a subsequent crime.

Iowa v. Tovar, 541 U.S. 77, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) A criminal defendant who faces the possibility of incarceration has a Sixth Amendment right to the assistance of counsel at all "critical stages" of the criminal process. Because a guilty plea hearing is a "critical stage," a defendant who received a sentence of two days incarceration for DUI was entitled to counsel at the plea hearing. See also, People v. Williams, 358 Ill.App.3d 1098, 833 N.E.2d 10 (4th Dist. 2005) (one consideration in determining whether a stage is "critical" and therefore carries the right to the assistance of counsel is whether the defendant may lose rights if not exercised at that stage; post-sentencing motion is a critical stage of the prosecution because sentencing challenges are waived if not preserved in the motion).

Massaro v. U.S., 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003) A person convicted of a federal crime does not waive an ineffective assistance of counsel claim by raising it for the first time in a collateral proceeding, even if the issue could have been raised on direct appeal.

Rothgery v. Gillispie County, 554 U.S. ___, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008) 1. The Sixth Amendment right to counsel attaches at the start of adversarial judicial proceedings. The initial appearance before a judicial officer, at which time the defendant learns of the charge and that his liberty is subject to restraint, marks the start of adversarial judicial proceedings whether or not the prosecutor is aware of or participates in the hearing.

Here, adversarial judicial proceedings were commenced by a probable cause hearing that was statutorily required upon defendant's warrantless arrest, and at which defendant was informed of the charge and released pending indictment.

2. In a concurring opinion, Justices Alito, Roberts and Scalia held that the attachment of the Sixth Amendment right to counsel is relevant only in that it signifies the commencement of the criminal prosecution. The concurring justices believed that counsel need not be appointed until necessary for an effective defense at trial. See also, People v. Ballard, 206 Ill.2d 151, 794 N.E.2d 788 (2002) (right to counsel attaches upon the initiation of

adversarial judicial proceedings by formal charge, preliminary hearing, indictment, information or arraignment, where there "has been significant prosecutorial involvement at the time of the questioned action," or "if the government has committed itself" to prosecuting the defendant; right to counsel is not triggered merely because police obtain an arrest warrant or interrogate a suspect; right to counsel was not triggered because an assistant State's Attorney assisted law enforcement officers in their investigation, where the assistant lacked authority to charge the defendant until just before defendant gave a statement and decided to file charges only after the statement was obtained).

People v. Clark, 386 Ill.App.3d 673, 899 N.E.2d 342 (3d Dist. 2008) The attorney-client relationship is consensual, and arises when both the attorney and the client consent to its formation. Where defendant clearly authorized a substitute public defender to act on his behalf, and the public defender accepted that authority by advising defendant about his case, an attorney-client relationship existed.

Cumulative Digest Case Summaries **§13-1(a)**

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

Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) Right to counsel at preliminary hearing.

U.S. v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) Right to counsel at post-indictment lineup. Compare, Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (no right to counsel at pre-indictment lineup).

Moore v. Illinois, 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977) Right to counsel for identification at preliminary hearing.

Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961) Right to counsel at arraignment.

Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967) Right to counsel at probation revocation.

Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) Right to counsel on appeal. See also, Swenson v. Bosler, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33 (1967) (right to the assistance of counsel on appeal does not depend on request); Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) (there is no constitutional requirement to appoint counsel on discretionary (or second) appeals in State courts or for filing a petition for

certiorari); Halbert v. Michigan, 545 U.S. 605, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005) (under a two-tier system of appellate review whereby the Michigan Court of Appeals hears appeals as a matter of right from criminal trials and by leave from guilty plea convictions and the Michigan Supreme Court hears cases only by leave, the State was required to appoint counsel for indigents who were seeking to file an application for leave to appeal from a guilty plea); People v. Jackson, 362 Ill.App.3d 1196, 841 N.E.2d 1098 (4th Dist. 2006) (Supreme Court Rules 607 and 651(d) support an argument that a criminal defendant has the right to represent himself on appeal; however, defendant failed to make a timely assertion of that right where he first mentioned Rules 607 and 651(d) in the brief which appointed counsel filed in his behalf).

Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) The right to appointed counsel applies only to the first appeal of right, and not to an appeal in a collateral, post-conviction proceeding.

People v. Larsen, 74 Ill.2d 348, 385 N.E.2d 679 (1979) A defendant does not have the right to counsel at a court ordered psychiatric examination. However, statements made during court ordered examinations, without a waiver of the right to counsel, are not admissible at a criminal trial.

People v. Baker, 92 Ill.2d 85, 440 N.E.2d 856 (1982) A defendant has a constitutional right to counsel at sentencing. See also, People v. Hughes, 315 Ill.App.3d 86, 733 N.E.2d 705 (1st Dist. 2000) (defendant has a constitutional right to be represented by counsel at sentencing; defendant abandons his right to counsel only where his conduct "prevents the effective resolution of the case and unnecessarily delays trial"; though trial judge did not err by allowing defense counsel to withdraw due to defendant's abuse, new counsel should have been appointed at defendant's request); People v. Brasseaux, 254 Ill.App.3d 283, 660 N.E.2d 1321 (2d Dist. 1996) (hearing on motion to reduce sentence is critical stage of the proceedings at which defendant is entitled to the appointment of counsel).

Tedder v. Fairman, 92 Ill.2d 216, 441 N.E.2d 311 (1982) An inmate in a correctional institution has the right of access to the courts, but even indigent inmates do not have the right to appointed counsel in a civil suit. However, prison authorities must provide "meaningful access" to the courts, which may include providing an adequate law library, paralegal help, law student clinical programs or staff attorneys.

People v. Price, 345 Ill.App.3d 129, 801 N.E.2d 1187 (2d Dist. 2003) Although the defendant has no statutory right to counsel under 725 ILCS 5/116-3 (authorizing a convicted defendant to seek fingerprint or forensic DNA testing on evidence that "was secured in relation to the trial which resulted in his or her conviction" but for which the requested testing was unavailable at trial), the trial court may appoint counsel if necessary to assure meaningful access to the courts.

People v. Ross, 303 Ill.App.3d 966, 709 N.E.2d 621 (1st Dist. 1999) Defendant had right to have counsel present when the trial court interrupted deliberations at 10:30 p.m. to ask whether the jury would be able to reach a verdict that night. Communication between the court and jury during deliberations is a critical stage of the proceedings.

People v. Kruger, 363 Ill.App.3d 1113, 845 N.E.2d 96 (4th Dist. 2006) 1. Under 725 ILCS 5/112-4(b), a person against whom the State's Attorney is seeking an indictment has the right to be accompanied by an attorney during grand jury testimony. The attorney may advise the client of his rights, but may not otherwise participate in the proceedings. The witness must be advised, before he testifies, that he has the right to refuse to give answers that will incriminate him, that anything he says may be used against him, that he has the right to be accompanied and advised by counsel, and that counsel will be appointed if the witness is indigent.

2. Once adversarial judicial proceedings have been initiated, the Sixth Amendment right to counsel attaches to the offense for which the charge has been filed. Once the right has attached and defendant has asserted his right to counsel, the prosecution may not initiate interrogation. Any purported waiver of defendant's previously-exercised Sixth Amendment right to counsel is invalid if it occurs in counsel's absence.

3. Where defendant had been charged with a firearms violation after an investigation into a murder disclosed that he was in possession of a firearm and ammunition, and defendant's attorney knew that defendant was a murder suspect and that the State contemplated calling him before the grand jury, defendant's Sixth Amendment rights were violated where the State took him before the grand jury without notifying defense counsel. "The State knew defendant was represented yet purposefully circumvented counsel to obtain a sworn statement of defendant's involvement in the . . . murder."

People v. Griffin, 305 Ill.App.3d 326, 713 N.E.2d 662 (2d Dist. 1999) Although Supreme Court Rule 604(d) provides that counsel must be appointed for an indigent defendant only after a post-plea motion is filed, where a guilty plea defendant shows an interest in appealing the trial court must determine whether he desires counsel to prepare and file a post-plea motion.

Cumulative Digest Case Summaries **§13-1(b)**

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

U.S. v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) 1. The Sixth Amendment right to counsel includes the right of a non-indigent defendant to choose the attorney who will represent him. The right to counsel of choice is limited by several factors, including the trial court's power to admit lawyers, allow argument, and control conflicts of interest, and by requirements of fairness and scheduling.

The trial court violated the right to counsel of choice when it refused to allow a California lawyer to participate in a Missouri federal proceeding because it mistakenly believed that in a separate case, the California attorney had violated a Missouri ethical rule.

2. The court rejected two arguments by the prosecution: (1) even where the right to counsel of choice is violated, reversal is required only if the defendant shows that the attorney who represented him was constitutionally ineffective, and (2) to obtain a reversal, the defendant must show some "identifiable" difference between the representation actually provided and that which would have been provided by counsel of choice. "Where the right to be assisted by counsel of one's choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation."

3. Violations of the Sixth Amendment right to counsel of choice are not subject to the harmless error rule. See also, People v. Bingham, 364 Ill.App.3d 642, 847 N.E.2d 903 (4th Dist. 2006) (denial of the right to counsel of choice is a "structural error" which cannot be harmless.)

Wheat v. U.S., 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) The Sixth Amendment right to counsel of choice has limitations. For example, a person who is not an attorney may not represent others, and a defendant may not insist on representation by an attorney he cannot afford, who declines the representation, or who has a relationship with an opposing party.

Where counsel's representation of a co-defendant created a potential conflict of interest, the trial court properly refused to allow counsel to represent the defendant despite the latter's willingness to waive the conflict. See also, People v. Crowe, 327 Ill.App.3d 930, 764 N.E.2d 1174 (1st Dist. 2002) (an attorney may be disqualified where there is either an actual conflict

of interest or a serious potential for a conflict; trial court's decision to disqualify defendant's counsel of choice will be overruled only for a clear abuse of discretion; trial court abused its discretion by disqualifying counsel here); People v. Kaeding, 165 Ill.App.3d 188, 518 N.E.2d 1058 (2d Dist. 1988) (defendant does not have a right to be represented by a person who is not an attorney).

People v. Holmes, 141 Ill.2d 204, 565 N.E.2d 950 (1990) The trial court did not violate the right to counsel by granting the State's motion to disqualify defense counsel due to the serious potential for a conflict of interest. Counsel had previously represented both the State's key witness and the witness's brother, and the trial court found that counsel's cross-examination might be restricted.

People v. West, 137 Ill.2d 558, 560 N.E.2d 594 (1990) An indigent defendant does not have the right to choose appointed counsel. See also, People v. Lewis, 165 Ill.App.3d 97, 518 N.E.2d 741 (2d Dist. 1988) (defendant does not have the right to select a particular public defender); People v. Carter, 132 Ill.App.3d 523, 477 N.E.2d 1307 (1st Dist. 1985) (indigent defendant is entitled to an attorney other than the public defender only on a showing of good cause; general dissatisfaction with appointed counsel is not sufficient).

Burnette v. Terrell, 232 Ill.2d 522, 905 N.E.2d 816 (2009) 1. The trial judge has authority to remove defense counsel under certain circumstances, including where: (1) there is a serious potential for conflict of interest, (2) the demands of the court's calendar necessitate that the trial be held when current counsel is unavailable, (3) counsel is intoxicated, or (4) counsel's performance is so inadequate that defendant is not receiving the level of assistance guaranteed by the Sixth Amendment. When removing counsel for any of these reasons, the trial judge must make an adequate record to allow a reviewing court to determine whether the removal was proper.

2. A trial judge is authorized to appoint the Office of the Public Defender to act as the attorney for an indigent defendant, but lacks authority to appoint individual assistant public defenders. Once the office has been appointed, the Public Defender has both the statutory authority and the responsibility to assign assistant public defenders to cases. The Public Defender has the sole statutory authority to make work assignments to assistant public defenders; the trial court has no authority to direct individual assistants to handle particular cases.

Where the Public Defender assigns several assistants to a particular courtroom under a system in which each assistant assumes responsibility for cases in rotation, the Public Defender has not delegated his or her authority to assign cases to the judge who presides in the courtroom. Thus, even in this situation the judge lacks authority to assign individual assistants to cases.

3. Although a trial judge has inherent authority to control the courtroom and maintain decorum, that authority merely allows the court to find an attorney in contempt in a particular case. The trial court does not have authority to bar an attorney from appearing in unrelated cases.

By recusing itself from hearing any case in which a particular assistant public defender appeared or ordering the assistant removed from individual cases, the trial court in effect precluded the assistant from representing public defender clients to which she had been assigned by the Public Defender. In the absence of a finding of contempt or other sufficient cause, such actions were not within the court's inherent authority to control its courtroom.

People v. Friedman, 79 Ill.2d 341, 403 N.E.2d 229 (1980) Although a defendant has the right to be represented by counsel of his own choosing, "this right may not be employed as a weapon to indefinitely thwart the administration of justice or to otherwise embarrass the effective prosecution of crime." The trial judge properly denied as untimely a request to substitute counsel where defendant had been advised two months before trial that he was free to substitute retained counsel so long as the trial was not delayed; defendant waited until three days before the trial date to contact new counsel. See also, People v. Williams, 92 Ill.2d 109, 440 N.E.2d 843 (1982) (upholding denial of motion for continuance to obtain counsel where the motion was made after the jury had been selected; "[w]hether to grant or to deny a motion for continuance is within the sound discretion of the trial court, and the diligence shown by the movant is to be considered").

People v. Segoviano, 189 Ill.2d 228, 725 N.E.2d 1275 (2000) A trial court does not abuse its discretion by denying a motion for substitution of counsel in the absence of ready and willing substitute counsel.

People v. Childress, 276 Ill.App.3d 402, 657 N.E.2d 1180 (1st Dist. 1995) 1. The defendant's right to counsel of choice must be respected unless it is used to "thwart, delay, or embarrass the effective administration of justice." Several factors are to be considered in determining whether the trial court improperly denied a continuance to substitute counsel, including whether: (1) the request was intended to delay the trial, (2) new counsel was ready, willing and able to proceed, (3) defendant articulated an acceptable reason for wanting new counsel, and (4) current counsel had represented defendant for a lengthy period of time.

2. Here, the request to substitute counsel should have been granted. Although the trial was set for the day defendant sought to substitute counsel, the judge specifically found that the request was not an attempt to delay the case. In addition, defendant had already retained new counsel, the case was less than a year old, and none of the prior continuances had been at defendant's request. Furthermore, the trial court denied the motion without inquiring about the length of continuance counsel would need.

People v. Potts, 17 Ill.App.3d 861, 309 N.E.2d 35 (5th Dist. 1974) Trial court erred by appointing public defender over objection of defendant, who wanted to be represented by another attorney who offered to serve without compensation. The right to be represented by counsel of choice does not depend on whether counsel is being paid.

People v. Young, 207 Ill.App.3d 130, 565 N.E.2d 309 (4th Dist. 1990) The trial court abused its discretion by denying defendant the assistance of a private attorney who was present and willing to enter an appearance, where the judge failed to determine whether a continuance would be required or how long such a continuance would be. The record showed no basis for the court's action except that granting a continuance would have caused inconvenience. See also, People v. Washington, 195 Ill.App.3d 520, 552 N.E.2d 1067 (1st Dist. 1990) (trial court abused its discretion by denying a continuance requested on the day the case was called for trial, after defendant's family retained an attorney who asked the public defender to obtain a continuance of one week; there was no indication that defendant had delayed the proceedings or that the request was a delaying tactic, and if the judge suspected that defendant was attempting to delay the proceedings by claiming that a private attorney had been hired he could have inquired further).

People v. Tucker, 382 Ill.App.3d 916, 889 N.E.2d 733 (1st Dist. 2008) 1. It is within the trial court's discretion to determine whether defendant is attempting to delay his trial by seeking to change counsel. Factors to be considered are whether the defendant articulates an acceptable reason for wanting new counsel, whether the defendant has continuously been in custody, whether defendant has informed the trial court of his efforts to obtain counsel, whether defendant has cooperated with the present attorney, and the length of time defendant has been represented by current counsel. The trial court does not abuse its discretion by denying a motion to substitute counsel if no attorney is specifically identified as willing to represent the defendant and able to enter an appearance.

2. Where defendant had been in continuous custody and had to rely on his family to hire a new attorney, and named an attorney to whom he had spoken by telephone but not yet paid a retainer, the trial court abused its discretion by denying a motion to substitute counsel without attempting to verify the willingness of the new attorney to undertake the representation. The Appellate Court also expressed concern about existing counsel's claim that he had "lost contact" with defendant for the last three months, when defendant had been incarcerated in a jail across from the courthouse. See also, People v. Little, 207 Ill.App.3d 720, 566 N.E.2d 365 (1st Dist. 1990) (trial court abused its discretion by denying request for a continuance, on the day set for trial, so attorney retained by defendant's family could enter the case; defendant was forced to rely on his family to obtain private counsel, the defense had not requested prior continuances, and there was no reason to believe the request was made for delay; before ruling on the motion, the trial court was required to determine the truth of the representation that the new attorney had been paid and was absent only because he had been given the wrong date and to ascertain the length of continuance that would be necessary; a defendant who has filed a speedy trial demand is not barred from seeking a continuance).

People v. Bingham, 364 Ill.App.3d 642, 847 N.E.2d 903 (4th Dist. 2006) The trial court's ruling on a motion for a continuance to substitute counsel is reviewed for abuse of discretion. The trial judge abused its discretion by failing to make any inquiry before denying a motion for a continuance to substitute counsel who was representing defendant on other charges; the case had been pending for only three months, no previous continuances had been requested, pretrial motions had not been filed, and there was no evidence that defendant was attempting to delay the proceedings. See also, People v. Clayborne, 47 Ill.App.3d 202, 361 N.E.2d 1141 (4th Dist. 1977) (error to deny continuance of probation revocation hearing to allow attorney representing defendant on the underlying criminal charge to appear in the revocation proceeding).

People v. Myles, 49 Ill.App.3d 325, 364 N.E.2d 323 (1st Dist. 1977) Defendant was denied the right to counsel of choice when the trial court forced "an admittedly inexperienced, newly admitted attorney," who had appeared on behalf of her partner for the limited purpose of arraignment, to represent defendant at a murder trial.

People v. Sullivan, 234 Ill.App.3d 328, 600 N.E.2d 457 (2d Dist. 1992) The trial court abused its discretion by denying a continuance to allow defendant to hire an attorney. Defendant was under the impression that the charges were to be dismissed, the only witnesses other than police officers joined in the request for a continuance, the record showed no previous dilatory tactics by defendant, the case was set for a bench trial, and any delay would have been brief.

People v. Hardin, 299 Ill.App.3d 33, 700 N.E.2d 1057 (1st Dist. 1998) Generally, the trial

court abuses its discretion by denying a motion to substitute new counsel if the new attorney is specifically identified and "stands ready, willing, and able to make an unconditional entry of appearance."

The refusal to allow the original attorney to withdraw, after granting leave to the new attorney to enter an appearance, denied the right to counsel of choice despite the judge's willingness to allow both attorneys to try the case. By dictating that defendant would have two rather than one counsel, the court risked problems involving trial strategy and might have caused the defendant to owe attorney fees to multiple lawyers.

Cumulative Digest Case Summaries **§13-1(c)**

Luis v. United States, ___U.S. ___, 136 S.Ct. 1083, ___ L.Ed.2d ___ (2016) (No. 14-419, 3/30/16)

A federal statute provided that in a prosecution for federal health care fraud, the U.S. Attorney may seek a pretrial order freezing certain of the defendant's assets, including property obtained as a result of the crime, property traceable to the crime, and other "property of equivalent value." Defendant was charged with committing health care fraud in the amount of $45 million. The prosecution sought a pretrial order to freeze $2 million in defendant's possession so it would be available for restitution and criminal penalties. The parties agreed that the funds were not connected to the charged offenses and that the order would prevent defendant from being able to hire counsel.

The Supreme Court held that a pretrial order freezing assets which are not related to the charged crime would violate the Sixth Amendment right to hire counsel of choice.

1. A four-member plurality held that the Sixth Amendment right to the assistance of counsel is a fundamental right, and includes the right to counsel of choice provided that the defendant has sufficient assets to hire the chosen attorney. Although **Caplin & Drysdale, Chartered v. United States**, 491 U. S. 617 (1989) and **United States v. Monsanto**, 491 U. S. 600 (1989)) allowed orders forfeiting or freezing assets which the defendants would have used to pay counsel fees, in both cases the assets were "tainted" because they were traceable to the crime in question. Thus, in those cases the government had a "substantial interest" in the assets even before convictions were obtained.

Here, by contrast, the assets were untainted by any association with the crime. Thus, the government lacked any substantial interest in the assets before it obtained a conviction. The court concluded that insofar as the funds were needed for defendant to hire counsel of choice, the "competing interests" of the Sixth Amendment and the government's right to secure "untainted" assets for forfeiture and restitution must be resolved in favor of the right to counsel of choice. The plurality also stressed that accepting the government's position might erode the right to counsel because Congress could enact statutes authorizing pretrial restraint of assets for various types of criminal conduct.

The plurality also stated that the Government's position would force more defendants to the indigent defense system, placing even more of a burden on "overworked and underpaid public defenders." The plurality noted that according to the Department of Justice, only 27% of county-based public defender offices have sufficient staff to meet nationally recommended caseload standards.

Finally, the plurality acknowledged that money is fungible, but found that "the law has tracing rules" that make it possible to determine whether particular assets are "tainted" by the charged crime.

2. Justice Thomas concurred in the result, finding that the text and common-law background of the Sixth Amendment prohibit pretrial restraint of lawfully owned property needed to pay for counsel of choice. Justice Thomas agreed that only "tainted" assets may be subject to restraint before trial, but rejected the majority's approach of balancing the interest of a criminal defendant in hiring counsel of choice with the government's interest in assuring a fund for forfeitures, restitution, and criminal penalties. Justice Thomas also stressed that the Sixth Amendment includes the right to counsel of choice so long as the accused has the ability to hire such counsel, and found that allowing the Government to force all criminal defendants into the indigent defense system would nullify the original understanding of the framers of the Bill of Rights concerning the right to counsel.

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. Adams, 2016 IL App (1st) 141135 (No. 1-14-1135, 3/15/16)

1. Defendants have a constitutional right to retain counsel of their choice. But that right is not absolute and cannot be used to thwart the administration of justice. Courts must balance a defendant's right to counsel of choice against the need for the efficient and effective administration of justice, and therefore must inquire into the reasons for the request so they can determine the validity of a defendant's request.

Courts should consider five factors in balancing these interests: (1) defendant's reasons for wanting new counsel; (2) defendant's continuous custody; (3) defendant's efforts to obtain new counsel; (4) defendant's cooperation with current counsel; and (5) how long current counsel represented defendant.

The trial court's decision to deny a continuance for substitution of counsel will only be reversed for an abuse of discretion. Generally, a trial court does not abuse its discretion by denying a continuance unless substitute counsel is ready and willing to represent defendant. But, even where new counsel is not readily available, a trial court will abuse its discretion if it fails to inquire into whether defendant is using the request as a delaying tactic.

2. Seventy days after defendant was arraigned, defendant appeared before the court for a bench trial. After the State answered ready for trial, defendant asked the court if he could get a continuance to retain private counsel. The court denied the request because it was the day of trial and both of the State's witnesses (police officers) were present.

3. The trial court abused its discretion in denying defendant's request. The trial court considered only two factors in ruling: that it was the day of trial and both witnesses were present. The court made no inquiry at all into defendant's reasons for wanting new counsel or efforts to obtain new counsel. Additionally, the case had been pending for only 70 days, no prior continuances had been requested, and defendant had been in continuous custody.

Reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Ben Wolowski, Chicago.)

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. Buckhanan, 2016 IL App (1st) 131097 (No. 1-13-1097, 9/27/16)

The trial court erred by disqualifying defendant's counsel of choice on the ground that counsel's father represented defendant's girlfriend, who was a potential State witness.

1. The Sixth Amendment right to the assistance of counsel includes a presumption in favor of defendant's counsel of choice. This presumption may be overcome if the State proves that there is an actual conflict of interest or a serious potential for such a conflict.

In Illinois, a two-part test applies where the prosecution challenges defendant's counsel of choice. First, the trial court must determine whether defense counsel has a specific professional obligation that actually or potentially conflicts with defendant's interests. If the answer to this question is yes, the trial court must determine whether the interests threatened by that conflict are of sufficient weight to overcome the presumption in favor of defendant's counsel of choice.

Courts must consider the likelihood that a purported conflict will actually occur, because a conflict that has little likelihood of occurring is not a legitimate basis to disqualify counsel of choice. The courts must also consider defendant's interest in having the undivided loyalty of counsel, the State's right to a fair trial at which defense counsel is not permitted to use confidential information to attack a State's witness, any appearance of impropriety that would result should the jury learn of the conflict of interest, and the probability that continued representation by counsel of choice will provide grounds to overturn a conviction on appeal.

The court should also consider whether there are alternatives to disqualification of counsel that would remove the conflict while protecting the right to counsel of choice. The trial court's decision to disqualify counsel is reviewed for abuse of discretion.

2. Rule 1.10(a) of the Illinois Rules of Professional Conduct states that lawyers who are "associated in a firm" may not represent a client when any member of the firm would be prohibited from doing so. Whether two or more lawyers constitute a "firm" depends on the facts of each case.

Practitioners are not part of a firm merely because they share office space and occasionally consult or assist each other, but may be regarded as a firm if they present themselves to the public in a way that suggests that they are associated in a firm. Any formal agreement between lawyers is relevant in determining whether they constitute a firm, as is the fact that they have mutual access to information concerning their clients.

The court noted that although the father and son were not formally associated in a law firm, they might arguably constitute a firm given the closeness of their relationship. The father and son shared office space and acted as co-counsel in various criminal matters, and the father covered for the son in a number of court appearances in this case. The court concluded that even if their relationship constituted a "firm," however, the interests threatened by the potential for conflict were not sufficient to overcome the constitutional presumption in favor of defendant's counsel of choice.

3. The State argued that it was necessary to disqualify the son because he and the father could exchange confidential information and give the defense an unfair advantage at trial. The State also argued that there was an inconsistency between the witness's statement at the police station and her grand jury testimony, and that because the father observed the statement he might be called to testify if the witness recanted the out-of-court statement. The State contended that an appearance of impropriety would be created if the father testified and the jury learned that he was representing the witness while the son was representing defendant.

The court rejected the State's arguments. First, there was nothing in the record to indicate that the two attorneys had shared information. Second, at a pretrial hearing the father indicated that he had no recollection of the witness making the statement in question. Third, because the court found that the statement and grand jury testimony did not actually contradict each other, the "entire basis of the State's argument is meritless.

Fourth, a mere appearance of impropriety is a "slender reed" on which to disqualify counsel of choice. Finally, any appearance of impropriety could easily have been avoided if the parties stipulated to the father's testimony in a way that avoided mentioning his name or relationship to the son.

4. The court also questioned whether the State acted in good faith, noting that the State first learned more than a year before trial that the father was representing the witness, but filed their motion to disqualify counsel less than one month before the trial was scheduled to begin. Furthermore, after counsel was disqualified and defendant went to trial with substitute counsel, the State failed to ask the witness a single question about the alleged inconsistency

between her statement and grand jury testimony. The State also had several other witnesses who could have testified to the same point, removing any need to call the father at all.

5. Defendant waived any conflict in open court, and the State did not argue that the waiver was ineffective. Thus, defendant would not be able to appeal any conviction on the grounds that trial counsel was constitutionally ineffective due to a conflict of interest.

Because the trial court abused its discretion by granting the State's motion to disqualify defendant's counsel of choice, the conviction was reversed and the cause remanded for a new trial.

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

People v. Koen, 2014 IL App (1st) 113082 (No. 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

Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) A person may not be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by or waives counsel.

Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979) The Sixth and Fourteenth Amendments require that an indigent not be sentenced to imprisonment unless he has been afforded the assistance of appointed counsel. Appointment of counsel is not required where imprisonment is authorized for the offense, but a non-prison sentence is imposed. Compare, People v. Campbell, 224 Ill.2d 80, 862 N.E.2d 933 (2007) (Illinois law affords indigent defendants a broader right to counsel than the Sixth Amendment; Supreme Court Rule 401(a) creates the right to appointed counsel whenever a charge is punishable by imprisonment).

Alabama v. Shelton, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002) 1. Unless there was a valid waiver of counsel, the Sixth Amendment is violated where a defendant who was not afforded counsel in the proceedings leading to the conviction is sentenced to imprisonment upon revocation of probation. The court noted the prosecution's concession that the Sixth Amendment bars activation of a suspended prison sentence that was imposed after an uncounseled conviction.

2. Jurisdictions that are concerned about the cost of providing counsel in criminal cases may utilize pretrial probation, in which the defendant and prosecutor agree to a pretrial rehabilitation program with conditions of conduct similar to probation conditions imposed after a conviction. Under such programs, adjudication of guilt and imposition of sentence occur only if the defendant breaches the probation conditions, at which time he has the right to the assistance of counsel.

Kitchens v. Smith, 401 U.S. 847, 91 S.Ct. 1089, 28 L.Ed.2d 519 (1971) Right to appointed counsel applies to guilty plea as well as trial, and does not depend on a request.

Mallard v. U.S. District Court, 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989) The federal district judge did not have authority to order a lawyer to represent an indigent civil litigant without compensation - the federal statute under which the court acted merely allowed a "request" that counsel provide such representation. The majority did not decide whether a court has inherent authority to compel an unwilling attorney to provide free representation, although the concurring and dissenting opinions suggested that such inherent authority does exist.

Burnette v. Terrell, 232 Ill.2d 522, 905 N.E.2d 816 (2009) 1. A trial judge is authorized to appoint the Office of the Public Defender to act as the attorney for an indigent defendant, but lacks authority to appoint individual assistant public defenders. Once the office has been appointed, the Public Defender has both the statutory authority and the responsibility to assign assistant public defenders to cases. The Public Defender has the sole statutory authority to make work assignments to assistant public defenders; the trial court has no authority to direct individual assistants to handle particular cases.

Where the Public Defender assigns several assistants to a particular courtroom under a system in which each assistant assumes responsibility for cases in rotation, the Public Defender has not delegated his or her authority to assign cases to the judge who presides in the courtroom. Thus, even in this situation the judge lacks authority to assign individual

assistants to cases.

2. Although a trial judge has inherent authority to control the courtroom and to maintain decorum, that authority merely allows the court to find an attorney in contempt in a particular case. The trial court does not have authority to bar an attorney from appearing in unrelated cases. By recusing itself from hearing any case in which a particular assistant public defender appeared or ordering the assistant removed from individual cases, the trial court in effect precluded the assistant from representing public defender clients to which she had been assigned by the Public Defender. In the absence of a finding of contempt or other sufficient cause, such actions were not within the court's inherent authority to control its courtroom.

Alexander v. Pearson, 354 Ill.App.3d 643, 821 N.E.2d 728 (1st Dist. 2004) The State Appellate Defender Act, which provides that the Office of the State Appellate Defender shall "represent indigent persons on appeal in criminal and delinquent minor proceedings. . . when appointed to do so . . . under a Supreme Court Rule or law of this State" (725 ILCS 105/10(a)), authorizes appointment of the Office of the State Appellate Defender only in criminal and delinquent proceedings. The trial court lacked authority to appoint the office as counsel in an appeal from a habeas corpus proceeding.

People v. Eggers, 27 Ill.2d 85, 188 N.E.2d 30 (1963) Trial court committed reversible error by refusing to appoint counsel solely because defendant posted $350 for bail bond. See also, People v. Castile, 71 Ill.App.3d 728, 390 N.E.2d 426 (1st Dist. 1979) (trial court erred by denying a request for a public defender solely because defendant owned a business and had posted a $100 cash bond).

People v. Adams, 388 Ill.App.3d 762, 903 N.E.2d 892 (3d Dist. 2009) 1. An indigent defendant has the right to appointed counsel if imprisonment is a possible sentence. Whether a defendant is indigent is generally left to the trial court's discretion, but should be based on as complete a financial picture as possible. A defendant is indigent if, on a "practical basis," he lacks the resources to retain counsel. One need not be completely without funds in order to be indigent.

Determining indigency requires the court to balance defendant's assets and liabilities and to consider the defendant's income. To assure that the rights of the defendant are protected, the trial court should appoint counsel when there is a close case concerning indigency.

2. Where defendant was not employed, had no significant savings, and owned only one sizeable asset (a car worth $6,000), and the trial court neither required defendant to file an affidavit of assets and liabilities nor conducted any specific inquiry into defendant's ability to pay, the record did not establish that defendant had sufficient resources to hire counsel. Mere ownership of a car worth $6,000 did not establish that defendant could hire counsel, because the record did not show whether defendant had another vehicle to use for transportation and seeking employment.

Even if the car was a sufficient asset for defendant to afford counsel, the trial court should have allowed an adequate opportunity to liquidate or encumber the car before trial. Because the trial occurred only 12 days after the finding that defendant was not indigent, defendant had insufficient time to dispose of the car and obtain counsel.

People ex rel. Baker v. Power, 60 Ill.2d 151, 330 N.E.2d 857 (1975) Because petitioner

posted bond of $1000 cash, which he borrowed from his mother, the trial judge held that he could not be represented by the public defender. The Supreme Court remanded for a hearing to determine whether petitioner was indigent, and thus qualified for the appointment of counsel, without regard to whether he had been released on bail.

People v. Ellis, 309 Ill.App.3d 443, 722 N.E.2d 254 (4th Dist. 1999) 1. Whether a particular individual is indigent is left to the trial court's discretion, which is to be exercised on as complete a financial picture as possible. A defendant need not be entirely without funds in order to be indigent; a person is indigent if "on a practical basis" he or she lacks sufficient resources to hire an attorney.

Whether counsel should be appointed "must be delicately decided and always with an eye toward protecting the rights of the accused." Thus, the trial court should err on the side of appointing counsel. See also, People v. Castile, 71 Ill.App.3d 728, 390 N.E.2d 426 (1st Dist. 1979) (defendant who lacks financial resources to retain counsel is indigent even if not totally devoid of means).

2. The trial court abused its discretion by finding that defendant was not indigent. Defendant's monthly income was $494 after funds for the care of dependent children were deducted - of that amount, $250 went to rent. Although the record did not indicate defendant's monthly expenses for groceries and utilities, his total assets were $456 while he owed $344 in debts. Furthermore, after his first request for counsel was rejected, defendant made a good faith effort to obtain private counsel but found that he needed to pay a higher retainer than he could afford.

People v. Miller, 113 Ill.App.3d 845, 447 N.E.2d 1060 (4th Dist. 1983) The trial judge erred by denying a DUI defendant's request for appointed counsel without making any inquiry into financial status. When deciding whether to appoint counsel, the trial court must conduct a serious inquiry which includes balancing the defendant's assets and income against his liabilities.

People v. Carter, 52 Ill.App.3d 508, 367 N.E.2d 791 (3d Dist. 1977) The trial court erred by forcing defendant to trial without an attorney. Although on the trial date the judge stated that defendant had an opportunity to procure an attorney, it failed to inquire into defendant's indigency.

Cumulative Digest Case Summaries **§13-1(d)**

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.)

People v. Hunt, 2016 IL App (1st) 132979 (No. 1-13-2979, 6/17/16)

1. As a general rule, a criminal defendant has a constitutional right to represent himself if he makes an unequivocal request to do so. To invoke the right of self-representation, the defendant must knowingly, intelligently, and unequivocally waive counsel and seek to proceed *pro se*. Courts must indulge every reasonable presumption against finding waiver of the right to counsel. To determine the voluntariness of a waiver, a reviewing court will examine the overall context of the proceeding, including defendant's conduct after the request

for self-representation.

The right to self-representation is not absolute, however, and may be forfeited if the defendant engages in serious and obstructionist misconduct or cannot make a knowing and intelligent waiver of counsel. A request to proceed *pro se* may also be rejected where it comes so late in the proceedings that self-representation would disrupt the orderly schedule of proceedings or where the defendant engages in serious and obstructionist misconduct. On the other hand, a request to proceed *pro se* that is not accompanied by a request for additional time to prepare should be regarded as timely.

On review, the trial court's decision on the defendant's election to represent himself will be reversed only if the trial court abused its discretion. An abuse of discretion occurs when the lower court's ruling is arbitrary and without a logical basis.

2. Defendant unequivocally expressed a desire to represent himself on two occasions, first before a substitute judge and again before the trial judge who heard the trial. The trial judge refused to allow self-representation on the basis that the request was a tactic to delay the trial.

Because defendant twice unequivocally requested to represent himself and did not ask for more time or engage in any obstructionist conduct, the trial court abused its discretion by denying the request. The court also found that where there had been six continuances - five by agreement and one on the court's own motion - the record did not support the finding that the request was made for purposes of delay.

Furthermore, defendant did not act as an obstructionist. Despite the trial court's belief that defendant engaged in humor and gamesmanship, the record shows that defendant acted appropriately and seriously.

3. The court rejected the State's argument that the defendant's request for self-representation could be denied because it was made on the day the matter was set for a jury trial. Although the cause was set for trial, there were two outstanding pretrial motions which needed to be addressed. Furthermore, the trial was continued several more times and did not start until six months later.

The court also rejected the State's argument that defendant acquiesced to trial counsel's representation because he neither renewed his request to proceed *pro se* nor complained about the public defender's representation. A defendant need not make repeated futile attempts to represent himself. Once the trial court denied self-representation as an attempt to delay the trial, additional requests would have been pointless.

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

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

People v. Seal, 2015 IL App (4th) 130775 (No. 4-13-0775, 8/24/15)

Under Illinois Supreme Court Rule 401(a), before allowing a defendant to waive his right to counsel, the trial court must admonish defendant about the following: (1) the nature of the charge; (2) the minimum and maximum sentence; and (3) that he has the right to counsel, including the right to appointed counsel if he is indigent. Substantial compliance with Rule 401(a) is required before a defendant may waive counsel.

Prior to trial, defendant had ongoing conflicts with each of his appointed lawyers. When defendant complained of his first lawyer's representation, the trial court appointed a new lawyer to represent him. When defendant had conflicts with his second lawyer, the court would not appoint another lawyer to represent defendant, so defendant requested to represent himself.

The trial court admonished defendant generally about the risks and disadvantages of

going *pro se*, but did not provide defendant with any of the admonishments required by Rule 401(a). The trial court accepted defendant's waiver of counsel and defendant represented himself at trial.

The Appellate Court held that defendant's waiver of counsel was invalid because there was no compliance, "substantial or otherwise," with Rule 401(a). Although the trial court advised defendant of the problems he might face representing himself, there were no admonitions about the charge, the potential sentence, or the right to counsel.

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

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

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§13-1(e)
Right to Self-Representation

Faretta v. California, 442 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) The Sixth Amendment guarantees the right to self-representation in a state criminal trial, if the defendant makes a voluntary and intelligent choice to do so. A state court errs by forcing counsel on an accused who asks to conduct his own defense. See also, People v. Haynes, 174 Ill.2d 204, 673 N.E.2d 318 (1996) (trial court may not refuse knowing and voluntary waiver of counsel on the ground that defendant lacks a "proper reason" to represent himself).

Indiana v. Edwards, ___ U.S. ___, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008) A State may decline to allow self-representation by a defendant who is competent to stand trial but incapable of presenting a defense. However, the court declined to adopt a precise test for determining when a defendant is incapable of conducting a defense, noting that it was uncertain how the standard urged by the State "would work in practice." (The prosecution urged the court to hold that a State could deny self-representation to a defendant who "cannot communicate coherently with the court or a jury.")

Martinez v. Court of Appeal of California, 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) Faretta v. California, 422 U.S. 806 (1975) does not require that a defendant be permitted to represent himself on appeal. However, States may choose to interpret their own constitutions as including a right to self-representation on appeal. See also, People v. Jackson, 362 Ill.App.3d 1196, 841 N.E.2d 1098 (4th Dist. 2006) (although Supreme Court Rules 607 and 651(d) support an argument that a criminal defendant has the right to represent himself on appeal, defendant failed to make a timely assertion of that right where he first raised Rules 607 and 651(d) in the brief which his appointed counsel filed in his behalf); Chambers v. Cook (sup. order granted 4/12/05, No. 100237) (the Supreme Court instructed the Appellate Court to vacate its order denying appellate counsel's motion to withdraw so defendant could represent himself on appeal).

McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) Defendant requested and was allowed to represent himself at trial; however, the trial judge appointed standby counsel to assist. Defendant argued that his right to self-representation was violated

by counsel's actions (such as making motions, dictating proposed strategies into the record, making objections to State testimony, suggesting questions to defendant to ask witnesses, and on two occasions interrupting a witness's answer to a question by defendant).

1. Although some of the standby counsel's actions "should not serve as a model," defendant's rights under Faretta were not violated. In addition, the Sixth Amendment is not violated "when a trial judge appoints standby counsel - even over the defendant's objection - to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals."

2. However, Faretta imposes limits on standby counsel's unsolicited participation. Because "the pro se defendant is entitled to preserve actual control over the case he chooses to present," standby counsel may not make or substantially interfere with significant tactical decisions, control the questioning of witnesses, or speak instead of the defendant on any important matter.

Furthermore, unless defendant consents, standby counsel should not be allowed to destroy the jury's perception that the defendant is representing himself. See also, People v. Williams, 277 Ill.App.3d 1053, 661 N.E.2d 1186 (4th Dist. 1996) (no Illinois case has reversed a trial court for refusing to appoint standby counsel).

People v. Coleman, 168 Ill.2d 509, 660 N.E.2d 919 (1995) The Court rejected the argument that in death penalty cases, the increased need for reliability mandates that even a defendant who wishes to represent himself be represented by counsel. The constitutional right to proceed pro se applies to all trials, including those for capital offenses.

People v. Burton, 184 Ill.2d 1, 703 N.E.2d 49 (1998) A defendant waives his right to self-representation unless he "articulately and unmistakably demands to proceed pro se." Even where a defendant indicates that he wants to proceed pro se, he may acquiesce in representation by counsel by abandoning the request or by remaining silent "at critical junctures of the proceedings." The timing of the request to represent oneself is significant; a request made after the trial has begun is untimely.

Defendant did not clearly and unequivocally invoke his right to represent himself when he said that if necessary, he was willing to represent himself in order to obtain defense counsel's records. Defendant's only expressed dissatisfaction with counsel was the latter's failure to turn over records, and defendant did not ask to represent himself after the trial court denied counsel's motion to withdraw.

Furthermore, the issue arose only after a conviction had been entered and defendant had been found death-eligible. "Even assuming defendant's statements could be construed as a clear and unequivocal request to represent himself, the circuit court generally has discretion to determine whether to allow a defendant to proceed pro se after meaningful proceedings have been conducted." Compare, People v. Davis, 169 Ill.App.3d 1, 523 N.E.2d 165 (2d Dist. 1988)(trial judge erred by denying a request for self-representation made on the morning trial was to begin; nothing in the record showed that defendant lacked the requisite capacity to make an intelligent and knowing waiver of his right to counsel, the request was based on defendant's dissatisfaction with the public defender in an earlier case, and defendant specifically said he did not want to delay the proceedings).

People v. Redd, 173 Ill.2d 1, 670 N.E.2d 583 (1996) The trial court did not abuse its discretion by refusing to allow standby counsel to cross-examine a witness at the sentencing

hearing. The right of self-representation does not permit the defendant to also have legal assistance; however, the trial court has broad discretion to appoint standby counsel and to determine the nature and extent of standby counsel's involvement. Even where standby counsel is appointed, the trial court need not permit "hybrid" representation in which the defendant alternates between self-representation and representation by counsel. See also, People v. Pecoraro, 175 Ill.2d 294, 677 N.E.2d 875 (1997) (defendant is not entitled to act as "co-counsel" with a defense attorney; decision to grant or deny hybrid representation "lies solely within the discretion of the trial court"); People v. Guthrie, 60 Ill.App.3d 293, 376 N.E.2d 425 (4th Dist. 1978) (where defendant was represented by counsel, trial court did not err by refusing to allow defendant to make arguments).

People v. Simpson, 204 Ill.2d 536, 792 N.E.2d 265 (2001) 1. A defendant who makes a valid waiver of counsel and chooses to represent himself is not entitled to the assistance of standby counsel. Although standby counsel may be appointed to assist a pro se defendant on procedural and evidentiary matters, such counsel has no duty to actively investigate or prepare a defense.

To succeed on a claim concerning the actions of standby counsel, the defendant would be required to show that counsel prevented him from accomplishing something "he otherwise intended to accomplish or would have been able to accomplish if standby counsel had not prevented him from doing so, either through unreasonable advice or direct action." In other words, to prevail on a claim that standby counsel was ineffective, the defendant must show that counsel's action fell below an objective standard of reasonableness "with respect to the level of guidance standby counsel was required to offer."

There was nothing in the record to suggest that defendant asked standby counsel to investigate. Instead, the record showed that defendant made an ill-founded strategic decision not present mitigation.

People v. Rohlfs, 368 Ill.App.3d 540, 858 N.E.2d 616 (3d Dist. 2006) 1. The right to self-representation is not absolute, and may be forfeited by engaging in obstructionist misconduct or if the defendant is unable to make a knowing and intelligent waiver of counsel. The trial court's decision on a request for self-representation will be reversed only for an abuse of discretion.

2. The judge did not abuse his discretion by denying defendant's request to represent himself where defendant engaged in "obstructionist conduct by repeatedly filing ill-conceived pretrial pleadings and disregarding the court's admonitions." In addition, defendant equivocated concerning his desire to represent himself, apparently wanted only to obtain discovery material which his attorney had not provided, and eventually abandoned the request.

Cumulative Digest Case Summaries **§13-1(e)**

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

Boyd v. Dutton, 405 U.S. 1, 92 S.Ct. 759, 30 L.Ed.2d 755 (1972) Person charged with felony has an absolute right to a lawyer. This right may be waived only by voluntary and knowing action. A waiver will not be lightly presumed, and there is a reasonable presumption against

waiver.

Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) Competency to stand trial is equivalent to competency to waive constitutional rights. A waiver of counsel must be both "knowing and voluntary" and made by a competent defendant. See also, People v. Coleman, 168 Ill.2d 509, 660 N.E.2d 919 (1995) (a defendant is incompetent to waive counsel if, because of a mental or physical condition, he is unable to understand the nature of the proceedings or assist in his defense).

Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) Waiver of counsel must be knowing and intelligent.

Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) The standard for determining if there is an effective waiver of counsel, at either trial or at critical pre-trial proceedings, is whether there was an intentional relinquishment of a known right.

Iowa v. Tovar, 541 U.S. 77, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) 1. A criminal defendant may choose to forego representation by counsel if the waiver is knowing, voluntary and intelligent. Although no precise formula need be followed, a defendant who seeks to waive counsel must be afforded sufficient information to make an intelligent election. The information required in a particular case depends on the factors of the case, including defendant's education and sophistication, the complexity or simplicity of the charge, and the stage of the proceedings at which the waiver occurs.

2. Where the defendant waived counsel at his initial appearance, stated at the plea hearing that he wanted to represent himself, and was informed at the plea hearing of the right to counsel, the nature of the charges, and the range of allowable punishment, the waiver of counsel was valid despite the trial court's failure to admonish defendant that waiving counsel: (1) might result in a viable defense being overlooked, and (2) would preclude an independent opinion of the wisdom of pleading guilty. The latter two admonishments, which had been required by the Iowa Supreme Court, are not elements of the Sixth Amendment but may be required as matters of State law.

People v. Campbell, 224 Ill.2d 80, 862 N.E.2d 933 (2007) 1. Under Supreme Court Rule 401(a), the trial court "shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first . . . informing him of and determining that he understands . . . that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court."

2. Where defendant was charged with driving with a suspended license, a Class A misdemeanor punishable by imprisonment, the trial court erred by failing to give the admonishments required by Supreme Court Rule 401(a). Defendant's waiver of counsel was ineffective because the court failed to comply with Rule 401(a); "[t]he rules of this court are not suggestions; rather, they have the force of law, and the presumption must be that they will be obeyed and enforced as written."

3. The validity of defendant's waiver of counsel was not moot, although defendant had completed the sentence. Because nullification of a conviction may hold important consequences for a defendant, completion of the sentence does not render moot a challenge to the underlying conviction.

People v. Lego, 168 Ill.2d 561, 660 N.E.2d 971 (1995) 1. A competent defendant is entitled to make a free, knowing and intelligent decision to waive counsel. The trial court must determine both that the defendant is competent and that the waiver is knowing and voluntary.

In order to make a competent and knowing decision to represent himself, the defendant must be aware of the dangers and disadvantages of self-representation. Whether there has been an intelligent waiver of counsel depends upon the particular facts and circumstances of each case, including the background, experience and conduct of the accused.

2. Defendant who lacked a "realistic view" of his own legal abilities and who suffered from organic brain syndrome was incompetent to waive counsel. "If by virtue of delusion occasioned by mental illness a defendant believes falsely that his legal skills equal or exceed those of virtually any attorney who might represent him, he could hardly be said to be aware of the dangers and disadvantages of self-representation."

People v. Baker, 92 Ill.2d 85, 440 N.E.2d 856 (1982) A waiver of counsel at arraignment, by a defendant who is advised that he has a right to counsel at all stages of the proceedings, is operative through the entire proceedings, including sentencing. In the absence of some indication that the waiver was limited, or other facts which would give the judge reason to conduct additional inquiry, no additional waiver of counsel need be obtained for sentencing. See also, People v. Palmer, 382 Ill.App.3d 1151, 889 N.E.2d 244 (4th Dist. 2008) (waiver of counsel is valid through all subsequent proceedings unless defendant requests counsel or the circumstances suggest the waiver was intended to apply only to a particular stage of the proceedings; although a properly admonished defendant may be held to have waived counsel throughout trial, a request for counsel which arises at a separate stage of the proceedings must be honored; trial court erred by refusing to honor request for appointed counsel for post-sentencing motion); People v. Griffin, 305 Ill.App.3d 326, 713 N.E.2d 662 (2d Dist. 1999) (waiver of the right to counsel carries through all subsequent proceedings unless the defendant requests counsel or the circumstances suggest that the waiver was limited to a particular stage of the proceedings; whether waiver has been revoked is to be decided by the trial court, whose finding will be reversed only for an abuse of discretion; once defendant who had pleaded guilty "clearly sought legal advice" from the trial judge by asking whether he was required to file a motion to withdraw his plea and expressed interest in having counsel for an appeal, the trial judge should have determined whether defendant was attempting to revoke the waiver).

People v. Redd, 173 Ill.2d 1, 670 N.E.2d 583 (1996) 1. A valid waiver of counsel occurs where the trial court determines that the defendant had the ability to understand the proceedings, knew the significance and consequences of his decision, and was not coerced into giving up the right to counsel. In making this determination, the defendant's background, experience and conduct must be considered.

Defendant's waiver was valid where two judges questioned him about his education and background, observed his demeanor and appearance, and listened to his statements. Defendant had previous experience with the legal system, and "demonstrated a rational understanding of the charges" and potential penalties. Under these circumstances, the record clearly showed that defendant was able to understand the proceedings and assist in his defense.

2. The Court rejected defendant's argument that he should have been readmonished of the right to counsel after the verdict and before sentencing. Illinois follows the "continuing waiver" rule, which holds that an intelligent and knowing waiver of counsel applies to all phases of trial unless circumstances change significantly or the defendant asks that counsel

be appointed. The Court rejected the argument that the "continuing waiver" rule should not apply in capital cases.

The Court also rejected the argument that the passage of three years between the remand and trial required readmonishment of the right to counsel. Although lengthy delay between phases of the trial is one circumstance that may require readmonishment of a pro se defendant, defendant refused offers of appointed counsel as recently as two months before trial. Furthermore, once the trial was completed there was no additional delay before sentencing. See also, People v. Haynes, 174 Ill.2d 204, 673 N.E.2d 318 (1996) (waiver was valid although admonishments were given three months earlier by different judge; admonishments were substantially accurate and were not given in anticipation that an immediate waiver would be forthcoming).

3. Neither defendant's behavior nor the fact that an issue concerning defendant's sanity had been raised in the first trial required the judge to re-examine defendant's capacity to proceed pro se. There was "no suggestion in the record that defendant was suffering from any condition that would impair his ability to knowingly and understandingly waive counsel"; furthermore, "absent indications of irrationality at the present trial," the fact that defendant's sanity had previously been questioned did not affect the waiver of counsel.

People v. Simpson, 172 Ill.2d 289, 665 N.E.2d 1228 (1996) 1. The trial court did not fail to adequately assess defendant's ability to understand the proceedings before accepting a waiver of counsel. The judge had ample opportunity, through the extensive pretrial proceedings, to observe defendant and assess his ability to understand his right to counsel. In addition, defendant had extensive experience with the judicial process and had represented himself on a prior occasion. Finally, defendant filed numerous motions, "actively" presented a defense, and was "literate, responsive and understanding" throughout the trial.

2. The waiver was not improper because the trial court failed to adequately investigate defendant's reasons for proceeding pro se. The record showed that defendant wanted to waive counsel so he could avoid extending the speedy trial period; in addition, defendant understood the consequences of his waiver.

3. A valid waiver of counsel remains effective unless defendant requests counsel or the circumstances change significantly. A defendant who waives counsel for trial should be readmonished of the right to counsel where lengthy delays occur between the trial and sentencing, newly discovered evidence requires the advice of counsel, or new charges have been brought.

People v. Baker, 94 Ill.2d 129, 445 N.E.2d 769 (1983) The record failed to show that defendant made a knowing and understanding waiver of counsel at his probation revocation hearing. Defendant was not advised of the purpose of the proceeding, the nature of the alleged violation, his rights to confront and cross-examine witnesses, or the minimum and maximum sentences. The mere fact that defendant had previously been allowed to discharge counsel did not justify the lack of admonishment. See also, People v. Montoya, 94 Ill.App.3d 6, 418 N.E.2d 84 (2d Dist. 1981) (waiver of counsel was not effective where the trial judge failed to give clear and complete admonishments under Rule 401(a); defendant was told the names of the offenses charged but not the nature of the charges or the possible sentences).

People v. Coleman, 129 Ill.2d 321, 544 N.E.2d 330 (1989) Defendant's waiver of counsel was knowing and intelligent although the admonishment of the minimum sentence was incorrect; the record showed that defendant was aware of the minimum sentence. See also, People v.

Kidd, 178 Ill.2d 92, 687 N.E.2d 945 (1997) (where the defendant is aware that he is eligible for a death sentence if convicted, his waiver of counsel is not invalidated by an inaccurate admonishment concerning the authorized sentence on a charge other than murder).

People v. Myles, 86 Ill.2d 260, 427 N.E.2d 59 (1981) It was unnecessary to admonish defendant under Rule 401(a) where defendant did not waive counsel and undertake his own representation, but refused to cooperate with appointed counsel. Compare, People v. Woods, 84 Ill.App.3d 938, 405 N.E.2d 1238 (1st Dist. 1980) (where public defender was appointed but participated only minimally because of defendant's objections, "practically speaking" defendant was tried without counsel; trial judge should have admonished of the nature of the charges and potential penalties); People v. Johnson, 123 Ill.App.3d 128, 462 N.E.2d 930 (4th Dist. 1984) (defendant should have received Rule 401 admonishments where he proceeded pro se because he did not want the public defender); People v. Kosyla, 143 Ill.App.3d 937, 494 N.E.2d 945 (2d Dist. 1986) (defendants did not make a valid waiver where they repeatedly said they did not want the public defender; trial court should have appointed public defender, even over objection, instead of requiring defendants to go to trial without counsel).

People v. Jiles, 364 Ill.App.3d 320, 845 N.E.2d 944 (2d Dist. 2006) 1. Strict compliance with Rule 401(a) is not always required; substantial compliance may be sufficient if the record indicates that the waiver was knowing, intelligent and involuntary, and if the missing admonishments did not prejudice the defendant's rights.

2. There was a lack of substantial compliance with Rule 401(a) where the trial court warned that if defendant represented himself he would be responsible for following the rules of evidence and should not expect any "slack" on procedural matters, but allowed the defendant to proceed pro se when he said that he understood. Because the judge failed to give any of the admonishments required by Rule 401(a), the waiver was not valid.

3. The court rejected the State's argument that admonitions given to the defendant at his arraignment - some three months before the waiver - constituted substantial compliance with Rule 401(a). Admonishments must be given at the time the defendant waives counsel, so that he can consider the ramifications of his decision to represent himself. Furthermore, the previous admonishments did not touch on the most serious charge, which was added after the arraignment. See also, People v. Stoops, 313 Ill.App.3d 269, 728 N.E.2d 1241 (4th Dist. 2000) (defendant did not make effective waiver of counsel where he was unable to obtain counsel and eventually represented himself after being told by the judge to prepare to do so; if a non-indigent defendant is unable to obtain private counsel but unwilling to waive his Sixth Amendment rights, the trial court should appoint counsel and subsequently conduct a hearing on whether to require reimbursement; prior admonishments did not remove need for proper Rule 401 admonishments when defendant decided to proceed without counsel).

People v. Eickelman, 32 Ill.App.3d 665, 336 N.E.2d 61 (5th Dist. 1975) Defendant did not make an effective waiver of counsel where he waited until the day of trial to request appointment of Public Defender. The trial court refused to appoint counsel because the State and its witnesses would have been inconvenienced by a delay in the trial; however, the inconvenience would have been minor because there was no jury and only one witness.

People v. Herring, 327 Ill.App.3d 259, 762 N.E.2d 1186 (4th Dist. 2002) Where the record does not contain a verbatim transcript of defendant's purported waiver of counsel, the convictions must be reversed under Supreme Court Rule 401(a). Defendant did not waive this

issue by failing to object at trial or in a post-trial motion; because the right to counsel is so fundamental, a claim that there was no effective waiver of counsel is reviewed as plain error. See also, People v. Robertson, 181 Ill.App.3d 760, 537 N.E.2d 1036 (4th Dist. 1989) (an effective waiver was not shown where a docket entry stated "defendant waived his right to counsel"; the waiver was not taken in open court nor recorded verbatim, and "no record exists from which it may be determined whether the requirements of Rule 401(a) were met"); People v. Montgomery, 298 Ill.App.3d 1096, 700 N.E.2d 1085 (3d Dist. 1998) (Supreme Court Rule 401(b) is not satisfied by submission of a bystander's report indicating that the admonitions required by Supreme Court Rule 401 were given; Rule 401(b) "mandates that, when the defendant waives the right to counsel, the proceedings must be recorded verbatim").

People v. Martin, 84 Ill.App.2d 117, 228 N.E.2d 557 (1st Dist. 1967) Trial court order preventing defendant who represented himself from communicating during trial (to obtain advice or information) was unreasonable. Although a pro se defendant need not be provided with legal material, allowed to visit a law library, released from custody or permitted unreasonable intermissions, he should not be subject to greater limitations (except those necessary from the fact of custody) than those imposed upon attorneys.

People v. Koch, 232 Ill.App.3d 923, 598 N.E.2d 288 (4th Dist. 1992) The trial court failed to substantially comply with the rules governing waivers of counsel where it incorrectly stated the possible sentences; defendant was subject to a sentence twice as long as the admonishment, and he eventually received only one year less than the maximum.

The fact that the trial court accurately admonished defendant prior to accepting the plea could not correct the earlier error; Rule 401(a) requires that a defendant be admonished of the potential sentences before counsel is waived. See also, People v. Thomas, 335 Ill.App.3d 261, 780 N.E.2d 838 (2d Dist. 2002) (substantial compliance with Rule 401(a) may be sufficient if the record indicates that the waiver was knowing and intelligent, or if the defendant has a "high level of sophistication"; no valid waiver occurred where the "entire colloquy" at the hearing on the motion to withdraw the plea consisted of the defendant answering "Yes" when asked whether he wanted to represent himself; admonitions given six months earlier did not suffice, and defendant clearly did not have "high level of sophistication" where he functioned at a low intellectual level, had not completed high school, had been in special education classes, had difficulty conveying even basic biographical information, had suffered brain damage in a previous incident, and according to a pre-plea report might have been functionally illiterate).

People v. McCombs, 372 Ill.App.3d 967, 866 N.E.2d 1200 (3d Dist. 2007) 725 ILCS 5/115-4.1(a), which requires that a defendant tried in absentia must be represented by retained or appointed counsel, applies even where the defendant waived counsel before absconding. The court noted that §115-4.1(a) contains no exception to the counsel requirement where there was a previous waiver, although it does specifically authorize a bench trial in absentia if the defendant previously waived a jury. "Had the legislature intended to create an exception to the requirement of counsel, it would have explicitly stated that there was such an exception."

The court noted that where a defendant absconds after waiving counsel, the trial court may conduct a trial in absentia after appointing counsel and allowing reasonable time to prepare.

People v. Young, 341 Ill.App.3d 379, 792 N.E.2d 468 (4th Dist. 2003) 1. The Appellate Court rejected the argument that the trial court erred by accepting defendant's waiver of counsel at a post-trial hearing. Although defendant had the right to counsel at the hearing, by stating that he did not want the assistance of trial counsel after being told that the judge would not appoint a different attorney, defendant "in effect waived his right to counsel and chose self-representation."

2. The court rejected the argument that Supreme Court Rule 401 admonitions are required when a defendant dismisses his attorney "late in the proceedings." The court stated, "The language of Rule 401(a) manifests only the intent to deal with defendants who are considering a waiver of counsel at the initial-appointment stage of the proceedings." Compare, People v. Langley, 226 Ill.App.3d 742, 589 N.E.2d 824 (4th Dist. 1992) (Rule 401(a) admonishments are required before a waiver of counsel can be accepted at the sentencing hearing).

Cumulative Digest Case Summaries **§13-2**

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. Henry, 2016 IL App (1st) 150640 (No. 1-15-0640, 6/30/16)

At his trial for first-degree murder, aggravated battery with a firearm, and unlawful use of a weapon, defendant failed to return to court when the proceedings ended on the first day. Bond was revoked and a warrant was issued for defendant's arrest. The trial continued, and defendant was convicted and sentenced *in absentia*.

Defendant was arrested some three years later, and began to serve the sentence that had been imposed *in absentia*. He then filed a post-conviction petition arguing that trial counsel had been ineffective for failing to investigate and call alibi witnesses at trial.

The State argued that by absenting himself from trial, defendant "chose to forego" his alibi defense. The court rejected this argument, noting that defendant's voluntary absence from trial may waive the rights to be present and confront witnesses but does not waive the right to the effective assistance of counsel. The court noted that under Supreme Court Rule 401, a defendant charged with an offense punishable by imprisonment may waive counsel only in open court and only after being properly admonished by the trial court of the consequences of a waiver. Because there was no such waiver in the record, defendant's flight did not waive his right to the effective assistance of counsel.

However, the court went on to find that defense counsel was not ineffective.

(Defendant was represented by Assistant Defender Roxanna Mason, Chicago.)

People v. Jackson, 2016 IL App (1st) 133741 (No. 1-13-3741, 3/10/16)

1. Under **People v. Krankel**, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), new counsel is not automatically required if a defendant raises a post-trial claim of ineffective assistance of trial counsel. Instead, the trial court must make a preliminary examination of the factual basis for the claim. New counsel need not be appointed if the claim lacks merit or pertains only to

matters of trial strategy.

If the allegations show possible neglect of the case, on the other hand, new counsel must be appointed to fully prosecute the ineffectiveness claim in the trial court. The **Krankel** procedure is intended to fully address *pro se* post-trial claims of ineffective assistance of counsel at the trial level and provide a sufficient record for the reviewing court to consider.

Here, the trial court erred by failing to conduct a preliminary inquiry and deciding whether to appoint independent counsel. Instead, the judge proceeded immediately to the merits of the issue and found that defendant had failed to establish ineffective assistance of counsel under the **Strickland** standard.

In addition, the trial court erroneously relied on evidence outside the record in rejecting defendant's claim that trial counsel had failed to conduct an adequate investigation. Furthermore, this case had been previously appealed and remanded, and upon remand the trial court misinterpreted the mandate and erroneously refused to consider one of defendant's issues.

Finally, the court erred by failing to inquire of trial counsel about defendant's complaints of ineffectiveness, and in fact failed to require defendant's lead counsel to even appear at the **Krankel** hearing. Although the trial judge need not automatically inquire of counsel during the preliminary phase of a **Krankel** hearing, some interchange between the court and counsel is usually necessary to assess what further action should be taken.

The cause was remanded for a further **Krankel** hearing.

2. A defendant has a constitutional right to represent himself so long as he knowingly and intelligently waives his right to counsel. The appropriate inquiry where a defendant wishes to represent himself is not the extent to which he is qualified or capable of doing so, but whether he is fully aware of the nature of the right to counsel and the consequences which may follow if counsel is waived. Thus, a defendant who requests to proceed *pro se* should be made aware of the dangers and disadvantages of self representation so that the record will establish that he made his choice intelligently.

Defendant stated that he wanted to represent himself at the post-trial proceedings and sentencing hearing. The trial court asked if defendant understood the "perils" of representing himself. When defendant responded "no," the trial judge refused to allow the defendant to represent himself on the grounds that he was "not qualified."

Because the trial court failed to make the defendant aware of the dangers and disadvantages of self-representation, and concluded that he was unqualified merely because before he was admonished by the judge he did not understand the "perils" of self-representation, the trial court erroneously denied defendant's right to self-representation.

3. Finally, the court concluded that where the trial judge criticized defendant for reading his *pro se* argument, corrected defendant's pronunciation of several words, and held defendant in contempt of court when he turned his back after stating that the judge was not being fair to him, the proceedings on remand should be conducted before a different judge.

(Defendant was represented by Assistant Defender David Harris, Chicago.)

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. Mitchell, 2016 IL App (2d) 140057 (Nos. 2-14-0057 & 2-14-0058 cons., 3/8/16)

1. A competent waiver of counsel carries forward to all subsequent proceedings unless a defendant later requests counsel. Courts must indulge every reasonable presumption against waiver and in favor of revocation of a prior waiver.

2. Defendant expressed dissatisfaction with his counsel, a public defender, and requested new counsel. When the court refused to appoint new counsel, defendant waived his right to counsel and proceeded *pro se*. In allowing defendant to represent himself, the court stated that it would not allow defendant to change his mind if he later realized that he needed counsel. He told defendant that he was "stuck with this choice" of representing himself, "no matter difficult it becomes."

A week later, but prior to the start of trial, defendant informed the court that he wanted counsel reappointed because he did not think he could represent himself. The court refused to reappoint counsel reminding defendant that he made the decision to represent himself knowing that he couldn't change his mind later. When defendant complained again about his prior counsel, the court again stated that he would not appoint other counsel.

Defendant reached a plea agreement with the State on that same day and pled guilty. Defendant later filed a motion to withdraw his plea arguing that the court erred in accepting his plea without reappointing counsel. The court denied the motion.

3. The Appellate Court held that the trial court improperly refused to reappoint counsel for defendant. The Court rejected the State's argument that defendant merely wanted the appointment of counsel other than the public defender. Despite defendant's misgivings about his prior counsel, it did not follow that he would have chosen to represent himself rather accept reappointment of prior counsel.

Since courts must make every reasonable presumption in favor of revocation of a prior waiver of counsel, the Court held that it must presume here that defendant realized the problems with representing himself and decided that he wanted the public defender reappointed. The trial court's refusal to reappoint counsel simply because he warned defendant that he couldn't change his mind was improper.

The cause was remanded with directions to allow defendant to withdraw his guilty plea.

(Defendant was represented by Deputy Defender Thomas Lillien, Elgin.)

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. Washington, 2016 IL App (1st) 131198 (No. 1-13-1198, 9/20/16)

1. Supreme Court Rule 401(a) provides that before accepting a waiver of the right to counsel, the trial court must determine that the defendant understands the nature of the charge, the sentencing range, the right to counsel, and the right to have counsel appointed due to indigency. While strict compliance with Rule 401(a) is not required, there must at least be substantial compliance. In addition, the record must show a knowing and voluntary waiver.

Once a defendant makes a valid waiver of counsel, that waiver remains in effect throughout the proceedings, including post-trial stages, unless: (1) defendant again requests counsel, or (2) other circumstances suggest that the waiver is limited to a particular stage of the proceedings.

In addition, where there are lengthy delays between the trial stages or the defendant later requests counsel, the trial court must readmonish the defendant under Supreme Court Rule 401(a) before again accepting a waiver. Thus, where defendant waives counsel, proceeds *pro se*, requests counsel for a distinct stage of the proceedings, receives counsel at that point, and then again decides to waive counsel, new admonishments must be given.

2. Defendant represented himself at trial, but at the beginning of the sentencing hearing requested an attorney to represent him on the motion for new trial. The trial court appointed the public defender and ordered a continuance.

At subsequent proceedings, defendant vacillated about whether he wanted to have an attorney appointed or wished to proceed *pro se*. Several additional continuances were ordered. Eventually the trial court stated that defendant had to decide whether he wanted to be represented by counsel or represent himself. Defendant responded, "For the purposes of the record, **Edwards v. Indiana** - I am the architect of the defense." The trial court then dismissed appointed counsel and set a date for a hearing on defendant's *pro se* post-trial motions and sentencing.

The court concluded that the trial court erred by failing to give new Rule 401(a) admonishments before accepting defendant's waiver of counsel. The court concluded that the original waiver did not continue in light of defendant's request for counsel on the post-trial motion.

The court concluded that by asking defendant if he wanted the assistance of counsel at the sentencing stage, the trial court "at least implicitly" informed defendant of the right to counsel and that counsel would be appointed if defendant was indigent. Thus, the third admonishment required by Rule 401(a) was satisfied. However, the trial court did not substantially comply with Rule 401(a) where it failed to state either the nature of the charges or the minimum and maximum penalties.

The court acknowledged that defendant was fully informed of his right to counsel and vacillated numerous times between wanting counsel and wanting to represent himself. However, Rule 401(a) admonishments must be provided at the time the trial court learns that defendant wants to waive counsel and proceed *pro se*. Admonishments given at an earlier time do not suffice where counsel has entered the case at defendant's request but a subsequent

request to proceed *pro se* is made.

Because the trial court failed to substantially comply with Rule 401(a) where defendant accepted the assistance of counsel after trial but again elected to waive counsel, the cause was remanded for a new sentencing hearing.

(Defendant was represented by Assistant Defender Sharifa Rahmany, 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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Caplin & Drysdale v. U.S., 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989) The Federal Drug Forfeiture Statute does not violate the Sixth Amendment although it provides no exception for attorney fees. See also, U.S. v. Monsanto, 491 U.S. 600, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989).

Mallard v. U.S. District Court, 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989) Federal district judge had no authority to order a lawyer to represent an indigent civil litigant without compensation; the federal statute under which the court acted merely allowed a "request" that counsel provide such representation. The majority did not decide whether a court has inherent authority to compel an unwilling attorney to provide free representation, although the concurring and dissenting opinions suggested that such inherent authority does exist.

Cumulative Digest Case Summaries **§13-3(a)**

Luis v. United States, ___U.S. ___, 136 S.Ct. 1083, ___ L.Ed.2d ___ (2016) (No. 14-419, 3/30/16)

A federal statute provided that in a prosecution for federal health care fraud, the U.S. Attorney may seek a pretrial order freezing certain of the defendant's assets, including property obtained as a result of the crime, property traceable to the crime, and other "property of equivalent value." Defendant was charged with committing health care fraud in the amount of $45 million. The prosecution sought a pretrial order to freeze $2 million in defendant's possession so it would be available for restitution and criminal penalties. The parties agreed that the funds were not connected to the charged offenses and that the order would prevent defendant from being able to hire counsel.

The Supreme Court held that a pretrial order freezing assets which are not related to the charged crime would violate the Sixth Amendment right to hire counsel of choice.

1. A four-member plurality held that the Sixth Amendment right to the assistance of counsel is a fundamental right, and includes the right to counsel of choice provided that the defendant has sufficient assets to hire the chosen attorney. Although **Caplin & Drysdale, Chartered v. United States**, 491 U. S. 617 (1989) and **United States v. Monsanto**, 491 U. S. 600 (1989)) allowed orders forfeiting or freezing assets which the defendants would have used to pay counsel fees, in both cases the assets were "tainted" because they were traceable to the crime in question. Thus, in those cases the government had a "substantial interest" in the assets even before convictions were obtained.

Here, by contrast, the assets were untainted by any association with the crime. Thus, the government lacked any substantial interest in the assets before it obtained a conviction. The court concluded that insofar as the funds were needed for defendant to hire counsel of choice, the "competing interests" of the Sixth Amendment and the government's right to secure "untainted" assets for forfeiture and restitution must be resolved in favor of the right to counsel of choice. The plurality also stressed that accepting the government's position might erode the right to counsel because Congress could enact statutes authorizing pretrial restraint of assets for various types of criminal conduct.

The plurality also stated that the Government's position would force more defendants to the indigent defense system, placing even more of a burden on "overworked and underpaid public defenders." The plurality noted that according to the Department of Justice, only 27% of county-based public defender offices have sufficient staff to meet nationally recommended

caseload standards.

Finally, the plurality acknowledged that money is fungible, but found that "the law has tracing rules" that make it possible to determine whether particular assets are "tainted" by the charged crime.

2. Justice Thomas concurred in the result, finding that the text and common-law background of the Sixth Amendment prohibit pretrial restraint of lawfully owned property needed to pay for counsel of choice. Justice Thomas agreed that only "tainted" assets may be subject to restraint before trial, but rejected the majority's approach of balancing the interest of a criminal defendant in hiring counsel of choice with the government's interest in assuring a fund for forfeitures, restitution, and criminal penalties. Justice Thomas also stressed that the Sixth Amendment includes the right to counsel of choice so long as the accused has the ability to hire such counsel, and found that allowing the Government to force all criminal defendants into the indigent defense system would nullify the original understanding of the framers of the Bill of Rights concerning the right to counsel.

People v. Aguirre-Alarcon, 2016 IL App (4th) 140455 (No. 4-14-0455, 8/3/16)

When the trial court appoints counsel to represent defendant, it may order defendant to reimburse the county or State, but it must first hold a hearing to determine defendant's ability to pay "no later than 90 days after entry of the final order disposing of the case at the trial level." 725 ILCS 5/113-3.1(a).

Here the trial court conducted no hearing whatsoever and neither the court nor any of the parties mentioned the reimbursement fee at any of the proceedings. The trial court instead *sua sponte* included the fee in a supplemental sentencing order.

The State conceded error but argued that the case should be remanded for a hearing on defendant's ability to pay. Defendant argued that the fee should be vacated without any remand because the trial court failed to hold a hearing as required by statute.

The Appellate Court first held that although defendant failed to object to the fee, application of the forfeiture doctrine would be inappropriate where the trial court failed to follow the procedural safeguards contained in the statute.

The Appellate Court held that remand was inappropriate where the trial court failed to hold any sort of hearing on defendant's ability to pay within 90 days as required by the statute. The Appellate Court thus vacated the fee outright.

(Defendant was represented by Assistant Defender Katherine Strohl, Ottawa.)

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§13-3(b)
Appointed Counsel Fees

People v. Johnson, 87 Ill.2d 98, 429 N.E.2d 497 (1981) The Supreme Court set out the following guidelines for awarding appointed counsel fees under a statute which required the trial court to order the county treasurer to pay counsel other than the Public Defender a "reasonable fee":

> "The formula for reasonable compensation should be the hourly fee normally charged for comparable services, less an amount adequate to satisfy the pro bono factor. . . . In determining what

> constitutes a reasonable fee, the trial court must consider a number of factors, including . . . time spent and services rendered, the attorney's skill and experience, complexity of the case, overhead costs, and expenses of trial. Another consideration is local conditions, which refers to the number of attorneys, in a given location, who could be called upon to perform pro bono work. Where there are only a few criminal-trial lawyers in a particular locale, the court must necessarily appoint attorneys from the same select group to represent indigent defendants. This process imposes an unfair burden on the group of attorneys, a burden which is not being shared by all members of the bar. The trial court must also consider this inherent inequity in determining compensation. . . ."
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> "[A]ttorneys should keep an itemized log of all time spent and services performed, and by whom. Specifically, the attorney must designate the amount of time spent in court and out of court, and indicate which services were performed by himself, by associates, law clerks, or paralegals. This information will establish a basis upon which to determine compensation, as well as provide a record in the event of review."

See also, People v. Johnson, 109 Ill.App.3d 1135, 441 N.E.2d 946 (4th Dist. 1982) (on remand, Appellate Court held that pro bono reductions of 58% and 60% were excessive and should not have exceeded 40%; trial court must balance hourly rate normally charged for comparable services with a pro bono factor to determine a "reasonable fee"); In Re Petition for Fees, 117 Ill.App.3d 744, 453 N.E.2d 949 (4th Dist. 1983) (appointed counsel may properly be compensated for work performed by associates, law clerks, investigator and investigator's assistant).

People v. Devin, 123 Ill.2d 60, 525 N.E.2d 56 (1988) Fee of $3,500 was reasonable for representation on appeal following resentencing. Requested fee of $18,724 for 322 hours was excessive in light of issues raised, length of record, and counsel's "long experience in criminal law and his handling of more than 100 appeals." See also, People v. Ashford 162 Ill.App.3d 212, 514 N.E.2d 1213 (5th Dist. 1987) (allowing appointed counsel $60 per hour and noting that the attorney had "a great deal of expertise in criminal proceedings," making him "capable of handling a criminal case far more efficiently than an attorney with a general practice from the same community").

People v. Gangestad, 104 Ill.2d 190, 470 N.E.2d 986 (1984) Fee of $8000 plus expenses would reasonably compensate counsel where appeal involved "extraordinary circumstances and protracted representation" because "record was lengthy and many issues were briefed and argued." See also, People v. Parks, 109 Ill.App.3d 737, 441 N.E.2d 95 (5th Dist. 1982) (appointed counsel need not "be compensated by the county for all time spent pursuing an unlikely defense"; trial court's determination that counsel spent excessive amount of time conducting research in a case which was eventually resolved through plea bargaining was not an abuse of discretion).

People v. Kinion, 97 Ill.2d 322, 454 N.E.2d 625 (1983) On the basis of equitable estoppel, trial counsel was not entitled to any attorney fees from the county. Counsel's comments to the

trial judge indicated he would not request fee for representing the defendant.

People ex rel. Conn v. Randolph, 35 Ill.2d 24, 219 N.E.2d 337 (1966) The courts have inherent power to appoint counsel, and to enter appropriate orders ensuring that counsel does not suffer an intolerable sacrifice and burden in representing indigents and that the indigent's right to counsel is protected.

Based upon the extraordinary circumstances of this case, the trial court could properly order attorney fees in excess of the amount set out by statute. The maximum amount set out by statute cannot be constitutionally applied where appointed counsel cannot continue to serve because of an extreme monetary loss.

People v. Nicholls, 71 Ill.2d 166, 374 N.E.2d 194 (1978) An indigent defendant may be assessed State's Attorney's fee for an unsuccessful appeal.

People v. Fowler & Law Offices of Ronald Tulin, 298 Ill.App.3d 706, 700 N.E.2d 216 (4th Dist. 1998) 1. A petition for fees is addressed to the trial court's sound discretion. Where the county in question has less than 2,000,000 inhabitants, the hourly rates and maximum compensation set forth in 725 ILCS 5/113-3(c) do not apply. In addition, the trial court need not find that "extraordinary circumstances" exist before awarding fees. Instead, the only relevant inquiry is whether the compensation awarded is "reasonable."

2. In setting a reasonable fee, the trial court should consider: (1) the time spent and services rendered, (2) the attorney's skill and experience, (3) the complexity of the case, (4) overhead costs, (5) expenses of trial, and (6) the number of attorneys in the local area that are available to perform pro bono criminal trial work. Other appropriate factors include the rate of compensation for counsel in the jurisdiction, the availability of public funds, and the effects of inflation. Compensation is "reasonable" where it will "reimburse the attorney for his or her overhead expenses and yield something toward the attorney's support"; a fee award "that is insufficient to cover a reasonable office overhead and expenses of trial is clearly unreasonable."

3. Without specifically deciding whether an hourly fee of $29.50 was unreasonable, the Appellate Court held that the trial judge failed to hold an adequate hearing on the petition for attorney's fees. The trial court appeared to ignore a statement itemizing counsel's services, and instead overemphasized the fact that a previous trial had ended in a mistrial and that counsel would be paid as an "independent public defender counsel." The court concluded that neither factor justified a $29.50 hourly fee - the trial court failed to elaborate on what it meant by an "independent public defender counsel," and it apparently gave double emphasis to the prior trial by reducing the fee without recognizing that counsel's compensation request was for fewer hours than had been involved at the first trial.

The trial judge also failed to consider the complexity of the case - "this was a capital murder case until four days prior to commencement of trial, thus requiring [counsel] to prepare the case as if the State would be seeking the death penalty." In addition, the trial lasted eight days, numerous motions were filed, expert witnesses were required, and an additional count was filed before the second trial. Under these circumstances, "the fact that this was a retrial does not necessarily mean it was not complex and did not require a great deal of attorney time."

4. The court concluded: "We recognize the financial burden placed on small counties in providing legal representation for indigent defendants. However, section 113-3(c) of the Code does not allow trial courts to shift the greater share of this burden to appointed counsel."

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

Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2117, 40 L.Ed.2d 642 (1974) State recoupment statute was constitutional; statute required person who was convicted of a criminal offense and subsequently acquired the means to pay for counsel to repay the State for the costs incurred to provide counsel when he was indigent.

James v. Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972) State statute providing that indigent defendant was liable for state expenditures to provide counsel did not deny right to counsel, but violated equal protection because it deprived defendants of protective exemptions available to other civil judgment debtors.

People v. Love, 177 Ill.2d 550, 687 N.E.2d 32 (1997) 725 ILCS 5/113-3.1, which authorizes the trial court to assess appointed counsel reimbursement against a criminal defendant, requires a hearing into the defendant's financial circumstances before reimbursement is ordered. The mere fact that bond has been posted does not necessarily establish that the defendant has the ability to pay reimbursement.

People v. Barbosa, 365 Ill.App.3d 297, 849 N.E.2d 152 (4th Dist. 2006) 1. At the hearing required by People v. Love, the trial court must consider both defendant's ability to pay and the cost to the county or State of providing representation. Reimbursement is permitted only if the trial court finds that the defendant has an ability to pay. The defendant must be given notice that the trial court is considering imposing a reimbursement order, and allowed to present evidence or argument regarding ability to pay.

2. The trial court erred in several respects before ordering reimbursement for appointed counsel: (1) the judge focused attention solely on whether $750 - the amount of defendant's bond - was a reasonable fee for counsel's services; (2) the judge did not indicate that defendant's ability to pay was at issue or ask any questions relating to ability to pay; (3) there was no indication that the court considered defendant's financial affidavit or any other evidence of his financial resources, and no relevant evidence appeared in the record; (4) no express finding concerning ability to pay was made.

People v. Bass, 351 Ill.App.3d 1064, 815 N.E.2d 462 (4th Dist. 2004) The court erred where, at the conclusion of the sentencing hearing, it asked defendant where he was working and how much he made, and then ordered $500 in reimbursement. Not only did the court fail to give notice of the hearing, it did not allow an opportunity to present evidence or argument and failed to consider the defendant's affidavit of assets and liabilities.

People v. Spotts, 305 Ill.App.3d 702, 713 N.E.2d 1191 (2d Dist. 1999) 1. The trial court failed to provide adequate notice or conduct a sufficient hearing before ordering reimbursement for attorney's fees. Although defendant was technically on notice that the prosecutor would seek public defender reimbursement where a motion for reimbursement was on file, he was not informed that the matter would actually be considered at sentencing.

2. Even where appointed counsel is not a public defender, the trial court is not confronted with an "all or nothing" situation. A defendant should be ordered to reimburse the county a reasonable sum based on his ability to pay, but "not necessarily the reasonable fees allowed appointed counsel."

3. Where the trial court did not conduct an adequate hearing before ordering reimbursement for appointed counsel fees, defendant's failure to object did not constitute waiver.

People v. Houser, 305 Ill.App.3d 384, 712 N.E.2d 355 (4th Dist. 1999) A trial judge may not assess fees before legal services are rendered. See also, People v. McCaskill, 298 Ill.App.3d 260, 698 N.E.2d 690 (4th Dist. 1998) (trial court exceeded its authority by ordering defendant to perform community service as reimbursement for the services of the Public Defender; 725 ILCS 5/113-3.1 does not authorize a court to require an indigent defendant to work in lieu of counsel fees; an indigent does not forfeit the right to counsel by refusing to "work off" the fee for appointed counsel).

People v. Bell, 296 Ill.App.3d 146, 694 N.E.2d 673 (4th Dist. 1998) Where defendant's probation was revoked for failing to pay court costs, probation fees and a public defender's fee, the trial court erred by reimposing the public defender fee without holding a new hearing on defendant's ability to pay. Because the second probation term was a "new" sentence ordered upon revocation of the original probation sentence, a new hearing into defendant's ability to pay was required.

People v. Bates, 365 Ill.App.3d 724, 851 N.E.2d 263 (4th Dist.2006) Where the defendant wilfully fails to appear for sentencing, the trial court may enter a reimbursement order without inquiring about ability to pay. The failure to appear for sentencing may result in several "self-inflicted wounds," including loss of the procedural right to have the trial court consider ability to pay.

People v. Webb, 276 Ill.App.3d 570, 658 N.E.2d 852 (3d Dist. 1995) 1. The trial court abused its discretion by ordering reimbursement for public defender services where defendant's bond money belonged to a third party and defendant had no funds or any foreseeable ability to pay. The Court rejected the State's argument that the reimbursement order was proper because the person who posted the bond did not testify that loss of the deposit would result in a financial burden. Where the defendant has no ability to pay for counsel, the financial situation of a third party who posted bond "has no relevance" to the reimbursement issue.

2. The Court also criticized the reimbursement procedure used in LaSalle County.

a. The bond form used in LaSalle County states that bond may be used for attorney's fees if the defendant fails to comply with the conditions of bond, but does not provide reasonable notice that the bond may be seized for reimbursement even if defendant complies with the conditions of the bond. Compare, People v. Maxon & Segrist, 318 Ill.App.3d 1209, 744 N.E.2d 339 (4th Dist. 2001) (a finding that the defendant lacks the ability to pay appointed counsel fees only relieves the defendant of the personal responsibility to pay such fees; that finding is irrelevant to whether the trial court may order the fees to be paid out of the bond; third party who posted bond has standing to object to failure to hold Love hearing).

b. "[I]t is difficult to imagine a more obvious conflict of interest than that created by LaSalle County's practice of augmenting its public defenders' salaries with reimbursements from bond money." It is "incumbent on the court . . . to guard against a trampling of an

indigent defendant's constitutional protections," especially where "appointed counsel must stand mute at the reimbursement hearing." Trial courts "must resist routine forfeiture proceedings favoring the county or State and conform its reimbursement orders to the evidence."

People v. Hower, 119 Ill.App.3d 479, 456 N.E.2d 869 (4th Dist. 1983) The trial judge acted properly by appointing counsel for a defendant who was under 18, despite the defendant's objection that he wanted to plead guilty and avoid paying attorney's fees. The applicable statute and Supreme Court Rule 403 provide that a person under 18 may not plead guilty "unless represented by counsel."

However, the trial judge erred by ordering reimbursement. The recoupment statute applies to indigent defendants who desire counsel, not to defendants who want to waive counsel but are required to be represented.

People v. Ashinsky, 131 Ill.App.3d 985, 476 N.E.2d 816 (3d Dist. 1985) Recoupment statute applies to persons charged with "a violation of any penal statute of this State," but do not apply to persons being held for extradition.

People v. Bowman, 335 Ill.App.3d 1142, 782 N.E.2d 333 (5th Dist. 2002) Supreme Court Rule 137, which asserts that the signature on a pleading constitutes a certificate that the counsel or party has read the pleading, believes it to be well founded in fact and law, and has not filed any improper purpose, applies to proceedings under the Post-Conviction Hearing Act. The trial judge did not abuse its discretion by ordering the State to pay attorney's fees of $1,950 where the prosecutor filed several motions to transfer the proceedings to a different judge and to vacate a discovery order, but never requested hearings and abandoned the motions after causing defense counsel "a great waste of time and effort."

Cumulative Digest Case Summaries **§13-3(c)**

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."
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> 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. Moore, 2015 IL App (1st) 141451 (No. 1-14-1451, 11/24/15)

1. 725 ILCS 5/113-3.1(a) provides that the trial court may order the defendant to pay a reasonable sum to reimburse the county or State for the cost of appointed counsel. Before ordering reimbursement, the court must conduct a hearing on its own motion or on that of the state. The hearing may be held any time after the appointment of counsel, but no more than 90 days after the entry of a final order disposing of the case at the trial level.

At the hearing, the court must consider the affidavit prepared by defendant and any other information pertaining to defendant's financial circumstances. A public defender fee may not be imposed in a perfunctory manner. The defendant must be given notice that the trial court is considering ordering a fee and given an opportunity to present evidence concerning any relevant matters, including his ability to pay. The trial court should consider not only defendant's financial circumstances but also his foreseeable ability to pay.

2. Under **People v. Somers**, 2013 IL 114054, the Supreme Court found that where a timely but insufficient hearing was held, the cause may be remanded for a new hearing. Here, the court concluded that the trial judge's imposition of a $150 public defender fee without addressing defendant's financial situation or ability to pay did not constitute a hearing, even

an inadequate one. "In our view, 'some sort of hearing' is more than the mere imposition of the public defender fee by way of a pronouncement in open court while the defendant is present."

Thus, once 90 days had elapsed after entry of a final order disposing of the case at the trial level, the Appellate Court lacked authority to remand the cause for a hearing. The court also noted that neither the interests of taxpayers nor judicial economy would be served by transporting defendant from DOC to Cook County and holding a hearing on his ability to pay $150.

The trial court's reimbursement order was vacated.

(Defendant was represented by Assistant Defender Katie Anderson, Chicago.)

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. Shaw, 2016 IL App (4th) 150444 (No. 4-15-0444, 4/29/16)

725 ILCS 5/113-3.1 authorizes the trial court to order the defendant to pay a reasonable sum to reimburse the county or State for the cost of court-appointed counsel. Before ordering such payment, the court must conduct a hearing on the courts own motion or on the motion of the State's Attorney at any time after the appointment of counsel but no later than 90 days after the entry of the final order disposing of the case at the trial level. In that hearing, the trial court must consider the affidavit prepared by the defendant concerning his assets and liabilities and any other information pertaining to the defendant's financial circumstances.

On appeal, defendant argued that the trial court erred by ordering a public defender fee without providing notice or conducting a hearing to determine defendant's ability to pay. The State conceded the issue and argued that the cause should be remanded for a hearing on the appropriateness of a public defender fee.

Although neither party raised the issue, the court found on its own motion that it lacked jurisdiction to consider the issue. Defendant filed the notice of appeal December 19, 2012, and indicated that he was appealing the judgement that was entered December 17, 2012. Because the public defender fee was not ordered until nearly two months later, and defendant failed to file an amended notice of appeal, the court concluded that it lacked jurisdiction to consider the public defender fee.

(Defendant was represented by Assistant Defender Erica Nichols Cook, Springfield.)

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.)

Top

§13-4
Effective Assistance of Counsel

§13-4(a)
Generally

§13-4(a)(1)
Standards

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)To establish ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that there was prejudice. Deficient performance requires a showing that counsel's actions were, in light of all the circumstances, outside the wide range of professionally competent assistance. There is a presumption that counsel's conduct was within the range of reasonable professional assistance and was "sound trial strategy."

To show prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Prejudice is presumed in certain contexts, such as where there is a denial of counsel or counsel has a conflict of interest. Accord, People v. Albanese, 104 Ill.2d 504, 473 N.E.2d 1246 (1984); People v. Barrow, 133 Ill.2d 226, 549 N.E.2d 240 (1989).

U.S. v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) 1. Where defense counsel wholly fails to subject the State's case to meaningful adversarial testing, ineffective assistance is presumed without any specific showing of prejudice.

2. Representation by a young, inexperienced lawyer who had never tried a criminal case and who had only 25 days to prepare did not justify a presumption that defendant was denied effective assistance of counsel. See also, Patrasso v. Nelson, 121 F.3d 297 (7th Cir. 1997) (Strickland standard applied at trial because counsel took some action on defendant's behalf; Cronic applied at sentencing because counsel "effectively abandoned" defendant and "entirely

failed to represent" him). But see, People v. Lear, 175 Ill.2d 262, 677 N.E.2d 895 (1997) (mere fact that counsel is inexperienced or has limited resources does not establish ineffectiveness).

Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) 1. To establish ineffective assistance of counsel, a criminal defendant must normally show that: (1) his attorney performed in an unobjectively unreasonable manner, and (2) there is a reasonable probability that had counsel been competent, the result of the proceeding would have been different. Prejudice is presumed, without applying the second factor, where counsel was completely denied at a critical step of the proceedings, counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, or the circumstances were such that even competent counsel would be unlikely to provide effective representation.

2. The exception for "entirely failing to subject the prosecution's case to meaningful adversarial testing" does not apply if counsel's failures occurred only at specific points of the proceeding. Thus, claims that defense counsel erred at a death hearing by failing to introduce mitigating evidence and by waiving closing argument are subject to both components of the ineffectiveness test.

Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) Strickland, rather than Cronic, applied when determining whether counsel was ineffective for failing to obtain defendant's consent for the unusual strategy of conceding guilt at the first stage of a death hearing in order to concentrate on the sentencing phase. Cronic applies only where counsel fails to function as an advocate; here, counsel continued to function as an advocate despite his opening argument concession that defendant was guilty.

A closer question would be presented if such a strategy was used in a non-death case; however, the "gravity of the potential sentence in a capital trial" and two-phase structure of a capital trial might justify such a strategy. Because the evidence is often overwhelming in capital cases and "avoiding execution [may be] the best and only realistic result possible," counsel may "reasonably decide to focus on the trial's penalty phase." See also, People v. Nieves, 192 Ill.2d 487, 737 N.E.2d 150 (2000) (attorney is not necessarily ineffective where, in the face of overwhelming evidence, he or she concedes guilt or relies on defenses that are not recognized by law or supported by the evidence; if defendant enters a not-guilty plea in the face of overwhelming evidence of guilt, "we are unwilling to find that his counsel was ineffective simply because he failed to contrive a leak-proof theory of innocence on defendant's behalf").

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) The same standard for effectiveness of counsel applies to both appointed and retained counsel.

Wainwright v. Torna, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982) A defendant does not have a constitutional right to counsel for discretionary appeals. Thus, a defendant is not deprived of effective assistance of counsel because his attorney fails to seek a discretionary appeal. See also, People v. Pinkonsly, 207 Ill.2d 555, 802 N.E.2d 236 (2003) (post-conviction petitioner does not have a constitutional right to the assistance of counsel, but does have a statutory right to counsel's "reasonable" assistance).

Wright v. Van Patten, 552 U.S. 120, 128 S.Ct. 743, 169 L.Ed.2d 583 (2008) 1. Under the Anti-Terrorism and Effective Death Penalty Act of 1996, federal habeas corpus relief is available on an issue that was adjudicated on the merits in state court only if the lower court's

decision was contrary to, or involved an unreasonable application of, clearly established federal law as interpreted by the Supreme Court.

2. The Wisconsin Court of Appeals did not unreasonably apply clearly established federal law when it found that Strickland, rather than Cronic, applies to a claim of ineffective assistance based on the fact that defense counsel participated in a plea hearing by speakerphone. Because no decision of the U.S. Supreme Court has squarely addressed the issue, the Wisconsin court's finding could not be deemed unreasonable.

The court noted however, that its "own consideration of the merits" of practicing law by speakerphone is left "for another day."

3. In passing, the court noted that Strickland applies to most claims of ineffective assistance. Cronic, which presumes that counsel's actions were prejudicial, applies only where prejudice is so likely that the cost of litigating the issue in each case is unjustified. One such situation is where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.

4. In a concurring opinion, Justice Stevens stated that when Cronic was decided in 1984, "neither the parties nor the Court contemplated representation by attorneys who were not present in the flesh." Justice Stevens stressed, "[T]oday's opinion does not state that the State court's interpretation of Cronic was correct, or that we would have accepted that reading if that case had come to us on direct review."

Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) A complaint against a public defender under the Federal Civil Rights Act (42 USC 1983), based upon the defender's alleged inadequate representation in petitioner's state appeal, was dismissed because a public defender does not act "under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Compare, Tower v. Glover, 467 U.S. 914, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1984) (public defender does act "under color of state law" if he conspires with state officials to deprive a person of constitutional rights). See also, Johnson v. Halloran, 194 Ill.2d 493, 742 N.E.2d 741 (2000) (members of county Public Defender office have no sovereign immunity from malpractice actions based on negligence in the representation of criminal defendants; P.A. 91-877, which took effect while the instant case was on appeal and which provides immunity in malpractice actions "except for wilful and wanton misconduct," does not apply to claims which vested before the act became effective).

People v. Coleman, 168 Ill.2d 509, 660 N.E.2d 919 (1995) In finding that defense counsel was not ineffective because the Public Defender's Office lacked sufficient training and supervision in death penalty cases, the court found that the case was not one in which prejudice should be presumed.

1. Prejudice is presumed only under circumstances where "any lawyer, even a fully competent one," would be unlikely to provide effective assistance. As an example the Court cited Powell v. Alabama, 287 U.S. 45 (1932), where "all members of the bar" were appointed for purposes of arraignment and a reluctant out-of-state attorney was appointed for trial.

2. General allegations of inadequate training and deficient office practices are not analogous to Powell and go to only a "narrow aspect" of defense counsel's "overall competence." Therefore, ineffectiveness would not be presumed.

People v. Simpson, 204 Ill.2d 536, 792 N.E.2d 265 (2001) 1. A defendant who makes a valid waiver of his right to counsel and chooses to represent himself is not entitled to the assistance

of standby counsel. If standby counsel is appointed, he or she has no duty to actively investigate or prepare a defense.

2. To succeed on a claim concerning the actions of standby counsel, the defendant must show that counsel prevented him from accomplishing something he "intended to accomplish or would have been able to accomplish if standby counsel had not prevented him from doing so, either through unreasonable advice or direct action."

3. There was nothing in the record to suggest that the defendant asked standby counsel to investigate. Instead, the record showed that defendant made an ill-founded strategic decision not present mitigation.

People v. Albanese, 104 Ill.2d 504, 473 N.E.2d 1246 (1984) A reviewing court need not determine whether counsel's performance was deficient before examining the prejudice prong of Strickland; an ineffectiveness claim may be resolved on the ground that the alleged errors did not alter the result of the case.

People v. Jackson, 205 Ill.2d 247, 793 N.E.2d 1 (2001) To establish ineffective assistance at the second stage of a death hearing, the defendant must show that counsel's performance was objectively unreasonable and that absent the errors, the sentencer would have concluded that a death sentence was unwarranted.

People v. Harris, 206 Ill.2d 1, 794 N.E.2d 314 (2002) An attorney's admission of ineffectiveness does not bind the court or determine whether counsel was ineffective. The appropriate question is not whether defense counsel viewed his performance as deficient, but "whether a reasonably competent attorney, in the same circumstances, would have decided not to raise" the issue.

Thus, appellate counsel was not ineffective merely because as part of defendant's amended post-conviction petition, he tendered an affidavit stating that his failure to raise an issue was the result of misreading the case law rather than a strategic decision.

People v. Dodson, 331 Ill.App.3d 187, 771 N.E.2d 586 (5th Dist. 2002) Cronic applied where defendant waived a jury and stipulated to a statement of the State's evidence that had been prepared by the prosecutor, defense counsel filed no pretrial motions and presented no evidence, and the State made no concessions in return for defendant's stipulation to the evidence. Counsel's decision to take a bench trial and sign the stipulation "virtually ensured a conviction and spared the prosecution those hardships that usually accompany the existence of a trained and skilled adversary trying to defeat its objectives."

The mere hope of leniency at sentencing was not a valid strategic reason for counsel's actions. "Capitulation, on a song and a prayer that making it easy for the State will somehow accrue to a client's benefit, is not strategy." See also, People v. Halawa, 291 Ill.App.3d 373, 683 N.E.2d 926 (1st Dist. 1997) (defense counsel was incompetent under Cronic because his "performance amounted to no representation at all"; counsel pleaded defendant guilty after waiving defendant's right to a preliminary hearing (meaning that the State's case was never subjected to a probable cause review), and failed to file motions for discovery or to quash the arrest and suppress the statements). Compare, People v. Madison, 334 Ill.App.3d 680, 778 N.E.2d 376 (2002) (Strickland applied where counsel did "everything legally possible to shield his client from the State's goals, despite a hopeless set of circumstances"; "[w]hile a few things counsel did could be second-guessed," in light of the overwhelming evidence "counsel chose the correct, and only, path of defense left open to him)."

People v. Fletcher, 335 Ill.App.3d 447, 780 N.E.2d 365 (5th Dist. 2002) Defense counsel was ineffective for introducing defendant's criminal history before the jury; there was a reasonable probability that the jury might have reached a different result where the State's evidence consisted of accomplice testimony by witnesses who had motives to falsify.

People v. Vera, 277 Ill.App.3d 130, 660 N.E.2d 9 (1st Dist. 1995) The cumulative effect of trial counsel's errors satisfied the prejudice requirement of Strickland. Although any one of counsel's errors may not have satisfied Strickland by itself, the cumulative effect rendered the conviction unreliable.

People v. Love, 312 Ill.App.3d 424, 727 N.E.2d 680 (2d Dist. 2000) A defendant has no right to the effective assistance of counsel on a motion for DNA testing under 725 ILCS 5/116-3; because §116-3 does not provide a statutory right to counsel, an attorney appointed or retained on a §116-3 motion is not required to render any particular level of assistance.

Cumulative Digest Case Summaries **§13-4(a)(1)**

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. Cherry, 2016 IL 118728 (No. 118728, 9/22/16)

In **United States v. Cronic**, 466 U.S. 648 (1984), the Supreme Court held that the usual prejudice prong of **Strickland** does not apply and prejudice may be presumed where (1) defendant is denied counsel at a critical stage; (2) counsel entirely fails to subject the State's case to meaningful adversarial testing; and (3) counsel represents a client in situations where no lawyer could provide effective representation. The second exception only applies where counsel's effectiveness falls to such a low level that it is not merely incompetence, but no representation at all.

Defendant argued that the representation of his counsel at a **Krankel** hearing was so deficient that prejudice should be presumed under the second **Cronic** exception. The court rejected defendant's argument. At the **Krankel** hearing, counsel orally argued defendant's *pro se* claims concerning his trial counsel's ineffectiveness. Although it was possible counsel could have done more, such as introducing evidence in support of defendant's claims, the failure to do so does not rise to the level of no representation at all. Counsel's failure, if any, would have been nothing more than poor representation under **Strickland**. And since defendant made no showing of prejudice, he could not prevail under the second prong of **Strickland**.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

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. Veach, 2016 IL App (4th) 130888 (No. 4-13-0888, 3/11/16)

1. Where a reviewing court must consider matters outside the record in order to decide whether trial counsel provided ineffective assistance, the issue is more appropriately addressed in post-conviction proceedings. To help clarify which cases rasing ineffectiveness may be appropriately addressed on direct appeal, the Appellate Court suggested dividing such cases into three categories.

Category A: cases that the court should decline to address. These are cases where the appellate record is not adequate to determine whether counsel was ineffective. The record will typically be missing information about the communication between counsel and defendant and about counsel's trial strategy and tactics.

When faced with this type of case, the reviewing court should decline to address the issue, affirm the lower court's judgment, and indicate that defendant may raise the issue in a post-conviction petition.

Category B: cases that the court may address because they are clearly groundless. On rare occasions, the claim clearly has no merit and thus there is no need to examine the information that is typically missing from the direct appeal record.

Category C: cases that the court may address because trial counsel's errors were so

egregious that the reviewing court can determine that trial counsel was ineffective without seeing further evidence. In such cases, the court must be able to conclude that no justifiable explanation for counsel's error could possibly exist.

2. Here, trial counsel agreed that video recordings should be admitted even though they contained prior consistent statements and bad character evidence. The court held that even though "at first blush" it was not clear why trial counsel agreed to admit this evidence, this was a Category A case that should not be addressed on direct appeal. The record contained no information about why counsel agreed to admit the evidence and since this was not a case where no justifiable explanation for counsel's action could possibly exist, the court would need to improperly guess at counsel's motivation to resolve the issue.

The court thus declined to address defendant's claim, affirmed his convictions, and noted that defendant may raise his claim in a post-conviction petition.

3. The dissent believed that the record on appeal showed ineffective assistance of counsel and that delaying the claim until a post-conviction proceeding was improper.

(Defendant was represented by Assistant Defender Jack Hildebrand, 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

Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) Defense counsel was not ineffective for failing to obtain defendant's consent for the unusual strategy of conceding guilt at the first stage of a death hearing in order to concentrate on the sentencing phase. Although an attorney has a duty to consult with a client regarding important decisions, counsel need not obtain the defendant's express consent to tactical decisions other than whether to plead guilty, waive a jury, testify, or take an appeal.

People v. Medina, 221 Ill.2d 394, 851 N.E.2d 1220 (2006) 1. Five decisions ultimately belong to the defendant after consultation with defense counsel: (1) what plea to enter; (2) whether to waive a jury trial; (3) whether to testify; (4) whether to appeal; and (5) whether to submit an instruction on a lesser included offense. The latter right is analogous to deciding what plea to enter, because a lesser included instruction exposes the defendant to potential criminal liability which might otherwise be avoided.

2. The court acknowledged, however, that requesting a lesser included instruction is "unavoidably intertwined with" counsel's strategic decisions. By advising the defendant of his right to decide whether to tender a lesser included offense instruction, the trial court may intrude on trial counsel's strategy by influencing the defendant to tender an instruction which, based on trial counsel's recommendation, he might have chosen to forego.

Balancing these conflicting considerations, the court concluded that when defense counsel tenders a lesser included offense instruction, the trial court should ask, in defendant's presence, whether counsel has advised defendant of the potential penalties associated with the lesser included offense. The judge should then ask defendant whether he agrees with the tender of the lesser included instruction. Such a procedure "will strike the appropriate balance of inquiry and confirmation without overreaching and undue intervention in the attorney-client relationship."

Where defense counsel does not request a lesser included offense instruction, the defendant is not exposed to additional criminal liability. In this instance, any inquiry by the trial court might interfere with counsel's trial strategy. Thus, when no instruction is tendered, the trial court should assume that the decision not to tender the instruction was made by the defendant after consulting with counsel, and should not make any admonishments. See also, People v. Brocksmith, 162 Ill.2d 224, 642 N.E.2d 1230 (1994) (adopting rule that defendant has right to decide whether to request a lesser included offense instruction).

People v. Campbell, 208 Ill.2d 203, 802 N.E.2d 1205 (2003) 1. Other than the five decisions which belong to the defendant, trial counsel has the right, after appropriate consultation with the defendant, to make ultimate decisions as to tactics and strategy. Counsel may waive the client's right to confrontation by stipulating to the admission of evidence, at least where the defendant does not object and the decision to stipulate is a matter of legitimate trial tactics. However, where a stipulation includes a statement that the evidence is sufficient to convict, or the State's entire case is presented by stipulation and defendant does not preserve an argument for appeal, due process and the right to plead not guilty require that the defendant personally waive the right to confrontation.

2. Counsel's decision to stipulate to the testimony of an out-of-state witness involved legitimate trial tactics. Although the stipulation constituted the only evidence concerning an essential element of both offenses with which defendant was charged, it also provided an innocent explanation for defendant's actions. In arguing for a directed verdict and in closing statements, defense counsel relied on the stipulation in arguing that defendant acted without criminal intent.

3. In a partially concurring and partially dissenting opinion, Justice Kilbride stressed that the defendant has the right to object to or dissent from counsel's decision to stipulate. Justice Kilbride also noted that the decision to stipulate would not be a sound trial tactic if in the absence of the stipulation, the State would have been unable to make a prima facie case of either offense. See also, People v. Phillips, 217 Ill.2d 270, 840 N.E.2d 1194 (2005) (defendant must personally waive the right to confrontation if a 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; where defendant was present but failed to object, the decision to stipulate was a matter of trial tactics and benefitted the defense, the stipulation did not assert that the evidence was sufficient to convict, and the State's case was not presented entirely by stipulation, counsel's agreement to the stipulation waived defendant's confrontation rights although there was no indication that defendant was specifically admonished).

People v. Keys, 195 Ill.App.3d 370, 552 N.E.2d 285 (4th Dist. 1990) While the accused has the right to make decisions involving certain fundamental rights, strategic matters are left to the attorney. Among matters deemed "strategic" are: (1) whether to bar the prosecution from using unconstitutionally obtained evidence; (2) whether to obtain a dismissal of an indictment on the ground of racial discrimination in the selection of the grand jury; (3) whether to wear civilian clothes rather than prison garb during trial; (4) whether to strike an improper jury instruction; (5) whether to include a particular nonfrivolous claim among the issues briefed and argued on appeal; (6) whether to forgo cross-examination; (7) whether to put certain witnesses (other than defendant) on the stand; (8) whether to seek a continuance and thereby waive speedy trial rights.

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. Higgins, 2016 IL App (3d) 140112 (No. 3-14-0112, 3/24/16)

1. Under **People v. Brocksmith**, 162 Ill. 2d, 224, 642 N.E.2d 1230 (1994), whether to submit a lesser-included offense instruction is one of five decisions which belong exclusively to the defendant and not to defense counsel. In **Brocksmith**, the court recognized that the decision to tender a lesser-included offense instruction is analogous to the decision to plead guilty and may result in a loss of liberty based on an uncharged offense.

2. Where defense counsel tenders a lesser-included defense instruction, the trial court must inquire of defense counsel, in defendant's presence, whether counsel has advised defendant of the potential penalties associated with the lesser-included offense and whether the defendant agrees with the decision to tender the lesser offense. **People v. Medina**, 221 Ill.2d 394, 851 N.E.2d 1220 (2006). Here, the court concluded that the trial court's duty to inquire applies only if defense counsel tenders the lesser-included offense instruction. Where the State requests a lesser-included offense instruction, the trial court need not ensure that defendant agrees with defense counsel's decision to not object to the instruction.

3. The court noted that in this case, the decision to not object to the lesser-included offense instruction appears to have been a valid and effective trial strategy. On the greater offense, defendant would have been subject to a sentencing range of 15 to 60 years. By not objecting the lesser-included offense instruction tendered by the State, defendant avoided a more serious conviction and received a sentence of 12 years, three years less than minimum sentence he could have received on the greater offense.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Joy Reedy, 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. 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. 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. Tayborn, 2016 IL App (3d) 130594 (No. 3-13-0594, 3/7/16)

1. An attorney's decision whether to file a motion to suppress statements is generally a matter of trial strategy that is entitled to great deference. To establish prejudice from substandard representation involving the failure to file a motion to suppress evidence, the defendant must show that a suppression motion would have succeeded and a reasonable probability that the outcome of the trial would have been different had the evidence been suppressed.

2. The court concluded that counsel was ineffective for failing to move to suppress a statement which defendant made as a result of custodial interrogation at the scene of a traffic stop. The court stressed that there was no reasonable strategy for failing to move to suppress defendant's statement that he was transporting cocaine, because the statement was the State's strongest evidence on charges of possession of cocaine and possession with intent to deliver. The court found that the motion would have been meritorious and there was a reasonable

probability that the outcome of the trial would have been different in the absence of the statement.

Defendant's conviction was reversed and the cause remanded for further proceedings.

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.)

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§13-4(a)(3)
Other

People v. Johnson, 75 Ill.2d 180, 387 N.E.2d 688 (1979) Defendant may waive competent counsel if the waiver is made voluntarily, knowingly and understandingly. Waiver was valid where trial court advised defendant of its belief that retained counsel was acting ineffectively and that defendant had the choice of requesting other counsel or waiving right to effective counsel and continuing with counsel of choice.

People v. Pinkonsly, 207 Ill.2d 555, 802 N.E.2d 236 (2003) Ineffective assistance of counsel is a constitutional issue, and cannot be raised in a §2-1401 petition. Compare, People v. Lawton, 212 Ill.2d 285, 818 N.E.2d 326 (2004) (§2-1401 petition may be utilized to raise claim of ineffective assistance of counsel in Sexually Dangerous Persons proceeding, at least where that claim could not have been raised on direct appeal because the same attorney represented the respondent both in the trial court and on appeal; although §2-1401 does not specifically authorize such actions, fundamental fairness requires that persons who are deprived of their liberty through the Sexually Dangerous Persons Act and who were represented by the same attorney in both the trial and reviewing courts be afforded a process by which to bring charges of ineffective assistance of counsel; the Post-Conviction Hearing Act is inapplicable because sexually dangerous person proceedings are civil).

Cumulative Digest Case Summaries **§13-4(a)(3)**

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, 2014 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 (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. 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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§13-4(b)
Examples

§13-4(b)(1)
Failure to Investigate

§13-4(b)(1)(a)
Generally

Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) Generally, tactical decisions cannot be the basis for a finding of ineffective assistance of counsel. A tactical decision is reasonable only to the extent it is based on a thorough investigation of the case, however. Thus, counsel's decision not to present mitigating evidence at a death sentencing

hearing could be a reasonable tactical decision only to the extent that the decision to make a less than full investigation of defendant's background was also reasonable.

Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) A defense attorney is required to make a reasonable investigation, or a reasonable decision which makes a particular investigation unnecessary. An attorney is not ineffective where there are sound reasons for deciding not to investigate a particular theory of defense. See also, People v. Kokoraleis, 159 Ill.2d 325, 637 N.E.2d 1015 (1994) (attorney is not ineffective for making a reasonable decision to stop investigating a particular issue; decision not to investigate an impaired capacity defense was reasonable where defendant repeatedly insisted that he had not been involved in the crime).

People v. Madej, 177 Ill.2d 116, 685 N.E.2d 908 (1997) A defense attorney is required to make a reasonable investigation or "a reasonable decision which makes particular investigations unnecessary." However, the decision to end an investigation must be the product of an informed judgment and not the result of failing to make an adequate initial investigation.

People v. Jackson, 205 Ill.2d 247, 793 N.E.2d 1 (2001) Counsel has an obligation to conduct a reasonable investigation of potential sources of mitigating evidence, unless there is a legitimate reason for failing to make a particular investigation. If an adequate investigation was conducted, counsel will not be deemed ineffective merely because a particular piece of evidence was not introduced.

People v. Coleman, 183 Ill.2d 366, 701 N.E.2d 1063 (1998) The court rejected the State's argument that under People v. Emerson, 122 Ill.2d 411, 522 N.E.2d 1109 (1987), an argument that counsel failed to adequately investigate mitigating evidence is waived if the record affirmatively demonstrates that defendant made a conscious decision to forego the presentation of mitigating evidence. Although defendant refused to cooperate with an investigation of mitigating evidence and may not have wanted such evidence to be presented, "we are reluctant to resolve this issue on either the basis of waiver or the holding in Emerson, given the fact that the federal courts have criticized Emerson's approach to this issue."

People v. Hobson, 386 Ill.App.3d 221, 897 N.E.2d 421 (1st Dist. 2008) The court noted, but failed to resolve, conflicting appellate authority concerning whether a defense attorney has an unqualified duty to comply with his client's request to see discovery materials. The failure to provide discovery materials to the client could constitute ineffective assistance only if there was prejudice, however; here, defendant was unable to show that the result of the trial would have been different had he seen the discovery.

Cumulative Digest Case Summaries **§13-4(b)(1)(a)**

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

People v. Holman, 164 Ill.2d 356, 647 N.E.2d 960 (1995) 1. A defense attorney is not ineffective for failing to investigate theories for which no sound basis exists. Counsel could not be deemed ineffective for failing to investigate psychiatric matters where he found defendant to be of normal intelligence and there was no reason to believe that psychological examinations would result in mitigating evidence.

2. Counsel was not ineffective for failing to hire an investigator to help prepare the case. Counsel testified that he conducted the investigation himself, and an expert witness testified at the post-conviction hearing that even when investigators are available, defense attorneys often attend interviews of mitigation witnesses.

3. Defense counsel's failure to retain a mitigation expert for sentencing was not ineffective assistance, although the post-conviction investigation revealed substantial mitigation that was not introduced at sentencing. The evidence was conflicting concerning the availability of expert mitigation services at the time of trial, and counsel testified that he had not been aware of such services.

People v. Jackson, 205 Ill.2d 247, 793 N.E.2d 1 (2001) 1. Counsel was not ineffective at sentencing for failing to discover mitigating evidence that defendant's family had an extensive history of mental illness. First, because extensive mitigating evidence was presented, "it is clear that the attorneys who assisted defendant at his resentencing conducted a reasonable investigation into potential sources of mitigating evidence." Second, although counsel failed to discover that at least 13 members of defendant's family had been diagnosed as suffering from mental illness which included episodes of extreme violence, the family was embarrassed and disinclined to reveal information about its "widespread affliction with mental illness."

2. In addition, defendant could not show that a non-death sentence would have been imposed had the evidence been presented, especially because a family history of mental illness is not inherently mitigating. See also, People v. Hickey, 204 Ill.2d 585, 792 N.E.2d 232 (2001) (trial counsel did not fail to make an adequate investigation where some of the evidence which counsel allegedly failed to investigate was in fact presented at the sentencing hearing, some of the evidence could have been regarded by the jury as aggravating rather than mitigating, and some of the data which formed the basis for alleged mitigating evidence may not have been available).

People v. Ganus, 185 Ill.2d 355, 706 N.E.2d 875 (1998) The decision to not investigate a possible defense is "reasonable" to the extent it is supported by reasonable professional judgment. Although "it might have been advisable to more fully investigate defendant's psychological or psychiatric condition," and additional mitigating evidence was discovered in post-conviction proceedings, counsel was not ineffective where he extensively investigated defendant's social history, utilized the assistance of a court-appointed mitigation specialist, and developed a "promising (although ultimately unsuccessful) strategy" of mitigation.

People v. Harris, 206 Ill.2d 1, 794 N.E.2d 314 (2002) 1. Defense counsel was not ineffective for failing to obtain the medical records of the complainant in an unrelated robbery, where the complainant testified for the first time at defendant's second sentencing hearing. Because the witness did not testify at the first sentencing hearing, at which the evidence in question was admitted by stipulation, there was no reason to anticipate that the witness would testify at the second hearing or that the State would introduce far more substantial evidence. In view of the information known by counsel, it was reasonable for counsel to believe that additional investigation of the witness's injuries was unnecessary and to direct his efforts to other areas.

People v. Munson, 206 Ill.2d 104, 794 N.E.2d 155 (2002) Trial counsel was not ineffective at sentencing for failing to properly investigate and present mitigating evidence. Although counsel is required to conduct a reasonable investigation into mitigating evidence, the failure to have a mitigation expert testify was not objectively unreasonable where counsel presented the testimony of eleven witnesses in mitigation and consulted with a mitigation specialist.

In addition, much of the additional evidence raised by the defendant was cumulative of evidence that was introduced at the sentencing hearing. Finally, evidence of a difficult childhood or developmental problems is not inherently mitigating and may be construed as aggravation by the trier of fact.

People v. Peeples, 205 Ill.2d 480, 793 N.E.2d 641 (2002) Trial counsel acted unreasonably by failing to investigate and present mitigating evidence concerning defendant's neurological condition. The error did not require reversal, however, because defendant could not show that a non-death sentence would have been imposed had the evidence been presented. The

neurological evidence produced on post-conviction indicated that any brain dysfunction was "minimal" and not linked to defendant's crimes. In addition, the jury could have considered the evidence to be aggravating, and the aggravating evidence was "plentiful and significant."

People v. Richardson, 189 Ill.2d 401, 727 N.E.2d 362 (2000) Where counsel knew the State intended to present significant aggravating evidence and made a reasonable strategic decision to focus his attention on the strongest mitigating evidence, he was not ineffective for failing to investigate other mitigating evidence for the death hearing.

Cumulative Digest Case Summaries **§13-4(b)(1)(b)**

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

Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) The decision to limit the investigation of possible mitigating evidence in a death penalty case constituted ineffective assistance.

1. Counsel limited their investigation to two sources - a one-page presentence report and documents concerning defendant's various placements in foster care - despite the availability of State funding that would have allowed a detailed social history report. In addition, counsel limited their investigation of possible mitigating evidence to sources which did not discuss defendant's life history and to very limited evidence concerning defendant's history of foster care, despite discovering that: (1) defendant's mother was a chronic alcoholic, (2) defendant was shuttled from one foster home to another and exhibited serious emotional difficulties, (3)defendant had frequent, lengthy absences from school, and (4) on at least one occasion defendant and his siblings were left without food for several days. "Any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background."

Counsel discovered nothing in their limited investigation to suggest that a mitigation case would have been counterproductive or that further investigation would have been fruitless, and until the eve of the sentencing hearing said they would present mitigating evidence. In addition, during the sentencing proceeding counsel did not refrain from presenting a mitigating case, but instead did so "half-hearted[ly]."

2. There was a reasonable probability that the jury, which heard no significant mitigating factor other than defendant's lack of a prior record, would have returned a different sentence had it heard the "powerful" mitigating evidence which counsel failed to discover.

Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) 1. Although defense counsel in a death case investigated several aspects of defendant's life, examined reports by three mental health experts concerning defendant's mental condition, and received little assistance from either the defendant or members of his family in terms of finding mitigating evidence, they were ineffective for failing to examine a court file concerning a prior conviction which the prosecution stated would be used to establish a statutory aggravating factor. It was objectively unreasonable to fail to obtain the file of a prior conviction which was available at the local courthouse and which counsel knew would be used as aggravating evidence.

2. Defendant was prejudiced by the failure to review the file - counsel would have found "a range of mitigation leads that no other source had opened up," including extensive records of defendant's childhood and mental health deficiencies.

Workman v. Tate, 957 F.2d 1339 (6th Cir. 1992) Defense counsel was ineffective for failing to contact two witnesses who were with defendant during events leading to his arrest. The decision not to contact the witnesses could not be considered "strategic," because there was no reason to believe that an investigation would have been futile. Defendant was prejudiced because the witnesses would have directly contradicted the complainants and suggested an innocent explanation for the incident.

Hall v. Washington, 106 F.3d 742 (7th Cir. 1997) Defendant did not receive effective assistance of counsel at a death hearing where defense lawyers: (1) failed to contact defendant in the six-week-period between the conviction and the death hearing, (2) did not discuss the hearing with defendant, (3) did not inquire about possible mitigating evidence or witnesses, (4) did not return telephone calls or respond to individuals who volunteered to offer mitigating evidence, and (5) failed to discover a number of readily available mitigation witnesses. Counsel's "utter disregard of the case caused them to overlook a substantial amount of mitigation evidence, both in quantity and in quality."

The attorneys' failure to call mitigating witnesses was not a matter of trial tactics; defense counsel can make a rational strategic decision "only after some inquiry or investigation." See also, Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996) (counsel could not make strategic decision to refrain from introducing mitigation where he had not investigated possible mitigating evidence).

People v. Madej, 177 Ill.2d 116, 685 N.E.2d 908 (1997) Counsel's decision to forego an investigation "was neither the product of an informed judgment nor a strategic decision reached after weighing all available options." Counsel failed to investigate because he expected to receive a continuance between the trial and sentencing hearing.

People v. Morgan, 187 Ill.2d 500, 719 N.E.2d 681 (1999) 1. Defense counsel was ineffective

for failing to investigate mitigating evidence despite being aware of defendant's mental health problems. The failure to investigate could not be justified on the ground that defendant's family might not have disclosed specific mitigating evidence or by counsel's decision to plead for mercy at the sentencing hearing - there "can be no legitimate 'strategy' where counsel has failed to make any investigation."

2. There was a reasonable probability that a non-death sentence would have been imposed had such evidence been presented. In imposing the sentence, the trial judge explicitly referred to the lack of mitigating evidence and stated that defendant's background was "one of all criminal conduct" and there was no "rhyme" or "reason" to the offenses. Had counsel investigated the wealth of mitigation evidence available, he would have discovered the "profound effect" defendant's brain damage had on his ability to control his conduct, the extent of the abuse defendant suffered as a child, and defendant's learning disabilities. See also, People v. Perez, 148 Ill.2d 168, 592 N.E.2d 984 (1992) (counsel was ineffective for failing to investigate and present evidence of defendant's mental history, and for failing to make even a minimal search into defendant's background with the information he possessed; it was counsel's "lack of diligence" rather than strategy which prevented him from introducing mitigating evidence; there was a reasonable probability the jury would have decided against a death sentence had it known all the evidence; People v. Young, 220 Ill.App.3d 98, 581 N.E.2d 371 (2d Dist. 1991) (counsel failed to make even the cursory investigation which would have disclosed evidence pertinent to an insanity defense).

People v. Howery, 178 Ill.2d 1, 687 N.E.2d 836 (1997) 1. A strategic decision to refrain from presenting mitigating evidence is not entitled to deference where the decision stems from the failure to properly investigate the defense. Counsel acted unreasonably by failing to investigate mitigating evidence and by presenting only brief testimony from three character witnesses at the death hearing. During an evidentiary hearing on the post-sentencing motion, counsel admitted that he had not "exert[ed] the same vigor" as at trial because he was "demoralized and distraught when the defendant was found guilty."

2. The failure to investigate likely resulted in a more severe sentence; a competent investigation would have disclosed at least three witnesses who would have testified about defendant's involvement in civic affairs, defendant suffered from emotional distress and "excessive drinking" at the time of the offense, and defendant had no prior criminal history. In addition, the sentencing court remarked that counsel failed to present any meaningful mitigating evidence, suggesting that the presentation of mitigation might have resulted in a non-death sentence. See also, People v. Thompkins, 191 Ill.2d 438, 732 N.E.2d 553 (2000) (counsel knew the State might seek a death sentence but "did very little" to prepare and "appeared to leave the matter of investigating to defendant"; the failure to conduct an adequate investigation meant that counsel "was in no position to make a reasoned decision whether [any] testimony would have any impact on the judge"; deference to counsel's strategy is not warranted where counsel failed to properly investigate and prepare the defense; mere fact that client is uncooperative will not excuse the failure to investigate).

People v. House, 141 Ill.2d 323, 566 N.E.2d 259 (1990) Defense counsel was ineffective where he failed to investigate evidence that would have established the foundation for admission of a spontaneous declaration. Due to the closeness of the evidence, the outcome was likely affected.

People v. Wiley, 205 Ill.2d 212, 792 N.E.2d 1274 (2001) Defense counsel was ineffective at

the second stage of the death hearing because he failed to investigate and present mitigating evidence. Counsel failed to contact members of defendant's family who were willing to testify, and the only family member who was called to testify could not have been a "better witness" for the State.

People v. Harris, 206 Ill.2d 293, 794 N.E.2d 181 (2002) Counsel was "woefully unprepared" for a death hearing because he did not believe that defendant merited a death sentence; in view of the substantial mitigating evidence available, the failure to investigate "may have so undermined the proper function of the adversarial system as to have produced an unjust result." Cause remanded for evidentiary hearing on post-conviction petition. See also, People v. Johnson, 205 Ill.2d 381, 793 N.E.2d 591 (2002) (post-conviction petition made a substantial showing that trial counsel was ineffective; counsel's "pervasive" failures went "to the core of the . . . constitutional guarantee of effective assistance at trial"; petition also made a substantial showing of prejudice where State's case was largely circumstantial and counsel did little other than attack identification evidence and file motions in limine concerning part of the State's evidence); People v. King, 192 Ill.2d 189, 735 N.E.2d 569 (2000) (evidentiary hearing was required on capital post-conviction petition alleging ineffective assistance for failing to investigate and present mitigating evidence concerning defendant's background and difficult upbringing; though such evidence is not inherently mitigating and counsel is not "automatically ineffective" for failing to present it, at trial counsel argued that defendant's background was mitigating but failed to present supporting evidence).

People v. Steidl, 177 Ill.2d 239, 685 N.E.2d 1335 (1997) 1. The post-conviction petition made a substantial showing of ineffectiveness. Because he failed to investigate the crime scene, counsel was unaware of three pieces of evidence that would have led to expert testimony contradicting the State's main witnesses. In addition, counsel failed to locate crucial witnesses or to impeach the State's primary witness with evidence that a competent investigation would have disclosed.

These errors were prejudicial because the evidence was closely balanced, there was no physical evidence to link defendant to the crime scene, and the defense presented an alibi.

2. The petition also made a substantial showing that trial counsel was ineffective at the sentencing hearing. The only mitigation presented was a short statement that defendant had no previous prior record; defense counsel admitted that he did not prepare for sentencing because he thought a death sentence was unlikely and that he would get a one or two-week continuance. See also, People v. Towns, 182 Ill.2d 491, 696 N.E.2d 1128 (1998) (counsel waited until conviction was returned to begin investigating mitigation, and confined his investigation to minimal conversations with four witnesses who testified in mitigation).

3. Defendant did not waive his right to present mitigating evidence by telling counsel he did not want to have evidence or witnesses presented. Where defense counsel fails to conduct an investigation that would reveal possible sources of mitigation, the defendant is not adequately informed of available mitigating evidence. Under such circumstances, any waiver of the right to present mitigation evidence is unknowing.

People v. Orange, 168 Ill.2d 138, 659 N.E.2d 935 (1995) Remanded for evidentiary hearing to determine whether counsel was ineffective for failing to investigate and present mitigation at sentencing; defense counsel presented no evidence at the sentencing hearing and merely argued that defendant had no significant criminal history. On post-conviction, defendant presented affidavits from 18 relatives, friends and employers who would have testified to

defendant's positive traits and abusive upbringing. In addition, in a post-conviction deposition, defense counsel said he had believed it would be fruitless to investigate mitigating evidence, that he had not discussed potential mitigation with defendant until after the guilty verdict was announced, that he made no attempt to contact any mitigating witnesses, and that he thought the best strategy was to end the sentencing hearing as quickly as possible so defendant could appeal.

People v. Coleman, 267 Ill.App.3d 895, 642 N.E.2d 821 (1st Dist. 1994) Counsel was ineffective for failing to contact the victim, investigate the crime scene, explore the victim's criminal background, pursue information that the victim had been shot under different circumstances than he claimed, and interview alibi witnesses. The trial judge said defendant "would have been better off with his mother defending him."

People v. Corder, 103 Ill.App.3d 434, 431 N.E.2d 701 (3d Dist. 1982) Counsel was ineffective where defendant was convicted on the basis of identification testimony by an undercover officer who stated that the offender was clean shaven. Counsel failed to interview witnesses on the State's list of witnesses or introduce evidence to corroborate defendant's testimony that he had a beard at the time of the crime - despite the fact that defendant's driver's license showed that he had a beard six days after the incident.

People v. Algee, 228 Ill.App.3d 401, 591 N.E.2d 1001 (5th Dist. 1992) Counsel's ineffectiveness precluded a knowing and voluntary plea - among other shortcomings, counsel refused to prepare a defense.

People v. Makiel, 358 Ill.App.3d 102, 830 N.E.2d 731 (1st Dist. 2005) Defendant's post-conviction petition presented a substantial allegation of ineffective assistance where trial counsel failed to contact a co-defendant who had been acquitted at a separate trial and who would have contradicted the State's chief witness on several points, including whether defendant participated in the offense.

People v. Morris, 335 Ill.App.3d 70, 779 N.E.2d 504 (1st Dist. 2002) Defendant's post-conviction petition made a substantial showing that defense counsel failed to investigate an alibi defense or interview alibi witnesses before trial, failed to comply with discovery rules requiring disclosure of witnesses, and failed to secure witnesses to testify on defendant's behalf. The court rejected the argument that the failure to call witnesses was a strategic decision, noting that defense counsel indicated his intent to call one of the witnesses on the day the jury was selected, and specifically sought a continuance to obtain the witness's testimony.

People v. Popoca, 245 Ill.App.3d 948, 615 N.E.2d 778 (2d Dist. 1993) Defense counsel was incompetent for failing to support an intoxication defense with additional testimony. Counsel failed to make any investigation into the possibility of obtaining expert testimony, and expert testimony elicited at the post-conviction hearing would have rebutted the State's argument that defendant was sober and made defendant's testimony more credible.

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

People v. Hall, 217 Ill.2d 324, 841 N.E.2d 913 (2005) 1. Where the defendant challenges a guilty plea based on ineffective assistance, he must show that counsel's performance was both objectively unreasonable and prejudicial. Where a post-conviction petitioner alleged that defense counsel repeatedly gave inaccurate advice whether lack of knowledge of a child's presence inside a stolen vehicle was a defense to aggravated kidnapping, the petition made a substantial showing that counsel's advice was objectively unreasonable.

2. To show prejudice in the context of a guilty plea, there must be a reasonable probability that absent counsel's errors, defendant would have insisted on going to trial. A mere allegation that defendant would not have pleaded guilty is insufficient; the petition must raise a claim of innocence or a plausible defense which could have been raised at trial.

Because the petition indicated that defendant would have had a defense to aggravated kidnapping based on his lack of knowledge that a child was inside the car, and because defendant's allegations must be taken as true when resolving the State's motion to dismiss, defendant's claim established both a plausible defense and a claim of innocence.

3. The court rejected the State's argument that the attorney's erroneous advice was cured by the trial court's guilty plea admonishments and the information, which stated that knowledge of the child's presence was an element of aggravated kidnapping. Although the trial court's admonitions are more than mere formalities, they are not sufficient in every circumstance to negate erroneous advice from defense counsel. The critical factor is whether the court's admonitions were sufficiently related to the erroneous advice to cure any prejudice.

Where the trial court merely read the aggravated kidnapping count from the information and asked if the defendant understood the charge, its statements confirmed defendant's knowledge of the allegations of the information. However, the court did not determine whether defendant realized that knowledge was an element of the offense.

People v. Palmer, 162 Ill.2d 465, 643 N.E.2d 797 (1994) 1. The duty to engage in plea negotiations depends on the particular facts and circumstances of each case. Failing to pursue plea negotiations may constitute ineffective assistance of counsel under some circumstances, but in other situations may be an acceptable strategic decision.

Here, counsel testified that he advised an open plea because he felt that defendant would receive a non-death sentence if he cooperated with the State. Thus, the decision not to pursue plea negotiations was a matter of defense strategy. Although that strategy was ultimately unsuccessful and defendant received a death sentence, it was not so unreasonable as to be ineffective assistance.

2. Alternatively, even if counsel's decision to forego plea negotiations was not a matter of trial strategy, the defendant could not establish sufficient prejudice to satisfy Strickland. The State's willingness to agree to a negotiated plea depends upon the peculiar circumstances of each case. Thus, defendant could only speculate that he would have received a plea agreement had counsel asked (although the co-defendant who actually committed the killing had been offered a non-death sentence in return for his plea).

People v. Curry, 178 Ill.2d 509, 687 N.E.2d 877 (1997) 1. Counsel's failure to disclose a plea

offer to the defendant may constitute ineffective assistance, without regard to whether defendant eventually receives a fair trial. To show that counsel was ineffective at the plea negotiation stage, the defendant must show that counsel's actions were objectively unreasonable and a reasonable probability that had counsel been competent, the result of the proceeding would have been different.

2. Counsel's representation was objectively unreasonable where he failed to advise defendant of the true ramifications of rejecting the State's plea offer because he did not know that consecutive sentences were mandatory if defendant was convicted of multiple counts. A criminal defendant has a constitutional right to be informed of the direct consequences of accepting or rejecting a plea offer and concerning the maximum and minimum sentences.

3. The result of the proceeding would likely have been different had counsel acted competently. First, defendant's stipulated testimony was that he would have accepted the plea offer had he known that consecutive sentences were mandatory. Second, defense counsel stated that at the time of plea negotiations he was unaware of the mandatory consecutive sentence requirement, and that such knowledge would have "seriously impacted [the] plea discussions." Third, in his affidavit counsel said that he told defendant a four-year-sentence was likely if defendant was convicted.

The Court rejected the State's argument that to show prejudice, defendant was required to establish that the trial judge would have accepted a plea agreement had one been tendered. Defendant would likely have satisfied such a requirement in any event, as the trial court was reluctant to impose the 12-year-minimum sentence. See also, People v. Brown, 309 Ill.App.3d 599, 723 N.E.2d 362 (3d Dist. 1999) (though a criminal defendant has no constitutional right to plea bargain, if the State chooses to bargain the defendant has a Sixth Amendment right to the effective assistance of counsel during the negotiations; before defendant can make a knowing and voluntary decision whether to accept a plea offer, defense counsel must determine all relevant facts and candidly advise the defendant of the "direct consequences" of accepting or rejecting the offer; by failing to advise defendant he would receive a natural life sentence if convicted of aggravated battery with a firearm, counsel failed to accurately inform defendant of the direct consequences of rejecting a plea offer; although criminal histories provided by defendants are often unreliable, defendant provided a materially accurate criminal history which should have caused counsel to advise him that life imprisonment was mandatory if convicted).

People v. Manning, 227 Ill.2d 403, 883 N.E.2d 492 (2008) 1. To provide effective assistance to a guilty plea defendant, trial counsel must provide accurate advice concerning the direct results of the plea. While the better practice would be for defense counsel to inform the defendant of all potential pleas that are reasonably available under the circumstances, including a plea of guilty but mentally ill, the failure to provide any advice about a collateral consequence is not necessarily ineffective assistance.

However, counsel is ineffective if he or she provides inaccurate advice concerning a collateral consequence of a plea, and the defendant is thereby prejudiced.

2. Because counsel did not discuss the possibility of a GBMI plea, he could not be said to have provided inaccurate advice about such a plea. In addition, because a GBMI plea was only a collateral consequence of the plea that was entered, defendant could enter a knowing and voluntary plea without knowledge of the GBMI option. Thus, counsel's performance was not deficient.

3. Defendant was not prejudiced where his primary concern was the length of his incarceration, which would not have been affected by entering a GBMI plea. The court also

found that whether a GBMI plea is entered or an inmate is found to be mentally ill, there is virtually no difference in the mental health treatment which DOC is required to provide.

People v. Correa, 108 Ill.2d 541, 485 N.E.2d 307 (1985) Counsel was ineffective where he made "unequivocal, erroneous, misleading representations" in response to defendant's specific plea inquiries. See also, People v. Young, 355 Ill.App.3d 317, 822 N.E.2d 920 (2d Dist. 2005) (post-conviction petition alleged constitutional violation - that defendant pleaded guilty because his trial attorney gave him incorrect advice about sentencing credit and work-release; court rejected the State's argument that inaccurate advice on good-time credit and early release concern only collateral consequences of a criminal conviction).

People v. Sifford, 247 Ill.App.3d 562, 617 N.E.2d 499 (3d Dist. 1993) Defense counsel was incompetent for pleading defendant guilty to an offense for which the statute of limitations had expired.

People v. Blommaert, 237 Ill.App.3d 811, 604 N.E.2d 1054 (3d Dist. 1992) Defense counsel was incompetent where he advised defendant she would serve only two to three years if convicted of murder, would be eligible for work release on a murder sentence, and would automatically lose custody of a child if convicted of manslaughter by plea or at trial. See also, People v. Algee, 228 Ill.App.3d 401, 591 N.E.2d 1001 (5th Dist. 1992) (counsel's ineffectiveness precluded a knowing and voluntary plea - counsel refused to prepare a defense, show defendant the State's discovery, accept phone calls, withdraw when asked to do so, or object to the State's Attorney's misconduct; in addition, counsel told defendant that the trial judge would impose the maximum sentence in this case and 120 years in a related case unless the State's plea offer was accepted that day); People v. Clark, 386 Ill.App.3d 673, 899 N.E.2d 342 (3d Dist. 2008) (if defense counsel affirmatively provides erroneous and misleading advice about the consequences of a plea, and defendant enters a guilty plea in reliance on the advice, the plea may be involuntary; post-conviction petition alleged the gist of an ineffective assistance claim where defendant stated that he pleaded guilty in reliance on defense counsel's erroneous representation that all of defendant's outstanding arrest warrants had been quashed, making him eligible for an impact incarceration program which would have reduced the prison term from eight years to no more than 180 days).

People v. Miller, 346 Ill.App.3d 972, 806 N.E.2d 759 (2d Dist. 2004) Guilty plea defendant was denied effective assistance of counsel when his attorney failed to challenge the search of a closed duffel bag found inside a locked storage cabinet on premises which the defendant had been allowed to use. Although a defendant who pleads guilty may not ordinarily raise constitutional violations that occurred before the plea was entered, a defendant may challenge his plea as involuntary where the advice he received from counsel was not within the range of competence required for attorneys representing criminal defendants. Had counsel challenged the search, the motion to suppress would have been granted and defendant would not have entered a guilty plea.

Cumulative Digest Case Summaries **§13-4(b)(2)**

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. Valdez, 2016 IL 119860 (No. 119860, 9/22/16)

Under **Padilla v. Kentucky,** 559 U.S. 356 (2010), defense counsel has a duty to correctly advise a defendant about the immigration consequences of a guilty plea before defendant enters the plea. In **Padilla,** even a cursory check of the relevant statute would have disclosed that the conviction would make the defendant mandatorily deportable. However, defense counsel told the defendant that he need not worry about the effect of the plea on his immigration status.

The **Padilla** court stated that where the law is not straightforward, defense counsel need only advise a non-citizen defendant that a guilty plea may carry a risk of adverse immigration consequences.

2. Here, defense counsel failed to inform a guilty plea defendant that the plea might

carry any consequences on his immigration status. The court stated that the effect of the conviction on defendant's immigration status was unclear, because depending on the circumstances a burglary conviction may or may not make deportation presumptively mandatory. Under these circumstances defense counsel was required only to advise defendant that his guilty plea might have immigration consequences.

3. Thus, defense counsel's failure to provide any advice about defendant's immigration status was objectively unreasonable and satisfied the first component of **Strickland.** However, the court concluded that the defendant could not show prejudice where the trial court complied with 725 ILCS 5/113-8 by admonishing defendant that the conviction "may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization." Because defense counsel was merely required to advise defendant of a possibility of immigration consequences, the trial court's admonishments to the same effect cured any prejudice resulting from defense counsel's omission.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Armstrong, 2016 IL App (2d) 140358 (No. 2-14-0358, 3/22/16)

To establish ineffective assistance of counsel in a guilty plea context, defendant must show that (1) counsel's performance was objectively unreasonable, and (2) it is reasonably probable that absence counsel's deficient performance defendant would not have pled guilty.

Defendant entered a negotiated guilty plea to the offense of failing to register as a sex offender and was sentenced to three years in prison. On appeal, he argued that his counsel was ineffective for advising him to plead guilty where the prior 1997 offense on which his status as a sex offender depended was not actually a sex offense. The Appellate Court agreed.

Defendant's prior conviction for unlawful restraint would have been (at the time he pled guilty in 1997) a sex offense requiring registration only if the victim had been under 18 years old. Neither the complaint nor the information charging defendant with the offense made any reference to the victim's age. The State's factual basis did not mention the victim's age. And the written judgment order did not mention the victim's age or order defendant to register as a sex offender.

Under these circumstances, defendant's 1997 conviction for unlawful restraint did not make him subject to sex offender registration. The State's factual basis established the nature of the offense and thus defined the range of available consequences. Since the factual basis did not establish that the victim was under 18, the offense was not a sex offense and defendant was not subject to registration.

Counsel was ineffective for advising defendant to plead guilty to the offense of failing to register. If counsel had reviewed the record of defendant's 1997 conviction, counsel would have discovered that defendant had not been convicted of a sex offense. It was then reasonably probable that defendant would not have pled guilty since he could not have been properly convicted of failing to register.

The case was remanded to the circuit court to allow defendant to withdraw his plea.

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

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. Carranza-Lamas, 2015 IL App (2d) 140862 (No. 2-14-0862, 8/13/15)

Where the immigration consequences of defendant's guilty plea to a Class 4 felony in exchange for a sentence of two years of first-offender probation were not clear and straightforward, especially since defendant already had a pending immigration case, trial counsel provided competent representation by advising defendant that his guilty plea and sentence would have immigration consequences and that he needed to consult with his immigration attorney to find out precisely what those consequences would be.

The situation here was distinguishable from **Padilla v. Kentucky**, 559 U.S. 356 (2010), where the immigration consequences of a guilty plea were clear and where counsel provided inaccurate rather than simply incomplete advice about the consequences.

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. Lopez, 2015 IL App (1st) 142260 (No. 1-14-2260, 9/30/15)

Ordinarily, a bare allegation that the defendant would have pleaded not guilty and insisted on a trial had counsel been competent does not establish prejudice for purposes of establishing an ineffective assistance of counsel claim. Instead, the defendant must assert either a claim of actual innocence or a plausible defense that could have been raised at trial.

The court concluded, however, that where the basis for the claim of ineffective assistance is that counsel failed to advise defendant of the immigration consequences of a guilty plea, prejudice is established where defendant shows that a decision to reject the plea bargain would have been rational under the circumstances. Where a post-conviction petitioner had come to the United States as a toddler and his entire immediate family lived in this country, his claim that he would have gone to trial or sought to enter a different plea rather than subject himself to deportation was reasonable. Therefore, he made a substantial showing of prejudice under **Strickland**.

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

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. Unzueta, 2015 IL App (1st) 131306 (No. 1-13-1306, 11/25/15)

1. Under **Padilla v. Kentucky**, 559 U.S. 356 (2010), to afford effective representation under the Sixth Amendment defense counsel must inform his client whether a guilty plea carries a risk of deportation. Under **Padilla**, the failure to so advise the defendant constitutes deficient representation.

However, the **Padilla** court expressly stated that it was not addressing the prejudice prong of **Strickland**. A finding of prejudice is required for a finding that counsel was constitutionally ineffective.

2. The Appellate Court noted a conflict in Illinois Appellate Court authority concerning whether a defendant who claims that his attorney was ineffective under **Padilla** establishes prejudice merely by showing that it would have been rational to reject the plea agreement had proper advice been afforded, or whether he must assert a claim of actual innocence or a plausible defense that could have been raised at trial. The court declined to reach this issue, stating that because the trial court complied with 725 ILCS 5/113-8 by advising the defendant that his guilty plea might carry immigration consequences, any prejudice caused by counsel's failure to comply with **Padilla** was cured. The court stressed that in addition to curing any deficiency in counsel's representation, the trial court's admonishments belied defendant's allegation that he would not have entered a guilty plea had he understood that his plea would have immigration consequences.

The court rejected the argument that the statutory admonitions were insufficient to cure defense counsel's shortcomings because they merely informed defendant that he might suffer immigration consequences, and not that deportation was mandatory upon conviction. "Defendant cites no authority for the proposition that there is a meaningful distinction . . . between being told that one *may* be deported versus being told that one *would* be deported."

(Defendant was represented by Assistant Defender Arianne Stein, Chicago.)

People v. Valdez, 2015 IL App (3d) 120892 (No. 3-12-0892, mod. op. 8/19/15)

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.)

People v. Williams, 2016 IL App (4th) 140502 (No. 4-14-0502, 5/11/16)

Where a post-conviction petitioner claims that trial counsel was ineffective in guilty plea negotiations, the **Strickland** standard applies. Thus, the petitioner must show that counsel's performance was deficient and that prejudice resulted. In the context of guilty plea negotiations, prejudice is shown where: (1) there is a reasonable probability that defendant would have accepted the plea offer absent counsel's deficient performance, and (2) the guilty plea offer would not have been withdrawn by the State or refused by the trial court.

Defendant's post-conviction petition alleged that he would have accepted the State's guilty-plea offer of an 18-year-sentence had defense counsel informed him that if he was convicted he could receive consecutive sentences and would be required to serve 85% of the sentence for first degree murder. The court concluded that the petition alleged a substantial constitutional violation and that the trial court therefore erred by entering a dismissal order at second-stage proceedings. The cause was remanded for third stage proceedings.

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

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§13-4(b)(3)
Errors in Presenting Evidence

People v. Campbell, 208 Ill.2d 203, 802 N.E.2d 1205 (2003) 1. Counsel may waive the defendant's right to confrontation by stipulating to the admission of evidence, at least where the defendant does not object and the decision to stipulate is a matter of legitimate trial tactics. However, where a stipulation includes a statement that the evidence is sufficient to convict, or the State's entire case is presented by stipulation and defendant does not preserve an argument for appeal, due process and the right to plead not guilty require that the defendant personally waive the right to confrontation.

2. Counsel's decision to stipulate to the testimony of an out-of-state witness involved legitimate trial tactics, although the stipulation constituted the only evidence concerning an essential element of both the charge and a lesser-included offense, because the stipulation arguably provided an innocent explanation for defendant's actions.

3. In a partially concurring and partially dissenting opinion, Justice Kilbride stressed that the defendant has the right to object to counsel's decision to stipulate. Justice Kilbride also noted that the decision to stipulate would not be a sound tactic if in the absence of the stipulation, the State would have been unable to make a prima facie case. See also, People v. Coleman, 301 Ill.App.3d 37, 704 N.E.2d 690 (1st Dist. 1998) (where laboratory reports indicated that only 7.02 grams of the 70.2 grams of substance seized from the defendant were tested for the presence of heroin, trial counsel was ineffective for stipulating that defendant was guilty of possessing 70.2 grams of heroin); People v. Mejia, 247 Ill.App.3d 55, 617 N.E.2d 799 (1st Dist. 1993) (although the use of stipulations has been approved as a "time-saving" device for the introduction of peripheral evidence, a stipulation is "no match for in-court live impeachment" on a critical issue); People v. Hoerer, 375 Ill.App.3d 148, 872 N.E.2d 572 (2d Dist. 2007) (counsel was ineffective when he stipulated to evidence that defendant had entered into plea negotiations with the State; there was no sound strategic reason for the stipulation, and the evidence would otherwise have been inadmissible).

People v. Salgado, 200 Ill.App.3d 550, 558 N.E.2d 271 (1st Dist. 1990) Defense counsel was

ineffective where, during direct examination of the defendant, he elicited a confession to residential burglary. "[W]e perceive no logical reason for counsel to have called defendant as a witness and elicited a confession on direct examination."

People v. Phillips, 227 Ill.App.3d 581, 592 N.E.2d 233 (1st Dist. 1992) Defense counsel was ineffective where on cross-examination of a police officer, he asked questions eliciting evidence of another crime. The questions would have been objectionable if asked by the prosecution, and the answers were devastating to the defense.

People v. Young, 306 Ill.App.3d 350, 716 N.E.2d 312 (1st Dist. 1999) Defense counsel was ineffective by eliciting testimony that a shooting victim had made 14 prior consistent statements identifying defendant as his assailant. The questioning permitted the trier of fact to hear evidence that bolstered the victim's credibility and which would have been otherwise inadmissible, and the trial court specifically relied on the statements in finding defendant guilty.

People v. Jackson, 318 Ill.App.3d 321, 741 N.E.2d 1026 (1st Dist. 2000) Trial counsel was ineffective for supplying an otherwise unproven element of the crime through his cross-examination of a State's witness. Counsel's actions so upset the balance between the defense and prosecution that the trial was rendered unfair, and defendant was prejudiced because he could not have been found guilty absent the evidence elicited by defense counsel. See also, People v. Bailey, 374 Ill.App.3d 608, 872 N.E.2d 420 (1st Dist. 2007) (counsel was ineffective at a trial for possession of a controlled substance with intent to deliver where she elicited evidence establishing intent to deliver); People v. Orta, 361 Ill.App.3d 342, 836 N.E.2d 811 (1st Dist. 2005) (defense counsel was ineffective in his cross-examination of police officers where he elicited testimony which enabled the State to prove an essential element of the charge; there was no tactical reason for defense counsel to elicit the testimony).

People v. York, 312 Ill.App.3d 434, 727 N.E.2d 674 (2d Dist. 2000) Defense counsel was ineffective for failing to introduce exculpatory DNA tests at defendant's trial for aggravated criminal sexual assault; the tests would have supported defendant's testimony that he had not been involved in the offense, and the State conceded that the evidence was available and conclusive. In addition, defense counsel attempted to introduce the evidence by questioning the defendant directly, but neglected to call an expert witness when the State's hearsay objection was sustained.

The failure to introduce the evidence was clearly the result of incompetence rather than trial strategy. In addition, in light of the conclusive nature of the evidence, the result of the trial would likely have been different had the results been admitted.

People v. Fletcher, 335 Ill.App.3d 447, 780 N.E.2d 365 (5th Dist. 2002) Counsel was ineffective for introducing defendant's criminal history before the jury - several of the convictions would not have been inadmissible as impeachment under Montgomery.

The court rejected the argument that defense counsel's strategy was to have defendant reveal his prior convictions to show that he always pleaded guilty when he committed a crime, and therefore must be innocent when he denied guilt. Although ineffective assistance does not occur where defense counsel engages in a sound but unsuccessful strategy, a reasonable attorney would not adopt a strategy of having the defendant testify about his extensive history of criminality in order to convince the jury that he was innocent of the instant crime. See also,

People v. Valentine, 299 Ill.App.3d 1, 700 N.E.2d 700 (1st Dist. 1998) (counsel was ineffective for "opening the door" to cross-examination regarding four battery arrests that would otherwise have been inadmissible).

Cumulative Digest Case Summaries **§13-4(b)(3)**

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

People v. Flores, 128 Ill.2d 66, 538 N.E.2d 481 (1989) Trial counsel not ineffective for failing to further impeach State witness concerning her ability to identify the defendant from a second floor window; counsel "vigorously cross-examined" the witness on her powers of observation and her 11-month delay in notifying the police, and presented several witnesses in an attempt to impeach her credibility.

People v. Pegram, 124 Ill.2d 166, 529 N.E.2d 506 (1988) Defense counsel was ineffective for failing to tender an instruction on the defense of compulsion. See also, People v. Serrano, 286 Ill.App.3d 485, 676 N.E.2d 1011 (1st Dist. 1997) (counsel was ineffective where he raised compulsion defense but failed to tender appropriate instructions); People v. Pollards, 367 Ill.App.3d 17, 854 N.E.2d 705 (1st Dist. 2006) (counsel was ineffective for failing to request an instruction on theft where the defendant was charged with possession of a stolen motor vehicle); People v. Lewis, 240 Ill.App.3d 463, 609 N.E.2d 673 (1st Dist. 1992) (counsel was ineffective for failing to request an instruction concerning the credibility of an accomplice where throughout trial counsel challenged witness's credibility because she participated in the crime); People v. Parker, 260 Ill.App.3d 942, 632 N.E.2d 214 (1st Dist. 1994) (counsel was ineffective for failing to request an instruction on second degree murder based on sudden and intense passion caused by mutual combat; jury would have been able to consider critical mitigating factor on which the evidence was close).

People v. Royse, 99 Ill.2d 163, 457 N.E.2d 1217 (1983) Counsel was ineffective where he objected only three times during three-day trial in which State witnesses "repeatedly gave damaging hearsay testimony, offered their opinions, summarized conversations without adequate foundation, and volunteered incriminating information about other drug transactions that were not the basis for the trial."

People v. Salazar, 162 Ill.2d 513, 643 N.E.2d 698 (1994) Counsel was incompetent where he failed to challenge unconstitutional jury instructions.

People v. Mitchell, 189 Ill.2d 312, 727 N.E.2d 254 (2000) Where a defendant who was on psychotropic medication argues that trial counsel was ineffective for failing to request a fitness hearing, Strickland v. Washington requires a showing that the defendant would have been found unfit had a fitness hearing been held. The court overruled precedent that prejudice is shown if a fitness hearing would have been held.

People v. Bew, 228 Ill.2d 122, 886 N.E.2d 1002 (2008) Defense counsel was not ineffective where he failed to file a motion to suppress under precedent that was controlling at the time of trial, but which was later overturned. The failure to file an appropriate motion was unreasonable, because at the time of the hearing such a motion stood a reasonable chance of success.

However, defendant could not show prejudice; finding prejudice based on precedent that has been overruled would afford the defendant a "windfall." Although defendant argued that counsel's failure deprived her of the opportunity to litigate other issues or to plea bargain more effectively, "Strickland requires actual prejudice . . ., not mere speculation."

People v. Houston, 229 Ill.2d 1, 890 N.E.2d 424 (2008) 1. Although defense counsel acted improperly by waiving the presence of a court reporter during voir dire, the defendant could not establish that the result of the trial would have been different had a court reporter been present. A bystander's report failed to show a prima facie case of discrimination under Batson, and the State would have been able to articulate race neutral reasons for excusing the only African-American veniremember against whom it exercised a peremptory.

2. Counsel's failure to request that the jury be instructed with IPI Crim. No. 3.15 (factors in evaluating an identification) did not constitute ineffective assistance of counsel. Because the central issue was not identification, defendant would not likely have been acquitted had the instruction been given.

People v. Briones, 352 Ill.App.3d 913, 816 N.E.2d 1120 (5th Dist. 2004) Counsel was ineffective for agreeing to withdraw a proposed jury instruction that complied with pattern instructions and accurately stated the law, and substituting a version which did not accurately reflect the law. It was unreasonable for counsel to withdraw her accurate instruction rather than citing controlling authority to justify it.

People v. Lemke, 349 Ill.App.3d 391, 811 N.E.2d 708 (5th Dist. 2004) Trial counsel was ineffective for failing to argue that defendant was guilty only of the lesser included offense of involuntary manslaughter. Defendant's actions "fit within a pattern" in which involuntary manslaughter convictions have occurred after a loaded handgun discharges during a confrontation, and there was a reasonable probability that the trial court would have entered a conviction for involuntary manslaughter had counsel presented that option.

People v. Holliday, 313 Ill.App.3d 1046, 732 N.E.2d 1 (5th Dist. 2000) The pro se post-conviction petition alleged the gist of ineffective assistance of counsel - defendant pleaded guilty on the 161st day of the speedy trial period, no delay was attributable to the defense, and defense counsel failed to obtain a ruling on a petition for discharge before the plea was entered. See also, People v. Workman, 368 Ill.App.3d 778, 858 N.E.2d 886 (5th Dist. 2005) (defendant was denied effective assistance of counsel where defense counsel failed to file a speedy trial discharge motion); People v. Boyd, 363 Ill.App.3d 1027, 845 N.E.2d 921 (2d Dist. 2006) (the failure to seek a speedy trial discharge is ineffective assistance if: (1) there is a reasonable probability that the defendant would have been discharged had a timely motion been brought, and (2) there was no strategic justification for failing to bring such a motion; counsel was ineffective because there was no strategic reason for allowing defendant to stand trial on new, multiple Class X felony charges that were subject to compulsory joinder).

People v. Moore, 279 Ill.App.3d 152, 663 N.E.2d 490 (5th Dist. 1996) 1. Counsel was ineffective for failing to object or request a mistrial when a police officer commented on defendant's exercise of his right to silence after receiving Miranda warnings. Counsel also failed to object to the admission of defendant's statements despite the absence of a valid Miranda waiver or to challenge the State's use of an improper conviction as impeachment.

2. The Court rejected the argument that counsel's actions were trial strategy. "Sound trial strategy is made of sterner stuff," and "embraces the use of established rules of evidence and procedure to avoid, when possible, the admission of incriminating statements, harmful opinions, and prejudicial facts."

People v. Brown, 358 Ill.App.3d 580, 831 N.E.2d 1113 (5th Dist. 2005) Defense counsel was

ineffective for failing to move to suppress defendant's statements on Sixth Amendment grounds. A reasonably competent defense attorney would have moved to suppress statements made to a cell mate who was cooperating with police, and counsel did attempt to exclude the evidence on other grounds. See also, People v. Hernandez, 362 Ill.App.3d 779, 840 N.E.2d 1254 (1st Dist. 2005) (defense counsel was ineffective for failing to move to suppress videotaped statement procured after the defendant invoked the right to silence); People v. Nunez, 325 Ill.App.3d 35, 756 N.E.2d 941 (2d Dist. 2001) (post-conviction petition made substantial showing of ineffectiveness for failing to file a pretrial motion to suppress; counsel was aware of the basis for the motion at least two months before trial, had no sound strategy for delaying the motion to suppress until trial, and obviously believed that a motion to suppress was consistent with his strategy; there was a reasonable probability that a timely motion would have been granted and that result of the trial would have been different).

People v. Moore, 307 Ill.App.3d 107, 716 N.E.2d 851 (5th Dist. 1999) It was unreasonable for counsel to fail to move to quash the arrest and suppress the evidence; counsel's failure to act not only deprived defendant of an opportunity to challenge the officer's actions, but also vitiated the only defense available.

In addition, posttrial counsel was ineffective for failing to raise trial counsel's ineffectiveness in the posttrial motion.

People v. Garza, 180 Ill.App.3d 263, 535 N.E.2d 968 (1st Dist. 1989) Counsel was incompetent for failing to: (1) impeach the only eyewitness with discrepancies between the initial description she gave to police and her trial testimony, (2) obtain and introduce the photos of two other people picked out by the witness, and (3) call defendant's sister to corroborate defendant's alibi testimony. See also, People v. Williams, 329 Ill.App.3d 846, 769 N.E.2d 518 (1st Dist. 2002) (defense counsel was ineffective where he failed to impeach the complainants' testimony with prior inconsistent statements; counsel cross-examined the witnesses about whether their statements to investigating officers contradicted their testimony, but did not complete the impeachment by calling the officers to testify; though counsel attempted to stipulate to the statements, no written stipulation or police reports were made part of the record and an oral stipulation was unclear).

People v. Jura, 352 Ill.App.3d 1080, 817 N.E.2d 968 (1st Dist. 2004) Trial counsel was ineffective for failing to object to admission of improper hearsay and to the State's reference to that hearsay in opening and closing argument, and for failing to request an instruction limiting the jury's use of the evidence. Defendant was prejudiced because the jury was exposed to multiple references to inadmissible evidence both from the witness stand and in the State's argument.

People v. Lowry, 354 Ill.App.3d 760, 821 N.E.2d 649 (1st Dist. 2004) Where the jury asked for the meaning of the word "knowingly" and whether a "knowing" act could be "accidental," defense counsel acted unreasonably by failing to offer an instruction defining "knowingly." The court refused to interpret the failure to offer an instruction as a tactical decision, noting that the record suggested defense counsel was confused as to the applicable law and the nature of the jury's question.

People v. Manns, 373 Ill.App.3d 232, 869 N.E.2d 437 (4th Dist. 2007) Defense counsel was ineffective for failing to raise an insanity offense at a discharge hearing for a defendant who

had been found unfit to stand trial and unlikely to recover within one year. The record contained substantial evidence concerning defendant's delusional behavior and the "bizarre" nature of the crime.

People v. Falls, 235 Ill.App.3d 558, 601 N.E.2d 1276 (1st Dist. 1992) Defendant was denied effective assistance where the record created a strong inference that counsel merely wanted to finish the case as soon as possible because defendant had run out of money. Counsel made several questionable tactical decisions, including abandoning a motion to suppress, waiving a jury trial, and resting without calling two significant witnesses. In addition, counsel was willing to have bond revoked and his client imprisoned so he would be paid.

Cumulative Digest Case Summaries **§13-4(b)(4)**

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. Goods, 2016 IL App (1st) 140511 (No. 1-14-0511, 9/12/16)

A defendant is entitled to an instruction of self-defense if there is some evidence on each of the following elements: (1) force was threatened against defendant; (2) defendant was not the aggressor; (3) danger of harm was imminent; (4) the threatened force was unlawful; (5) defendant actually and subjectively believed a danger existed which required the use of force; and (6) defendant's beliefs were objectively reasonable. When evidence supports a self-defense instruction, a second-degree murder instruction must be given as a mandatory counterpart.

The court held that defense counsel was ineffective for not presenting a claim of self-defense. The evidence showed that prior to the night of the shooting, the victim had acted in a menacing fashion towards defendant and had displayed a gun. In response to this menacing behavior defendant armed himself with a gun. On the night of the shooting, the victim drove defendant to an apartment complex in order to rob two acquaintances of defendant's, including co-defendant. They both got out of the car and defendant saw the victim fumbling in his waist. Defendant feared that the victim might be getting ready to shoot him.

The two men walked through the parking lot when co-defendant, an acquaintance of defendant's who also knew about the victim's threatening behavior, came out of nowhere, knocked the victim to the ground and then shot him. The co-defendant's actions frightened defendant, who also fell to the ground. When defendant got up, he shot the victim several times as he lay on the ground. Co-defendant took the victim's gun and shot him again. Defendant was convicted of first-degree murder.

The court held that the evidence showed defendant believed he was in danger and that the victim threatened defendant with force when he showed defendant his gun and acted in a menacing manner. On the night of the shooting, defendant saw the victim fumbling in his waistband and knew that the victim intended to commit a robbery. The record thus provided slight evidence warranting a jury instruction on self-defense. And since this defense was consistent with the defense actually presented, counsel's failure to raise self-defense amounted to deficient representation.

The failure to raise this defense was also prejudicial. In making this finding, the court noted that co-defendant was convicted of second degree murder. Even if defendant's belief in self-defense had been unreasonable the jury could have found him guilty of second degree murder.

The court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Amanda Ingram, 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. Lucious, 2016 IL App (1st) 141127 (No. 1-14-1127, 9/8/16)

In deciding if counsel has been ineffective, courts must be highly deferential to counsel's strategic choices, but will still find counsel's performance deficient where a strategic decision is so unreasonable that no effective counsel facing similar circumstances would pursue such a strategy.

The State charged defendant and his co-defendant with aggravated robbery which required proof that defendant or co-defendant indicated verbally or by their actions that they were armed. (720 ILCS 5/18-1(b)) At a joint bench trial, the State introduced evidence that co-defendant admitted to police that he told the victim "Don't make him [defendant] shoot you." In finding both defendants guilty, the trial court cited co-defendant's statement as evidence supporting the aggravated robbery charge. Defendant's counsel did not object to the court's reliance on this evidence.

The Appellate Court held that counsel was ineffective for failing to object to the trial court's consideration of the co-defendant's out-of-court statement as evidence against defendant. The confrontation clause is violated when a trial court presiding over a joint bench trial expressly relies on a co-defendant's statement as evidence of defendant's guilt. The Appellate Court acknowledged that at a joint bench trial the trial court is expected to be able to consider the evidence against each defendant separately. But here the trial court expressly considered co-defendant's statement as evidence of defendant's guilt. Once that occurred, trial counsel had a duty to object to the trial court's improper use of the evidence. Counsel's failure to do so constituted deficient performance under the first prong of **Strickland**.

The court specifically rejected the State's argument that counsel's failure to object was the product of strategy. The improper statement provided an essential element of aggravated robbery. No reasonable attorney would fail to see that. And objecting to the evidence would have directly aligned with counsel's strategy of seeking a conviction on the lesser offense of robbery.

The court also found that counsel's error was prejudicial under the second prong of **Strickland** since the improper evidence established an essential element of aggravated robbery. Had counsel objected, there was a reasonable probability that defendant would have been acquitted of that offense.

The court vacated defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

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. The trial court committed plain error at defendant's trial for aggravated possession of a stolen motor vehicle where it sustained a hearsay objection when the defense asked the owner of the car whether she learned, after reporting that the car was missing, that her husband had in fact sold it. The Appellate Court concluded that the question did not necessarily call for a response based on an out-of-court statement, because the record did not indicate how the witness would have come to know that her husband had sold the vehicle. Furthermore, even had the witness learned of the sale from an out-of-court statement, the question would have been proper because it was intended to show the witness's state of mind rather than to prove the truth of the matter asserted – that the car had in fact been sold. The court stressed that the evidence would have been central to the case because the owner's belief that the vehicle had been sold would have rebutted inferences that the car was stolen or that defendant had knowledge of the theft.

2. The court concluded that reversal was required by the cumulative effect of the exclusion of the evidence and the trial judge's reliance on an incorrect recollection of a witness's testimony. Defendant was prejudiced by the errors because the evidence was closely

balanced on whether the defendant was a *bona fide* purchaser, defendant rebutted the inference that he knew the vehicle was stolen by calling witnesses who testified that the vehicle had been purchased from the owner's husband, and defendant's explanation was reasonable and could have convinced a reasonable trier of fact.

3. The court rejected the State's argument that defendant's flight at the time of his arrest was evidence of consciousness of guilt. Defendant was initially pursued because of a traffic violation, and it could not be said on the record that the attempt to elude the police was motivated by knowledge that the vehicle was stolen rather than by a desire to avoid a traffic citation. The court also noted that defendant's alleged statement admitting that he knew the car was stolen was inadmissible because it was elicited during custodial interrogation conducted in the absence of **Miranda** warnings.

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.)

People v. Zambrano, 2016 IL App (3d) 140178 (No. 3-14-0178, 7/20/16)

The jury instruction on the testimony of accomplice witnesses states that when a witness says he was involved in the commission of a crime with defendant, his testimony is "subject to suspicion and should be considered by you with caution." Illinois Pattern Jury Instructions, No. 3.17. This instruction should be given when there is probable cause to believe that the witness, not the defendant, was responsible for the crime as a principle or an accessory under an accountability theory, even where the witness denies being involved in the crime.

Although trial counsel attacked the believability of the witness, he never submitted an

accomplice witness instruction. The court held that this failure constituted ineffective assistance.

The evidence showed that the witness was so involved in the offense that, despite his denials, there was probable cause to believe that he acted as an accomplice. Additionally, the State granted the witness use immunity before he testified, further supporting the idea that he acted as an accomplice. Under these circumstances, the court could ascertain no viable strategy for counsel's failure to submit the instruction. The failure to do so constituted deficient performance.

The witness's testimony was detrimental to defendant because it created the inference that defendant was either the shooter or acted in concert with the shooter. His testimony was sufficient by itself to convict defendant. Counsel's failure to submit the instruction prejudiced defendant by depriving the jury of critical information it needed to evaluate the testimony.

The court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Mario Kladis, Chicago.)

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§13-4(b)(5)
Mistakes of Fact or Law

Moore v. Bryant, 348 F.3d 238 (7th Cir. 2003) 1. Although counsel may not be required to investigate pending legislative changes in order to provide effective assistance, counsel was ineffective where he erroneously advised defendant that a potential revision to the good time law would apply retroactively, and that pleading guilty before the effective date of the change would result in a sentence that was about half what could be expected after the amendment took effect.

2. There was a reasonable probability that defendant would not have pleaded guilty had he been accurately advised; defendant submitted an affidavit in which he said he entered the plea due to his attorney's advice, and testified similarly at the hearing on his motion to withdraw his plea. In addition, defendant reluctantly pleaded guilty and immediately attempted to withdraw the plea.

People v. Chandler, 129 Ill.2d 233, 543 N.E.2d 1290 (1989) Defense counsel was ineffective where his strategy - to convince the jury that defendant did not actually stab or kill the victim - was apparently based on the mistaken belief that defendant could be acquitted of murder if he had not inflicted the fatal wounds. Because the jury was instructed on felony murder and accountability, it had no choice but to find defendant guilty even if it found that he did not inflict the fatal wounds.

Counsel's actions could not be viewed as an attempt to preclude the death penalty; the jury was waived for the death hearing, and at that hearing counsel did not argue ineligibility based on the same theory.

People v. Wright, 111 Ill.2d 18, 488 N.E.2d 973 (1986) Counsel's decision not to raise an intoxication defense was attributable "to counsel's misapprehension of the law and not to trial tactics." The remarks of the judge at the post-conviction proceeding demonstrated prejudice; the judge expressly stated that "the outcome would have been different" had the defense been

raised. Compare, People v. Weir, 111 Ill.2d 334, 490 N.E.2d 1 (1986) (failure to raise intoxication defense did not affect outcome).

People v. Pugh, 157 Ill.2d 1, 623 N.E.2d 255 (1993) Counsel was ineffective for advising defendant to stipulate to death eligibility based on counsel's erroneous understanding of the death penalty statute. See also, People v. Blommaert, 237 Ill.App.3d 811, 604 N.E.2d 1054 (3d Dist. 1992) (counsel incorrectly advised defendant that she would serve only two to three years if convicted of murder, would be eligible for work release on a murder sentence, and would automatically lose custody of a child if convicted of manslaughter by plea or at trial).

People v. Montgomery, 192 Ill.2d 642, 736 N.E.2d 1025 (2000) Trial counsel were not ineffective even if they advised defendant to waive a jury because they mistakenly believed the trial judge had promised to impose a non-death sentence. An attorney might logically advise a defendant to waive a jury in the belief that the judge is less likely than a jury to impose a death sentence.

People v. Bew, 228 Ill.2d 122, 886 N.E.2d 1002 (2008) Defense counsel was not ineffective where he failed to file a motion to suppress under precedent that was controlling at the time of trial, but which was later overturned. Although the failure to file an appropriate motion was unreasonable (because at the time of the hearing such a motion stood a reasonable chance of success), defendant could not show prejudice based on precedent that had been overruled.

People v. Kozlowski, 266 Ill.App.3d 595, 639 N.E.2d 1390 (1st Dist. 1994) Defense counsel was incompetent where he relied on a defense that was unavailable, failed to object to inadmissible evidence, and appeared to be uncertain of the precise charge. (See also, People v. Wilson, 149 Ill.App.3d 1075, 501 N.E.2d 863 (1st Dist. 1986) (trial counsel was ineffective where he was apparently unaware of five-month-old statute which allowed prior inconsistent statements to be admitted substantively); People v. Ortiz, 224 Ill.App.3d 1065, 586 N.E.2d 1384 (5th Dist. 1992) (counsel was incompetent where he did not know the fundamental rules governing examination of witnesses).

People v. Sifford, 247 Ill.App.3d 562, 617 N.E.2d 499 (3d Dist. 1993) Counsel was incompetent for pleading defendant guilty to an offense for which the statute of limitations had expired.

People v. Rainey, 149 Ill.App.3d 327, 500 N.E.2d 602 (4th Dist. 1986) Counsel was ineffective where he erroneously believed that he could raise an insanity defense only if defendant admitted committing the acts charged. The error was clearly prejudicial where the judge stated that he would have found defendant guilty but mentally ill had the evidence been presented. See also, People v. Hayes, 229 Ill.App.3d 55, 593 N.E.2d 739 (1st Dist. 1992) (counsel ineffective where he failed to present available evidence of insanity because he was confused concerning the burden of proof).

People v. Torres, 209 Ill.App.3d 314, 568 N.E.2d 157 (1st Dist. 1991) Defendant was deprived of effective assistance of counsel where, due to counsel's misunderstanding of or refusal to apply Illinois sexual assault law, the jury was left with no choice but to convict. In addition, counsel tried to raise a "family member" defense that was not statutorily authorized. See also, People v. Roy W., 324 Ill.App.3d 181, 754 N.E.2d 866 (3d Dist. 2001) (counsel was

ineffective where, due to his misunderstanding of the law, he failed to introduce evidence that would have provided an alternative explanation for a minor's sexual knowledge and informed the jury of pending charges which gave the complainant a motive to fabricate).

People v. Lewis, 240 Ill.App.3d 463, 609 N.E.2d 673 (1st Dist. 1992) Counsel was ineffective for basing his defense on inadmissible evidence. By promising during his opening argument to produce significant exonerating evidence, and then failing to do so, counsel severely prejudiced his client's case.

Cumulative Digest Case Summaries **§13-4(b)(5)**

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

Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) Generally, tactical decisions cannot be the basis for a finding of ineffective assistance of counsel. A tactical decision is reasonable only to the extent it is based on a thorough investigation of the case, however. Thus, counsel's decision not to present mitigating evidence at a death sentencing hearing could be a reasonable tactical decision only to the extent that the decision to make a less than full investigation of defendant's background was also reasonable. See also, People v. Hickey, 204 Ill.2d 585, 792 N.E.2d 232 (2001) (strategic choices made after a thorough investigation of the law and facts are virtually unchallengeable; deference is unwarranted where the failure to present mitigating evidence was due not to strategy, but to a failure to properly investigate); People v. Childress, 191 Ill.2d 168, 730 N.E.2d 32 (2000) (counsel not ineffective for failing to introduce photographs of defendant's hands; strategic decisions made after thorough investigation is "virtually unchallengeable"). Compare, People v. King, 316 Ill.App.3d 901, 738 N.E.2d 556 (1st Dist. 2000) (failure to call a witness whose testimony would have supported an otherwise uncorroborated defense may be ineffectiveness even if the investigation was adequate; the expected testimony was unequivocally exculpatory, would have provided an alibi, and would have complimented counsel's strategy).

People v. West, 187 Ill.2d 418, 719 N.E.2d 664 (1999) Strategic decisions constitute ineffective assistance only if the strategy chosen is so unsound that the prosecution's case is not subjected to meaningful adversarial testing. Counsel was not ineffective for failing to retain an independent forensic expert in a murder trial where counsel successfully introduced evidence on the same point by cross-examining the pathologist who performed the autopsy.

People v. Hattery, 109 Ill.2d 449, 488 N.E.2d 513 (1985) Where defendant entered a not guilty plea, counsel acted improperly by telling the jury that he was not asking for an acquittal, that the jury would find defendant both guilty and eligible for a death sentence, and that the only issue was whether a death sentence should be imposed. Counsel's actions were not sound strategic decisions made in light of the overwhelming evidence of guilt - counsel may not "concede his client's guilt in the hope of obtaining a more lenient sentence where a plea of

not guilty has been entered, unless the record adequately shows that defendant knowingly and intelligently consented to his counsel's strategy." But see, People v. Nieves, 192 Ill.2d 487, 737 N.E.2d 150 (2000) (Hattery inapplicable where counsel did not concede defendant's guilt in the hope of obtaining a more lenient sentence, but argued that defendant should not be convicted because he had committed a mercy killing; Hattery does not hold that attorney is per se ineffective for conceding guilt without defendant's consent; defendant is still required to show that counsel's actions were unreasonable and that an acquittal would have been likely with a different strategy); People v. Williams, 192 Ill.2d 548, 736 N.E.2d 1001 (2000) (even under Hattery, defendant must establish prejudice unless there was a "total lack of meaningful adversarial testing"; adversarial testing was not lacking where counsel conceded the truth of defendant's statement but cross-examined witnesses, argued that defendant should not be convicted of murder, and claimed that another person committed the killing). Compare, Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) (defense counsel was not ineffective under the Sixth Amendment where he failed to obtain defendant's consent for the unusual strategy of conceding guilt at the first stage of a death hearing in order to concentrate on the sentencing phase; although attorney has a duty to consult with a client regarding important decisions, counsel need not obtain the defendant's express consent to tactical decisions other than whether to plead guilty, waive a jury, testify, or take an appeal; strategy of conceding guilt at the guilt-innocence phase of a death penalty trial, in order to maintain credibility for the sentencing phase, was not the equivalent of a guilty plea because defendant "retained the rights accorded a defendant in a criminal trial").

People v. Morris, 209 Ill.2d 137, 807 N.E.2d 377 (2004) Although a strategy of jury nullification does not necessarily constitute ineffectiveness, counsel failed to subject the prosecution's case to adversarial testing where she undercut the request for jury nullification by repeatedly referring to defendant's involvement in an unrelated murder which was inadmissible. The repeated references to the unrelated murder were based on a fundamental misunderstanding of the trial court's rulings and "destroyed" the strategy of asking for jury nullification. See also, People v. Montanez, 281 Ill.App.3d 558, 667 N.E.2d 548 (1st Dist. 1996) (counsel was not ineffective for relying on the hope of "jury nullification" in a case in which the evidence of guilt was overwhelming; however, defense strategy resting on "jury nullification" is "risky business" and should be undertaken only with the defendant's consent).

Cumulative Digest Case Summaries **§13-4(b)(6)(a)**

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

Knowles v. Mirzayance, ___ U.S. ___, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009) Defense counsel was not ineffective where, at a bifurcated trial involving a first stage determination of guilt and a second stage determination whether defendant was not guilty due to insanity, counsel recommended that defendant withdraw the NGI plea after the jury rejected similar medical testimony at the first stage.

1. Counsel's actions were not objectively unreasonable. It is not unreasonable to recommend that the defendant withdraw a plea that is almost certain to be unsuccessful, and the jury's rejection of almost identical evidence when the State had the burden of proof made it unlikely that the defense could prevail when it had the burden of proof.

In addition, the strongest defense evidence at the NGI hearing - the testimony of defendant's parents - became unavailable when the parents refused to testify. Counsel was unsuccessful in changing the parents' minds, and was not required to "browbeat" reluctant witnesses in order to render effective assistance.

Finally, counsel did not abandon all defenses - he presented a defense to the first degree murder charge during the guilt phase, and represented defendant at sentencing. "The law does not require counsel to raise every available non-frivolous defense."

2. Even if counsel's actions were unreasonable, defendant could not show that he was prejudiced. There was no reasonable probability that defendant would have prevailed where the jury had just rejected the same evidence under a higher standard of proof.

People v. Richardson, 189 Ill.2d 401, 727 N.E.2d 362 (2000) "[A]fter defendant testified that he did not commit the murder, it would have been contradictory for his trial counsel to present mitigation evidence to explain or clarify why defendant committed the murder." See also People v. Evans, 186 Ill.2d 83, 708 N.E.2d 1158 (1999) (counsel was not ineffective for failing to investigate and present evidence that defendant was acting under the influence of an extreme mental or emotional disturbance; "[i]t would have been difficult for . . . counsel to elicit testimony . . . that defendant acted under the influence of an extreme mental or emotional disturbance" after defendant testified he did not act at all); People v. Enis, 194 Ill.2d 361, 743 N.E.2d 1 (2000) (counsel "cannot be expected to present mitigation evidence that contradicts his client's protestations of innocence"); People v. Sims, 322 Ill.App.3d 397, 750 N.E.2d 320 (5th Dist. 2001) ("we are not ready to accept the notion that competent representation requires a defense attorney to maintain a defense theory inconsistent with a client's claimed innocence").

People v. Childress, 191 Ill.2d 168, 730 N.E.2d 32 (2000) 1. Defense counsel was not ineffective for failing to investigate and present mitigation at the sentencing hearing; there was no reasonable probability that a non-death sentence would have been imposed where much of the evidence could have been viewed as either mitigating or aggravating, many of the affidavits attached to the petition contained not only mitigating evidence but also "highly damaging aggravating evidence," and the aggravating evidence was overwhelming and clearly justified a death sentence.

2. Trial counsel was not ineffective for failing to ask prospective jurors whether they would automatically impose a death sentence if defendant was convicted of murder. The failure to ask every veniremember the Morgan question was clearly a matter of trial strategy where counsel was obviously aware that she was entitled to do so. See also People v. Coleman, 183 Ill.2d 366, 701 N.E.2d 1063 (1998) (post-conviction petition failed to make a substantial showing that counsel did not adequately investigate mitigation for death penalty hearing; there was no likelihood that a more complete investigation would have changed the result of the death hearing where the evidence in question was not inherently mitigating and the record showed that defendant committed the crimes in a methodical and deliberate manner and lacked a favorable disciplinary record while incarcerated).

People v. Kubat, 114 Ill.2d 424, 501 N.E.2d 111 (1986) 1. Defense counsel was not ineffective because he failed to call three alibi witnesses. The methods by which two witnesses fixed the date of the alleged alibi "could reasonably lead counsel to conclude that cross-examination could severely damage their credibility," and counsel could have reasonably concluded that the testimony of one of the witnesses "might be harmful to his alibi defense." See also, People v. Henderson, 171 Ill.2d 124, 662 N.E.2d 1287 (1996) (counsel could not be faulted at sentencing for failing to present evidence that was arguably mitigating but which the sentencer could have regarded as aggravating).

2. Counsel was not ineffective for failing to present witnesses who would have testified that the reputation of a certain State witness was bad. In light of the strong impeachment evidence that was presented (i.e. the witness's animosity toward defendant, her threats against defendant and the fact that she testified in exchange for immunity), defendant was not prejudiced.

People v. Harris, 225 Ill.2d 1, 866 N.E.2d 162 (2007) Counsel were not ineffective for failing to introduce medical records; because the records were potentially damaging, there were strategic reasons not to introduce them.

People v. Flores, 128 Ill.2d 66, 538 N.E.2d 481 (1989) 1. Trial counsel was not ineffective for failing to impeach a State witness concerning her ability to identify the defendant from a second floor window, where counsel "vigorously cross-examined" the witness and presented "several witnesses in an effort to impeach her credibility."

2. Counsel was not ineffective for failing to call two witnesses to impeach another State witness; their prospective testimony would not have changed the outcome.

3. Counsel was not ineffective for strategic decision not to call certain members of defendant's family as alibi witnesses. Counsel had talked to the family members and concluded that the proposed alibi was unreliable. See also, People v. Kidd, 175 Ill.2d 1, 675 N.E.2d 910 (1996) (whether to call alibi witnesses was clearly matter of trial strategy).

People v. Holman, 164 Ill.2d 356, 647 N.E.2d 960 (1995) Counsel did not employ defective

strategy at death hearing where he elected to refrain from presenting mitigating evidence which he thought would "not go over well" in his county. An attorney may reasonably conclude that the risks in presenting potentially mitigating evidence outweigh the potential gain. In addition, because defendant testified at trial that he did not commit the offenses, counsel could have reasonably decided not to present mitigating evidence which conflicted with that claim.

People v. Segoviano, 189 Ill.2d 228, 725 N.E.2d 1275 (2000) Whether to seek a mistrial, or to oppose the State's motion for a mistrial, is a question of trial strategy that will not sustain a claim of ineffectiveness unless counsel "entirely fails to conduct any meaningful adversarial testing." Defense counsel did not fail to test the State's evidence - he adopted the "fairly ingenious strategy" of opposing the State's motion for mistrial, having the State confess the error in front of the jury, and using the error in closing argument to undercut the prosecution's case.

The court rejected the argument that rejecting a mistrial constitutes waiver only if it is clear that defendant, rather than defense counsel, made the decision to oppose the State's mistrial motion.

People v. Fuller, 205 Ill.2d 308, 793 N.E.2d 526 (2002) Defense counsel was not ineffective for allowing defendant to plead guilty to intentional and knowing murder where defendant's confession and testimony indicated that the shooting was accidental; counsel likely believed that the best defense strategy was to plead guilty to all the charges, take responsibility, and use the show of remorse to avoid a death sentence.

People v. Szabo, 186 Ill.2d 19, 708 N.E.2d 1096 (1998) Counsel was not ineffective at death hearing where he intended to present mitigating testimony through defendant's testimony, but did not have an alternative plan when defendant elected not to testify. Nor did counsel err by failing to make defendant's good conduct while incarcerated the centerpiece of the mitigation case; counsel made a reasonable strategic decision to emphasize the disparity between a death sentence and a prison term received by a co-defendant, and did introduce those aspects of defendant's conduct while incarcerated which were admissible.

People v. West, 187 Ill.2d 418, 719 N.E.2d 664 (1999) Counsel was not ineffective for failing to retain an independent forensic expert in a murder trial where counsel successfully introduced evidence on the same point by cross-examining the pathologist who performed the autopsy.

People v. Metcalfe, 202 Ill.2d 544, 782 N.E.2d 263 (2002) The conduct of voir dire involves strategic matters that are generally not subject to scrutiny. Defense counsel was not ineffective for failing to challenge a veniremember who had been the victim of a crime and who expressed unhappiness with the way in which the prosecution had been handled; it was possible counsel thought that the veniremember's dissatisfaction might be directed against the State and would benefit the defendant.

Cumulative Digest Case Summaries **13-4(b)(6)(b)**

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. Johnson, 205 Ill.2d 381, 793 N.E.2d 591 (2002) The post-conviction petition made a substantial showing that trial counsel was ineffective. Counsel's "pervasive" failures (including the failure to interview witnesses, review discovery, investigate and present crucial

evidence, and hire expert witnesses) did not involve strategic decisions, but were matters "which go to the core of the . . . constitutional guarantee of effective assistance at trial."

The petition also made a substantial showing of prejudice - the State's case was largely circumstantial, and counsel did little other than attack identification evidence and file motions in limine concerning portions of the State's evidence.

People v. Sutherland, 194 Ill.2d 289, 742 N.E.2d 306 (2000) Trial counsel acted unreasonably by failing to present evidence that boots and tires consistent with tracks found at the crime scene came into defendant's possession only after the offense. Because the State's evidence consisted primarily of associating defendant with the crime through a variety of evidentiary items, "an attack on the suggested links between defendant and the boots and tire could have played a prominent role in his defense."

In addition, in view of defense counsel's strategy of attempting to discredit expert testimony linking defendant to the crime, "it was incumbent on counsel to utilize available means of casting doubt on the physical evidence." Although counsel attempted to convince the jury that the hair and fiber evidence did not conclusively establish defendant's guilt, he failed to utilize evidence "discrediting two of the most salient and significant items in the State's case."

People v. Patterson, 192 Ill.2d 93, 735 N.E.2d 616 (2000) A State witness's improper reference to defendant's post-arrest silence did not provide a reasonable basis for defense counsel to withhold the defense he had promised in opening argument - that defendant's confession was coerced. "We . . . fail to see what strategy would lead [trial counsel] to conclude that it would be best to pin defendant's chance for success on the possibility of a reversal and remandment for a new trial rather than attempting to obtain an acquittal."

People v. Moore, 279 Ill.App.3d 152, 663 N.E.2d 490 (5th Dist. 1996) Counsel was ineffective where he failed to object or request a mistrial when a police officer commented on defendant's exercise of his right to silence, failed to object to the admission of statements despite the absence of a valid Miranda waiver, failed to challenge the State's use of a criminal damage to property conviction as impeachment, allowed scientific testimony to be admitted without a proper foundation, and allowed defendant to be repeatedly questioned concerning the credibility of police officers. Counsel's actions could not be justified as trial strategy; "[s]ound trial strategy is made of sterner stuff."

People v. Jones, 311 Ill.App.3d 433, 723 N.E.2d 1217 (5th Dist. 2000) The decision to take a bench trial before the same trial judge who had previously found defendant guilty, and to stipulate to the evidence on which that finding had been based, "failed to resemble a confrontation between adversaries." The constitution requires more from trained professionals than "mere capitulation."

People v. Mejia, 247 Ill.App.3d 55, 617 N.E.2d 799 (1st Dist. 1993) Defense counsel was ineffective for stipulating to the contents of reports instead of calling live witnesses. Although the use of stipulations has been approved as a "time-saving" device for the introduction of peripheral, uncontested evidence, a stipulation is "no match for in-court live impeachment" on a critical issue.

The court refused to view counsel's actions as strategy. "[W]e are confident that no competent attorney would have defended his client in this manner." Although saving time at

trial is a valid concern, "counsel's concern for an expeditious proceeding goes too far when, other than putting the defendant on the stand to deny his guilt, counsel presents defendant's entire defense through stipulation."

People v. Butcher, 240 Ill.App.3d 507, 608 N.E.2d 496 (1st Dist. 1992) Defense counsel was ineffective for failing to subpoena two additional witnesses who could have corroborated a defense witness's testimony that defendant had not committed the offense. Since the State's case hinged entirely on identification evidence, there could be no sound strategic reason for failing to call the witnesses. Defendant was prejudiced because, given the closeness of the case, there was a reasonable probability that the additional witnesses would have raised a reasonable doubt of guilt.

Counsel was also ineffective because he elicited evidence that defendant had previously been arrested for murder; such evidence could not have been part of any sound strategy. (See also, People v. Morris, 335 Ill.App.3d 70, 779 N.E.2d 504 (1st Dist. 2002) (the failure to call witnesses could not be deemed a strategic decision where counsel indicated his intent to call one of the witnesses on the day the jury was selected and specifically sought a continuance to obtain the witness's testimony).

People v. Cabrera, 326 Ill.App.3d 555, 764 N.E.2d 532 (3d Dist. 2001) Where the record did not contain sufficient facts from which the trial judge could determine counsel's reasons for failing to call certain witnesses, the postconviction judge erred by concluding that trial strategy was involved.

People v. Valentine, 299 Ill.App.3d 1, 700 N.E.2d 700 (1st Dist. 1998) Even if the disclosure of defendant's prior arrests was a "well-intentioned trial tactic" intended to "mitigate the effect of defendant's impeachment by his prior theft conviction," the trial court erred by admitting evidence that would have been inadmissible except for defense counsel's actions. Without fully explaining its holding, the court held that "[t]he law will not permit a prosecutor to take unfair advantage of tactical errors by defense counsel that open the door to prejudicial evidence."

People v. McMillian, 352 Ill.App.3d 336, 816 N.E.2d 10 (5th Dist. 2004) Defense counsel was ineffective for failing to make several objections, and for disclosing defendant's "decade of criminality" in an apparent effort to convince the jury that defendant always pleaded guilty when he had committed a crime. There was a reasonable probability that the outcome of the trial might have been different had counsel been effective.

People v. Popoca, 245 Ill.App.3d 948, 615 N.E.2d 778 (2d Dist. 1993) Defense counsel was incompetent for failing to support an intoxication defense with available expert testimony. The failure to call an expert could not be deemed a strategic decision where trial counsel did not make such a claim; "just as a reviewing court should not second-guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer."

Cumulative Digest Case Summaries **§13-4(b)(6)(c)**

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. Lucious, 2016 IL App (1st) 141127 (No. 1-14-1127, 9/8/16)

In deciding if counsel has been ineffective, courts must be highly deferential to counsel's strategic choices, but will still find counsel's performance deficient where a strategic decision is so unreasonable that no effective counsel facing similar circumstances would pursue such a strategy.

The State charged defendant and his co-defendant with aggravated robbery which required proof that defendant or co-defendant indicated verbally or by their actions that they were armed. (720 ILCS 5/18-1(b)) At a joint bench trial, the State introduced evidence that co-defendant admitted to police that he told the victim "Don't make him [defendant] shoot you." In finding both defendants guilty, the trial court cited co-defendant's statement as evidence supporting the aggravated robbery charge. Defendant's counsel did not object to the court's reliance on this evidence.

The Appellate Court held that counsel was ineffective for failing to object to the trial court's consideration of the co-defendant's out-of-court statement as evidence against defendant. The confrontation clause is violated when a trial court presiding over a joint bench trial expressly relies on a co-defendant's statement as evidence of defendant's guilt. The Appellate Court acknowledged that at a joint bench trial the trial court is expected to be able to consider the evidence against each defendant separately. But here the trial court expressly considered co-defendant's statement as evidence of defendant's guilt. Once that occurred, trial counsel had a duty to object to the trial court's improper use of the evidence. Counsel's failure to do so constituted deficient performance under the first prong of **Strickland**.

The court specifically rejected the State's argument that counsel's failure to object was the product of strategy. The improper statement provided an essential element of aggravated robbery. No reasonable attorney would fail to see that. And objecting to the evidence would have directly aligned with counsel's strategy of seeking a conviction on the lesser offense of robbery.

The court also found that counsel's error was prejudicial under the second prong of **Strickland** since the improper evidence established an essential element of aggravated robbery. Had counsel objected, there was a reasonable probability that defendant would have been acquitted of that offense.

The court vacated defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Carolyn Klarquist, 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.)

People v. Tayborn, 2016 IL App (3d) 130594 (No. 3-13-0594, 3/7/16)

1. An attorney's decision whether to file a motion to suppress statements is generally a matter of trial strategy that is entitled to great deference. To establish prejudice from substandard representation involving the failure to file a motion to suppress evidence, the defendant must show that a suppression motion would have succeeded and a reasonable probability that the outcome of the trial would have been different had the evidence been suppressed.

2. The court concluded that counsel was ineffective for failing to move to suppress a statement which defendant made as a result of custodial interrogation at the scene of a traffic stop. The court stressed that there was no reasonable strategy for failing to move to suppress defendant's statement that he was transporting cocaine, because the statement was the State's strongest evidence on charges of possession of cocaine and possession with intent to deliver. The court found that the motion would have been meritorious and there was a reasonable probability that the outcome of the trial would have been different in the absence of the statement.

Defendant's conviction was reversed and the cause remanded for further proceedings.

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

Yarborough v. Gentry, 540 U.S. 1, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) 1. The right to effective assistance extends to closing arguments. However, due to the strategic questions involved, review of closing argument is extremely deferential.

2. The State court's decision - that defense counsel's closing argument did not constitute ineffective assistance - was not objectively unreasonable where counsel made several key points to the jury and omitted only ambiguous arguments which might have "backfired." In addition, concentrating on a small number of key points is a valid strategy and may be more effective than a "shotgun" approach.

3. Counsel did not act unreasonably by acknowledging facts unfavorable to the defense. By doing so, counsel built credibility with the jury and reminded the jury of the irrelevance of some of the facts. Nor was counsel's "low key" summation unreasonable in light of the "patronizing and overconfident summation" by the prosecutor.

Finally, it was not ineffectiveness to state that even counsel could not be sure of the truth; "[w]inning over an audience by empathy is a technique that dates back to Aristotle."

People v. Briones, 352 Ill.App.3d 913, 816 N.E.2d 1120 (5th Dist. 2004) Counsel was ineffective for failing to call defendant as a witness after promising to do so in opening statements. Although counsel may have made the promise in good faith only to have defendant change his mind, or that some unexpected event may have made defendant's testimony strategically inadvisable, it was counsel's responsibility to make a record of the reasons for failing to call the defendant.

People v. Davis, 287 Ill.App.3d 46, 677 N.E.2d 1340 (1st Dist. 1997) Counsel was ineffective where he informed the jury during opening argument that defendant would testify, and attempted to explain the failure to testify after the trial court found that a prior conviction, which counsel had failed to investigate, was admissible. The court refused to view counsel's actions as strategy; due to a failure to investigate, counsel failed to present "the most

important piece of evidence he had promised to produce." In addition, it clearly would have been prejudicial error had the prosecutor commented on the defendant's failure to testify in the same manner.

People v. McMillian, 352 Ill.App.3d 336, 816 N.E.2d 10 (5th Dist. 2004) Counsel was ineffective for failing to object to improper closing argument which stated that defendant's friends had not testified because "they're not going to lie under oath," and to a false claim that a police report contained a prior consistent statement which supported an officer's testimony.

People v. Lewis, 240 Ill.App.3d 463, 609 N.E.2d 673 (1st Dist. 1992) Counsel was ineffective for basing his defense on inadmissible evidence. By promising during his opening argument to produce significant exonerating evidence, and then failing to do so, counsel severely prejudiced his client's case.

Cumulative Digest Case Summaries **§13-4(b)(7)**

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

Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) 1. Defendant's right to counsel was not violated by an undercover agent's presence, at defendant's request, during strategy conferences between defendant and his attorney. The agent did not communicate any defense strategy to the prosecutor, and at trial testified only about things which occurred prior to the meetings.

The court rejected a per se rule that the Sixth Amendment is violated whenever the prosecution knowingly "permits intrusion into the attorney-client relationship." Such a rule would prohibit an informant from attending a meeting between a defendant and his attorney, effectively disclosing his status as an informant and inhibiting legitimate law enforcement interests. The court recognized, however, that a Sixth Amendment violation might occur where the informant communicates to the prosecutor the substance of conversations between a defendant and his attorney. See also, Shillinger v. Haworth, 70 F.3d 1132 (10th Cir. 1995)(suggesting that the Weatherford requirement of prejudice might be limited to cases in which the prosecution does not intend to interfere in the attorney-client relationship and there is a legitimate law enforcement purpose; where the prosecutor admitted that he intended to determine the substance of defendant's conversations with his attorney and attorney-client communications were actually disclosed, prejudice should be presumed).

2. Defendant was not deprived of a fair trial by the prosecution's failure to disclose, before trial, that the agent would testify, or by the agent's representation to the defense that he would not testify. Due process does not require disclosure of the names of all witnesses who will testify unfavorably to the defendant. Furthermore, there was no deliberate misrepresentation where the informant did not learn until the day of trial that he would be called to testify.

Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) The Sixth Amendment was violated at a bench trial where the judge prohibited closing argument. See also, People v. Smith, 205 Ill.App.3d 153, 562 N.E.2d 553 (1st Dist. 1990) (defendant's Sixth Amendment right to present argument at bench trial could not be abrogated merely because the trial court had a crowded docket).

Geders v. U.S., 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) The right to the assistance of counsel was violated by the trial judge's order preventing defendant from consulting with his counsel "about anything" during a 17-hour overnight recess between defendant's direct and cross-examination.

Brooks v. Tennessee, 406 U.S. 605, 92 S.Ct. 1981, 32 L.Ed.2d 358 (1972) State statute which required defendant who wanted to testify to do so before any other defense testimony denied due process by depriving defendant of the "guiding hand of counsel" when making a critical decision.

People v. Williams, 93 Ill.2d 309, 444 N.E.2d 136 (1982) Defendant was entitled to a new trial based on the unique circumstances of this case - at a death penalty trial, counsel represented three clients before two juries, failed to file a motion to suppress or make proper objections, and was engaged in misconduct in other matters which led to his disbarment. Although counsel's conduct does not come within the usual tests for incompetency, the Court could not characterize counsel's decisions as mere "misjudgments made with full knowledge of the applicable law and the facts." Compare, People v. Franklin, 167 Ill.2d 1, 656 N.E.2d 750 (1995) (although at the time of trial defense counsel was the subject of a federal criminal

investigation involving "Operation Greylord," the interests of justice did not require a new trial; the mere fact that defense counsel was the subject of a criminal investigation does not justify a presumption that he failed to provide competent representation).

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§13-4(b)(9)
Post-trial Motion & Sentencing

People v. Henderson, 171 Ill.2d 124, 662 N.E.2d 1287 (1996) Counsel was not ineffective at sentencing for failing to present evidence that was arguably mitigating but which the sentencer could have seen as aggravating.

People v. Richardson, 189 Ill.2d 401, 727 N.E.2d 362 (2000) Where defendant maintained his innocence at sentencing, counsel acted reasonably by deciding not to introduce evidence of defendant's psychological impairments and poor upbringing. "[A]fter defendant testified that he did not commit the murder, it would have been contradictory for his trial counsel to present mitigation evidence to explain or clarify why defendant committed the murder." See also, People v. Evans, 186 Ill.2d 83, 708 N.E.2d 1158 (1999) (counsel not ineffective; it would have been difficult to elicit testimony that defendant acted under the influence of an extreme mental or emotional disturbance after defendant testified he did not act at all); People v. Enis, 194 Ill.2d 361, 743 N.E.2d 1 (2000) (counsel "cannot be expected to present mitigation evidence that contradicts his client's protestations of innocence"); People v. Holman, 164 Ill.2d 356, 647 N.E.2d 960 (1995) (counsel not ineffective for failing to present mitigation that he thought would "not go over well" in his county or which would conflict with defendant's claim of innocence); People v. Sims, 322 Ill.App.3d 397, 750 N.E.2d 320 (5th Dist. 2001) ("we are not ready to accept the notion that competent representation requires a defense attorney to maintain a defense theory inconsistent with a client's claimed innocence").

People v. Childress, 191 Ill.2d 168, 730 N.E.2d 32 (2000) Defense counsel was not ineffective for failing to present mitigation at the sentencing hearing; much of the evidence could have been viewed as either mitigating or aggravating, many of the affidavits attached to the petition contained not only mitigating evidence but also "highly damaging aggravating evidence," and the aggravating evidence was overwhelming and clearly justified a death sentence.

People v. Howery, 178 Ill.2d 1, 687 N.E.2d 836 (1997) Trial attorney was ineffective for failing to investigate mitigating evidence and for presenting only brief testimony from three character witnesses at death hearing. Counsel admitted that at sentencing he had not "exert[ed] the same vigor" as at trial, and a competent investigation would have disclosed at least three witnesses who would have testified concerning defendant's involvement in civic affairs. In addition, defendant had no prior criminal history and suffered from emotional distress and "excessive drinking" at the time of the offense. Finally, the trial court's remarks suggested that mitigation might have altered its determination that there was no evidence sufficient to preclude the death penalty.

People v. Shoemaker, 358 Ill.App.3d 257, 831 N.E.2d 1201 (4th Dist. 2005) Counsel was not

ineffective at sentencing although he stated that defendant's actions were "the most filthy, disgusting, things I've ever heard of," that he was "not real happy" being around the defendant, and that defendant's sentences for aggravated criminal sexual assault and home invasion should not exceed sentences which the same judge had imposed on murder convictions. "By candidly acknowledging his client's shortcomings, counsel may have built credibility . . . and persuaded the court to focus his attention not on defendant's character, but the sentencing structure."

People v. Moore, 307 Ill.App.3d 107, 716 N.E.2d 851 (5th Dist. 1999) Counsel who entered the case for posttrial motions was ineffective for failing to raise meritorious issue concerning trial counsel's ineffectiveness.

People v. Owens, 386 Ill.App.3d 765, 899 N.E.2d 625 (4th Dist. 2008) Because the filing of a motion to reconsider the sentence is a "critical stage" of a criminal proceeding, a defendant is entitled to consult with counsel to determine whether a motion should be filed. However, whether to file a motion to reconsider is a tactical decision that is left to counsel's professional judgment.

Defense counsel was not ineffective for failing to file a motion to reconsider the sentences imposed after a jury trial; counsel consulted with the defendant at the sentencing hearing, and then told the trial court that defendant did not intend to challenge his sentences but did want the clerk to file a notice of appeal.

Cumulative Digest Case Summaries **§13-4(b)(9)**

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. Billups, 2016 IL App (1st) 134006 (Nos. 1-13-4006 & 1-13-4007 cons., 5/24/16)

Defendant's pre-sentence investigation report listed numerous prior convictions, including three convictions for weapons offenses. Two of the weapons offenses were based on statutes that had been declared unconstitutional in **Aguilar**, 2013 IL 112116. The other weapons offense, unlawful possession by a felon, was not based on an unconstitutional statute, but the underlying felony may have been one of the improper gun offenses. Defense counsel did not object to the information in the PSI and the trial court stated in imposing sentence that defendant had been "in the penitentiary for narcotics and gun cases."

The Appellate Court held that counsel provided ineffective assistance by failing to object to the trial court's consideration of the two improper convictions. The Appellate Court noted that **Aguilar** had been decided before the sentencing hearing in this case, and found that competent counsel would have objected to the convictions. The failure to object could not have served any strategic purpose.

And because the trial court specifically relied on defendant's gun convictions in imposing sentence, there was a reasonable probability that the court would have imposed a lesser sentence if counsel had objected. Defendant was thus prejudiced by counsel's error.

The case was remanded for resentencing.

(Defendant was represented by Assistant Defender Josh Bernstein, 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

Wainwright v. Torna, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982) There is no constitutional right to counsel for discretionary appeals. A defendant is not deprived of effective assistance of counsel because his attorney fails to seek a discretionary appeal. Accord, People v. James, 111 Ill.2d 283, 489 N.E.2d 1350 (1986).

Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) There is no constitutional right to compel appointed appellate counsel to raise a nonfrivolous issue which counsel decides, in his or her professional judgment, not to raise. See also, People v. Barnard, 104 Ill.2d 218, 470 N.E.2d 1005 (1984) (it is not incompetence to refrain from raising issues which counsel believes to be without merit, unless that appraisal of the merits is patently wrong); People v. Smith, 195 Ill.2d 179, 745 N.E.2d 1194 (2000) (unless an issue is meritorious, defendant is not prejudiced by counsel's failure to raise it); People v. Richardson, 189 Ill.2d 401, 727 N.E.2d 362 (2000) ("[e]xperienced advocates have always emphasized the importance of screening out weaker arguments on appeal and focusing on at most a few key issues"). Compare, People v. West, 187 Ill.2d 418, 719 N.E.2d 664 (1999) (where the finding of death eligibility would have been reversed on direct appeal had appellate counsel challenged the sufficiency of the State's evidence, counsel was ineffective).

Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) 1. Whether an attorney is constitutionally ineffective for failing to file a notice of appeal is determined under Strickland. Thus, the defendant must show that: (1) the failure to file a notice of appeal was objectively unreasonable; and (2) prejudice resulted.

2. Where the defendant gives counsel no specific instructions about an appeal, counsel is not necessarily required to file a notice of appeal. An attorney who consults with the defendant about an appeal acts unreasonably only if he or she disregards the defendant's explicit instructions concerning an appeal. It is unreasonable for an attorney to fail to consult with the defendant about an appeal if, under all the known circumstances, there is reason to believe that: (1) a rational defendant would want to appeal, or (2) the particular defendant has reasonably demonstrated an interest in appealing. Counsel must also consider whether the defendant received the sentence for which he bargained and whether the plea agreement expressly reserved or waived the right to appeal.

3. To show prejudice from the failure to consult with defendant about an appeal, there must be a reasonable probability that had consultation occurred, defendant would have filed a timely appeal. The defendant need not show that there were meritorious issues. See also, People v. Edwards, 197 Ill.2d 239, 757 N.E.2d 442 (2001) (where a post-conviction petition alleged that trial counsel ignored requests to file an appeal, and there was nothing of record to indicate that defense counsel reviewed the plea proceedings for error or consulted with the defendant before deciding not to file a motion to withdraw the plea, the petition made a sufficient allegation of ineffective assistance to survive summary dismissal); People v. Ross, 229 Ill.2d 255, 891 N.E.2d 865 (2008) (defense counsel acts unreasonably by disregarding specific instructions from the defendant to file a notice of appeal; prejudice is shown where defendant would have taken an appeal; 725 ILCS 5/5-122 authorizes a post-conviction court to grant leave to file a late notice of appeal where counsel was ineffective for failing to file a notice of appeal); People v. Torres, 228 Ill.2d 382, 888 N.E.2d 91 (2008) (there is a constitutional duty to consult about an appeal if there is reason to think that a rational defendant would want to appeal or the particular defendant has reasonably demonstrated that

he is interested in appealing; there was no reason to believe that a rational defendant would want to appeal where there were no nonfrivolous grounds, the sentence was within the range of which defendant was admonished and was the minimum which was available, defendant expressly stated that he was pleading guilty to put an end to the proceedings, and defendant expressed no interest in appealing when admonished concerning his appellate rights; however, the better practice is to consult with the client about the possibility of an appeal following imposition of a sentence on a guilty plea); People v. Rovito, 327 Ill.App.3d 164, 762 N.E.2d 641 (1st Dist. 2001) (where defendant testified that he instructed his attorney to file an appeal, but defense counsel testified that defendant specifically said he did not wish to appeal, the trial court was required to determine the credibility of the conflicting claims).

People v. Moore, 177 Ill.2d 421, 686 N.E.2d 587 (1997) Appellate counsel was ineffective for failing to raise an issue on direct appeal. Although the controlling precedent in the district in which the case arose would have held that no error occurred, that precedent was "illogical and an unreasonable interpretation of . . . precedent and statutory law." In addition, there was conflicting precedent in another appellate district. Compare, People v. Harris, 206 Ill.2d 1, 794 N.E.2d 314 (2002) (appellate counsel was not ineffective for failing to challenge the State's use of victim impact evidence from an unrelated crime; in view of the law at the time of the appeal, reasonable appellate counsel could have decided not to argue that victim impact evidence from other crimes was inadmissible; an attorney's admission of ineffectiveness does not bind the court or determine whether counsel was ineffective).

People v. Mack, 167 Ill.2d 525, 658 N.E.2d 437 (1995) 1. An appellate attorney is ineffective where the failure to raise an issue is objectively unreasonable and there is a reasonable probability that had the issue been raised, the conviction or sentence would have been reversed. Appellate counsel's decision concerning the issues to be raised is entitled to substantial deference, however, and will be found objectively unreasonable only if it was "patently erroneous."

2. Appellate counsel was ineffective for failing to raise a jury verdict issue on direct appeal. Counsel's failure to raise the issue was objectively unreasonable, although no direct authority on the point existed at the time of the direct appeal, because a reasonable appellate attorney would have argued that due process is violated by a verdict that omits an essential element of a death penalty eligibility factor.

Because due process requires that a verdict which purports to set out the elements of death eligibility include all essential elements, defendant's death sentence would have been vacated on direct appeal had the issue been raised. Thus, prejudice was shown. Compare, People v. Jones, 219 Ill.2d 1, 845 N.E.2d 598 (2006) (counsel was not ineffective for failing to challenge ruling on motion to suppress where there was no basis to exclude statements).

People v. Peeples, 205 Ill.2d 480, 793 N.E.2d 641 (2002) Counsel was not ineffective for failing to argue on direct appeal that defendant's exclusion from the in camera portion of voir dire violated due process. Absence from a portion of jury selection violates due process only if a fair trial is denied - the record did not indicate that the jurors selected during the in camera proceeding were prejudiced.

People v. Wilson, 191 Ill.2d 363, 732 N.E.2d 498 (2000) Appellate counsel was not ineffective for failing to argue on direct appeal that the State had agreed not to seek a death sentence if defendant revealed information about the offense. There was no reasonable likelihood that the

issue would have been successful had appellate counsel raised it, because the conditions of the State's offer not to seek a death sentence - that defendant was not the shooter and that he tell the truth - were not fulfilled.

People v. Moore, 133 Ill.2d 331, 549 N.E.2d 1257 (1990) Defendant's appeal, which had been dismissed because of counsel's neglect in failing to prosecute the appeal, was reinstated. See also, People v. Cole, 287 Ill.App.3d 147, 678 N.E.2d 78 (1st Dist. 1997) (under Moore, prejudice is presumed where counsel fails to perfect an appeal).

People v. Thornhill, 31 Ill.App.3d 779, 333 N.E.2d 8 (1st Dist. 1975) The Appellate Court condemned lengthy delays and inaction by appellate counsel; in addition to use of the court's contempt power, "the bar is put on notice that in the future this type of inattention to an attorney's professional responsibility will cause this court to forward all such pertinent facts to the Attorney Registration Commission."

The press of other business may not be sufficient grounds to justify delay. "[P]rompt disposition of litigation is too important to be delayed because a select group of attorneys may be enjoying more business at a given moment than their brethren."

People v. Wilson & Harris, 273 Ill.App.3d 71, 652 N.E.2d 405 (3d Dist. 1995) Appellate counsel was incompetent for failing to file a supplemental brief after the U.S. Supreme Court modified precedent while defendant's direct appeal was pending, and the new precedent applied to cases still on direct review.

People v. Hanks, 335 Ill.App.3d 894, 781 N.E.2d 601 (1st Dist. 2002) Post-conviction petition stated the "gist" of a meritorious claim of ineffective assistance of appellate counsel; counsel failed to raise an issue based on a juror's knowledge of defendant's prior rape conviction.

Cumulative Digest Case Summaries **§13-4(b)(10)**

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. Meeks, 2016 IL App (2d) 140509 (No. 2-14-0509, 3/30/16)

1. The Sixth Amendment right to counsel includes the right to effective assistance of counsel on direct appeal. Where a claim of ineffective assistance of counsel is based on the failure to raise a particular issue, **Strickland v. Washington** applies. Thus, the defendant must show both that counsel's performance was objectively unreasonable and that had it not been for counsel's errors, there would have been a reasonable probability that the result of the proceeding would have been different.

By contrast, the **Strickland** standard does not apply where a claim of ineffective assistance of appellate counsel is predicated on counsel's failure to prosecute the appeal, resulting in its dismissal. A defendant is entitled to have a direct appeal with an appellate advocate, and cannot be deprived of that right on the ground that an appeal would have been unsuccessful.

2. Where retained appellate counsel unilaterally decided not to raise any issue on defendant's behalf, but instead refunded the retainer which defendant had paid and said that he had decided to work on a post-conviction petition, counsel functionally ceased to represent the defendant. The court acknowledged that appellate counsel is ethically bound to refrain from raising issues that have no arguable merit. Even where counsel believes there is no arguable merit to an appeal, however, he or she may not simply sit by and wait for the appeal to be dismissed for want of prosecution. Instead, the attorney has an ethical obligation to move to withdraw from representing defendant on appeal.

3. The court noted that had appellate counsel been court appointed rather than privately retained, he would have been required to comply with the procedure set forth in **Anders v. California**. Although there is no Illinois precedent concerning whether **Anders** applies to retained counsel, the court found that it need not resolve that question because even retained counsel was obliged to seek leave to withdraw once he concluded that no issues of merit could be raised.

Where the trial court erred by summarily dismissing a post-conviction petition which alleged ineffective assistance because retained appellate counsel failed to take any action in defendant's behalf, the court remanded the cause for second-stage post-conviction proceedings.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

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

Smith v. Robbins, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) 1. The practice adopted in Anders v. California, 386 U.S. 738 (1967) was merely a "prophylactic" procedure, and is not constitutionally mandated. Thus, counsel is not ineffective for following the practice sanctioned by the California courts in lieu of Anders, so long as counsel believes that an appeal presents only frivolous issues.

People v. Brigham, 151 Ill.2d 58, 600 N.E.2d 1178 (1992) An attorney who has been suspended from practice for reasons unrelated to competence is capable of providing effective assistance of counsel despite the suspension. By contrast, where counsel is either an imposter who was never admitted to the bar or a disbarred attorney, reversal of the conviction is required.

Where there was no allegation that defense counsel was incompetent for reasons other than his failure to pay dues, defendant was not entitled to relief.

People v. Mitchell, 189 Ill.2d 312, 727 N.E.2d 254 (2000) Where a defendant who was on psychotropic medication argues that trial counsel was ineffective for failing to request a fitness hearing, Strickland v. Washington requires a showing that the defendant would have been found unfit had a fitness hearing been held. The court overruled precedent that prejudice is shown if a fitness hearing would have been held had counsel made an appropriate request.

People v. Houston, 229 Ill.2d 1, 890 N.E.2d 424 (2008) Although defense counsel acted improperly by waiving the presence of a court reporter during voir dire, counsel was not ineffective where the defendant could not establish that the result of the trial would have been different had a court reporter been present. A bystander's report failed to show a prima facie case of discrimination under Batson, and the State would have been able to articulate race neutral reasons for excusing the only African-American veniremember against whom it exercised a peremptory.

People v. Williams, 93 Ill.2d 309, 444 N.E.2d 136 (1982) Defendant was entitled to a new trial based on the unique circumstances of this case - at a death penalty trial, counsel represented three clients before two juries, failed to file a motion to suppress or make proper objections, and was engaged in misconduct in other matters which led to his disbarment. Although counsel's conduct does not come within the usual tests for incompetency, the Court could not characterize counsel's decisions as mere "misjudgments made with full knowledge of the applicable law and the facts." Compare, People v. Franklin, 167 Ill.2d 1, 656 N.E.2d 750 (1995) (Williams did not require reversal of conviction without a specific showing of ineffectiveness where defense counsel was the subject of a federal criminal investigation involving "Operation Greylord"; Williams was an "aberration peculiar to the facts of that case," and there is no reason to presume that counsel failed to provide competent representation merely because he was the subject of a criminal investigation); People v. Perry, 183 Ill.App.3d 534, 540 N.E.2d 379 (1st Dist. 1989) (mere pendency of disciplinary proceedings does not brand an attorney incompetent).

People v. James, 362 Ill.App.3d 250, 839 N.E.2d 1135 (4th Dist. 2005) Trial counsel's decision whether to provide his client with discovery materials is a matter of trial strategy which lies within counsel's discretion. There is no constitutional right to see discovery. See also, People v. Davison, 292 Ill.App.3d 981, 686 N.E.2d 1231 (4th Dist. 1997) (although counsel might elect to keep discovery from the defendant due to a legitimate fear that an untrained

defendant might misinterpret the materials and "disrupt counsel's management of the case," counsel has ethical obligation to inform a client of important matters and provide sufficient information to allow defendant to participate intelligently in the case). Compare, People v. Hobson, 386 Ill.App.3d 221, 897 N.E.2d 421 (1st Dist. 2008) (court noted, but did not resolve, conflicting appellate authority concerning whether a defense attorney has an unqualified duty to comply with his client's request to see discovery materials; the failure to provide discovery materials to the client can constitute ineffective assistance only if there was prejudice, a showing which defendant could not make).

People v. Falls, 235 Ill.App.3d 558, 601 N.E.2d 1276 (1st Dist. 1992) Defense counsel was ineffective where he attempted to withdraw because he had not been paid, made several questionable decisions, and asked the judge to revoke defendant's bond and pay it to counsel.

People v. Lewis, 240 Ill.App.3d 463, 609 N.E.2d 673 (1st Dist. 1992) The cumulative effect of defense counsel's errors deprived defendant of a fair trial. Counsel based the defense on inadmissible evidence, failed to request an instruction concerning the credibility of an accomplice although he contended throughout trial that the witness was not credible because she was an accomplice, promised during opening argument to produce significant exonerating evidence and then failed to do so, failed to move to sever two murders which occurred at different locations on different days and with different motives, pursued a strategy that left the jury no choice but to convict, and in closing argument argued a theory on which the jury had not been instructed.

People v. Hoerer, 375 Ill.App.3d 148, 872 N.E.2d 572 (2d Dist. 2007) Defense counsel was ineffective when he stipulated to the admission of evidence that defendant had entered into plea negotiations with the State.

Cumulative Digest Case Summaries **§13-4(b)(11)**

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. Nesbit, 2016 IL App (3d) 140591 (Nos. 3-14-0591 & 3-14-0695, 9/8/16)

A defendant is entitled to credit against his sentence for each day he spends in pretrial custody. But a defendant who is out on bond on one charge and is subsequently arrested and returned to custody on another charge is not entitled to credit on the first charge until his bond is withdrawn or revoked. Once a defendant withdraws or surrenders his bond, he is considered in custody on both charges and earns credit against each charge.

A month after he was charged in the present case, defendant posted bond and was released from custody. The Department of Corrections immediately took defendant into custody for an earlier conviction. When defendant appeared in court on the present charge, his attorney informed the court that defendant was on bond in this case and in DOC custody on another case.

Following his conviction, defendant filed a post-conviction petition alleging that his counsel had provided ineffective assistance of counsel for failing to surrender his bond. In an affidavit attached to the petition, defendant stated that his counsel never informed him that he could surrender his bond and receive sentencing credit. He further stated that if his counsel had so informed him, he would have surrendered his bond.

The Appellate Court held that defendant's post-conviction claim made a substantial showing of ineffective assistance warranting a third-stage evidentiary hearing. The failure of counsel to notify defendant of his option to surrender bond and receive credit was objectively unreasonable and created prejudice by depriving defendant of sentencing credit.

The case was remanded for a third-stage evidentiary hearing.
(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

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.)

Top

§13-5
Conflict of Interest

§13-5(a)
Generally

Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) The Sixth Amendment right to effective assistance of counsel includes the right to counsel who does not labor under a conflict of interest. See also, People v. Hardin, 217 Ill.2d 289, 840 N.E.2d 1205 (2005) (right to effective assistance of trial counsel stems from the Sixth Amendment, and includes the correlative right to conflict-free representation).

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) Once a defendant shows that a conflict of interest actually affected the adequacy of representation by either retained or appointed counsel, he need not demonstrate prejudice in order to obtain relief. However, a defendant must show an actual conflict of interest, not merely a possible conflict.

Wheat v. U.S., 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) A defendant's Sixth Amendment right to choose his or her own counsel has limitations. A defendant may not insist on representation by an attorney who has a relationship with an opposing party. Where counsel's representation of a co-defendant represented a potential conflict of interest, the trial court properly refused to allow counsel to also represent the defendant, despite defendant's willingness to waive the conflict.

People v. Hernandez, 231 Ill.2d 134, 896 N.E.2d 297 (2008) 1. In determining whether a

conflict of interest exists, courts first determine whether there is a per se conflict, in which certain facts about defense counsel's status engender, on their own, a disabling conflict. Generally, a per se conflict arises when a defendant's attorney has ties to an entity that would benefit from an unfavorable verdict for the defendant.

If a per se conflict exists, the defendant is not required to show that counsel's actual performance was affected.

Three situations raising per se conflicts have been identified: (1) when defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) when defense counsel contemporaneously represents a prosecution witness; and (3) when defense counsel is a former prosecutor who was personally involved in prosecuting the defendant.

2. In the absence of a per se conflict, the defendant must show that an actual conflict of interest adversely affected counsel's performance. To establish an actual conflict of interest, defendant must show a specific defect in counsel's strategy, tactics or decision making which is attributable to the conflict. To obtain relief in an actual conflict situation, the defendant must show that the conflict actually affected counsel's performance.

The court rejected the State's request to abandon the per se conflict rule and grant relief only if there is an actual conflict.

3. A per se conflict exists whenever counsel has represented both the defendant and the alleged victim of the crime, without regard to whether counsel actively represents the victim and without any inquiry into the specific facts. Thus, there was a per se conflict where, while representing defendant on a solicitation of murder charge, defense counsel was attorney of record in an unrelated case involving the intended victim of the solicitation. The per se conflict rule applied although the victim had fled the country and not contacted counsel for more than five years.

4. Attorneys have an obligation to bring to the court's attention facts that might create a conflict of interest. The prosecutor and two defense attorneys discussed the potential conflict, but failed to advise the court because they believed that no conflict existed. Had the trial court been informed, defendant could have been properly admonished and allowed to decide whether he wished to waive the conflict. See also, People v. Washington, 101 Ill.2d 104, 461 N.E.2d 393 (1984) (the per se conflict rule does not apply to the joint representation of codefendants, because a possible conflict is inherent in almost every instance; in such cases, the defendant must show that an actual conflict of interest caused prejudice).

People v. Morales, 209 Ill.2d 340, 808 N.E.2d 510 (2004) 1. No per se conflict existed although, while representing defendant at his trial for the murder of a drug courier, defense counsel also represented a drug supplier who sent the courier to collect payments from the defendant. The supplier did not testify at defendant's trial - which would have triggered the per se rule - and there was no indication that the supplier had "something to gain" from defendant's conviction.

2. Even where there is no per se conflict of interest, the right to effective assistance of counsel is violated where an actual conflict of interest adversely affects defense counsel's performance. To establish an actual conflict, the defendant must show that the conflict led to a specific defect in counsel's strategy, tactics or decisionmaking.

The court found that no specific defect in counsel's performance was shown, rejecting the claim that counsel was limited in his cross-examination of State's witnesses and unwilling to disparage the supplier during opening and closing arguments.

People v. Moore, 189 Ill.2d 521, 727 N.E.2d 348 (2000) 1. A per se conflict of interest was not created where a potential witness paid counsel to represent the defendant. Defense counsel was paid only to represent defendant, had no contemporaneous professional relationship with the potential witness or her attorney, and at no time acted as the witness's attorney.

2. Nor did defense counsel have an actual conflict, although counsel decided not to call the girlfriend who paid defendant's attorney fees. Because the girlfriend had exercised her 5th Amendment rights when called by the State, and made it clear that she would do the same if called by the defense, it was apparent that counsel's failure to call the witness was not due to a conflict of interest.

People v. Ortega, 209 Ill.2d 354, 808 N.E.2d 496 (2004) 1. There was at least a serious potential for a conflict of interest arising from the representation of a confidential informant by defense counsel's law partner, although the partner's representation of the informant ended before defendant's trial. Defense counsel had professional obligations to both protect confidential information which he had learned from his law partner and to thoroughly cross-examine the informant, who was called as a State's witness. Under these circumstances, the trial court did not err by granting the State's motion to disqualify defense counsel.

2. Even had the informant been willing to waive both the attorney-client privilege concerning information he had given to the partner (and which the partner had transmitted to trial counsel) and any conflict of interest, the trial court would have been justified in finding that there was a potential for a serious conflict. In addition, at least two of the relevant concerns - the State's interest in a fair trial at which defense counsel does not have access to confidential information about a State's witness and the appearance of impropriety should the jury learn that defense counsel's law partner had represented a State's witness concerning the same incident - could not be cured by a waiver.

People v. Woidtke, 313 Ill.App.3d 399, 729 N.E.2d 506 (5th Dist. 2000) 1. Defense counsel suffered from a per se conflict where he represented defendant on a murder charge while representing a second suspect on misdemeanor charges that arose from the same case, even though the misdemeanor charges were resolved before defendant's trial. Counsel never disclosed the dual representation to defendant, the second suspect, or the trial judge. In addition, he subpoenaed the second suspect at defendant's trial, but did not place him on the stand.

2. The conflict was not obviated because the second suspect could be still be charged with murder if additional evidence was found. "As a practical matter, . . . it is unlikely that such evidence would be actively pursued after defendant's conviction and sentencing."

Nor was the conflict obviated because defendant had been found unfit to stand trial and was in a mental health center when counsel represented the second client. A conflict existed because counsel was obligated to protect any privileged information concerning the second client's involvement in the murder, even if that evidence would have helped the defendant.

People v. Coleman, 301 Ill.App.3d 290, 703 N.E.2d 137 (5th Dist. 1998) A per se conflict of interest existed where defense counsel contemporaneously represented the defendant and three State's witnesses. See also, People v. Drysdale, 51 Ill.App.3d 667, 366 N.E.2d 394 (5th Dist. 1977) (retained trial counsel had a conflict of interest where he previously represented State's chief witness at an involuntary commitment proceeding resulting in a finding that the witness was in need of mental treatment; because counsel was under a continuing commitment not to disclose any confidence given him by the former client, he could not

effectively cross-examine).

People v. Daly, Umphreyes, Thompson, Wickert & Jones, 341 Ill.App.3d 372, 792 N.E.2d 446 (4th Dist. 2003) A per se conflict of interest occurs if the "professional relationship between counsel and the witness is contemporaneous with counsel's representation of defendant." A per se conflict existed where defendants were charged with various drug offenses based on the testimony of a confidential informant whom defense counsel had represented as recently as a few weeks before the alleged sales. The informant's role with local police began six months before the sales, when defense counsel negotiated the dismissal of several criminal charges.

To properly represent defendant, counsel "needed to cross-examine [the informant] about matters that arose during the very time that [counsel] was representing [the informant]," including any agreement which the informant made to gain dismissal of the criminal charges against him. Although defense counsel was not actively representing the informant at the time of defendant's trial, counsel's professional relationship with the informant continued "indefinitely," at least to the extent that counsel would ever be called upon to cross-examine the informant about matters which occurred during counsel's representation.

The court also stressed that the informant was able to make controlled drug buys only because counsel was successful in his negotiations on the informant's behalf; not only did counsel would have to attack his own work in order to represent defendant, but he "could not be expected to impeach [the informant] with information that would void" the informant's arrangement with police and possibly lead to reinstatement of dismissed charges.

3. A per se conflict of interest requires reversal of the conviction unless the defendant was aware of the conflict and knowingly waived it. Because there was no evidence of a waiver, the convictions were reversed and the causes remanded for new trials.

Cumulative Digest Case Summaries **§13-5(a)**

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. Peterson, 2015 IL App (3d) 130157 (No. 3-13-0157, 11/12/15)

The Sixth Amendment right to counsel includes the right to representation by an attorney who does not have conflicting obligations. Under Illinois law, a conflict of interest may be either "*per se*" or actual. A *per se* conflict of interest exists where certain aspects of defense counsel's status, in and of themselves, engender a disabling conflict.

Generally, a *per se* conflict of interest exists where defense counsel has a tie to some entity which would benefit from a verdict that is unfavorable to the defendant. The rules concerning *per se* conflicts are intended to both avoid unfairness to the defendant and to prevent later claims that counsel's representation was not devoted completely to the defendant.

Under Illinois law, a *per se* conflict 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 defendant's prosecution. Unless the defendant waives the right to conflict-free representation, a *per se* conflict of interest requires reversal even where there is no showing that counsel's performance was affected.

There was no *per se* conflict of interest where, before defendant was charged, defendant and counsel signed a media contract which ended before charges were filed in this case. The court concluded that the instant case did not present any of the three situations recognized

in Illinois as creating *per se* conflicts.

The court acknowledged that under **People v. Gacy**, 125 Ill. 2d 117, 530 N.E.2d 1340 (1988), a *per se* conflict might arise if defense counsel enters into a contract to write a book about a case during the course of his or her representation. Here, however, the purpose of the contract was not for counsel to write a book, but an attempt by counsel and defendant to "get ahead" of the case and avoid having charges filed. The court also noted that it was not expressing any opinion whether counsel's actions violated the Rules of Professional Conduct and might justify disciplinary action.

Defendant's conviction for first degree murder was affirmed.

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. Stoval, 40 Ill.2d 109, 239 N.E.2d 441 (1968) Generally, there is a per se conflict of interest where counsel has represented both the defendant and the alleged victim of the crime, without regard to whether counsel actively represents the victim and without any inquiry into the specific facts. Thus, counsel had a conflict of interest where he was a member of a law firm that represented the corporation that owned the jewelry store which defendant was accused

of burglarizing and the individual who operated the store.

People v. Hernandez, 231 Ill.2d 134, 896 N.E.2d 297 (2008) 1. A per se conflict of interest existed where, while representing defendant on a solicitation of murder charge, defense counsel was attorney of record in an unrelated case involving the intended victim. The per se conflict rule applied although the victim had fled the country and not contacted counsel for more than five years.

2. Attorneys have an obligation to bring to the trial court's attention facts or circumstances that might create a conflict of interest. Here, the prosecutor and two defense attorneys discussed the potential conflict but failed to advise the court, apparently because they believed that no conflict existed. Had the trial court been informed, defendant could have been properly admonished and allowed to decide whether he wished to waive the conflict.

People v. Washington, 101 Ill.2d 104, 461 N.E.2d 393 (1984) Defense counsel had a per se conflict where a State witness was a police officer of a municipality for which counsel was a part-time prosecutor. When a city prosecutor acts as defense counsel in a case where his own city's officers are involved, "a struggle inevitably arises between counsel's obligation to represent his client competently and zealously" and a prosecutor's "natural inclination not to anger the very individuals whose assistance he relies upon in carrying out his prosecutorial responsibilities."

People v. Coslet, 67 Ill.2d 127, 7 Ill.Dec. 80, 364 N.E.2d 67 (1977) Defense counsel had a conflict of interest where he represented both the defendant, who was accused of murdering her husband and who was convicted of voluntary manslaughter, and the administrator of the husband's estate. The attorney had a duty to preserve the assets of the estate, and the conviction of the wife would have benefitted the estate by precluding the wife from taking assets as a surviving joint tenant. See also, People v. Meyers, 46 Ill.2d 149, 263 N.E.2d 81 (1970) (a conflict of interest existed where defendant's appointed counsel agreed to also represent defendant's wife in a dram shop action on a contingent fee basis; damages in the dram shop action would presumably increase in proportion to the length of defendant's sentence, increasing counsel's fee).

People v. Thomas, 131 Ill.2d 104, 545 N.E.2d 654 (1989) A per se conflict existed where defendant was represented by an attorney who also represented a State witness in an unrelated welfare fraud case.

People v. Free, 112 Ill.2d 154, 492 N.E.2d 1269 (1986) Where defense counsel represents a State witness contemporaneously with representing the defendant, there is a per se conflict of interest which obviates the need to show prejudice. Where the attorney undertook representation of defendant after his relationship with the State's witness had ended, however, prejudice must be shown. See also, People v. Daly, Umphreyes, Thompson, Wickert & Jones, 341 Ill.App.3d 372, 792 N.E.2d 446 (4th Dist. 2003) (per se conflict of interest existed where defendants were charged with various drug offenses based on the testimony of a confidential informant whom defense counsel had represented as recently as a few weeks before the alleged sales and whose work with the local police was the result of an agreement which counsel negotiated to dismiss several criminal charges; counsel could not cross-examine informant about that agreement without risking that the arrangement would be ended and charges reinstated against the informant).

People v. Graham, 206 Ill.2d 465, 795 N.E.2d 231 (2003) 1. An attorney-client relationship is voluntary, and requires the consent of both the attorney and the client. "[T]he client must authorize the attorney to act on his behalf, and the attorney must accept this power."

2. No attorney-client relationship was created, and therefore no conflict of interest existed, where before representing the defendant counsel went to the police station at the request of the uncle of a State's witness, who believed that the witness was a suspect in the murder with which defendant was subsequently charged. As soon as the attorney discovered that the nephew was not a suspect, he left without talking to the nephew. Counsel did nothing with respect to representing the nephew and did not charge for the time he spent at the station.

People v. Hillenbrand, 121 Ill.2d 537, 521 N.E.2d 900 (1988) Defense counsel did not have a conflict of interest on the ground that he had previously represented the parents of the murder victim. Counsel did not have any "contemporaneous professional commitment" to the parents which conflicted with his representation of defendant.

People v. Fife, 76 Ill.2d 418, 392 N.E.2d 1345 (1979) A conflict of interest exists where defense counsel is a special assistant Attorney General, though limited to specified noncriminal work, and the client in a criminal case is inadequately informed of the affiliation and fails to effect a knowing and intelligent waiver. In these circumstances, there is no need to show actual prejudice.

This holding is also applicable to cases in which a member of a law firm has an affiliation with the Attorney General while another member of the firm represents a criminal defendant. But see, People v. Lykins, 77 Ill.2d 35, 394 N.E.2d 1182 (1979) (Fife is to be applied prospectively only; defendant who failed to raise the conflict in lower courts waived the right to raise it for the first time in Supreme Court).

People v. Hanson, Tracy, Yager & Beavers, 273 Ill.App.3d 332, 652 N.E.2d 824 (5th Dist. 1995) Though neither party raised the issue, the Appellate Court found that defense counsel suffered from a per se conflict of interest where he represented both a corporation under civil investigation for unauthorized disposal of hazardous waste and four employees who were charged with criminal offenses related to disposal of the same waste. The Court found that the likelihood defense counsel "succeeded in protecting the corporation . . . at the expense of the convictions of the individual defendants . . . is too serious to allow defendants' convictions to stand."

People v. Woidtke, 313 Ill.App.3d 399, 729 N.E.2d 506 (5th Dist. 2000) 1. Defense counsel suffered from a per se conflict where he represented defendant on a murder charge while representing a second suspect on misdemeanor charges that arose from the same case, although the misdemeanor charges were resolved before defendant's trial. Counsel never disclosed the dual representation to defendant, the second suspect, or the trial judge. In addition, he subpoenaed the second suspect at defendant's trial but did not place him on the stand.

2. The conflict was not obviated because the second suspect could be still be charged with murder if additional evidence was found. "As a practical matter, . . . it is unlikely that such evidence would be actively pursued after defendant's conviction and sentencing."

Nor was the conflict obviated because defendant had been found unfit to stand trial and was in a mental health center when counsel represented the second client. A conflict existed

because counsel was obligated to protect any privileged information concerning the second client's involvement in the murder, even if that evidence would have helped the defendant. See also, People v. Sims, 322 Ill.App.3d 397, 750 N.E.2d 320 (5th Dist. 2001) (representing multiple suspects in the same offense did not create actual conflict where both suspects consistently claimed that neither had been involved in the offense; Woidtke is not violated where the interests of suspects remain "entirely compatible"). In re B.K., 358 Ill.App.3d 1166, 833 N.E.2d 945 (5th Dist. 2005) A per se conflict of interest does not exist merely because an attorney is appointed both to represent a minor named in a delinquency petition and as the minor's guardian ad litem. However, because a significant conflict of interest can arise in a particular case, the trial court must carefully consider potential conflicts and should appoint separate attorneys if a conflict arises.

People v. Collins, 382 Ill.App.3d 149, 886 N.E.2d 1248 (2nd Dist. 2008) The trial court did not err by concluding that counsel suffered from a disqualifying conflict of interest because, in an unrelated case, he represented the son of a police officer who was a State's witness. Not only did the officer deliver counsel's fee (which may have been paid at least in part by a different relative), but there was also the possibility of representing the son in a civil case.

Cumulative Digest Case Summaries **§13-5(b)(1)**

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.)

People v. Poole, 2015 IL App (4th) 130847 (No. 4-13-0847, 9/16/15)

1. A *per se* conflict of interest exists where 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) was a former prosecutor who had been personally involved with the prosecution of defendant. When a *per se* conflict exists, a defendant does not need to show prejudice to obtain relief.

Here, defense counsel contemporaneously represented both defendant and a witness who was called by the State to testify at defendant's trial. The State argued that the witness, although called by the State, was not a prosecution witness because she had been declared a hostile witness and all of her testimony benefitted defendant. The Appellate Court rejected

this argument since it was clear that the State used the witness to introduce her prior inconsistent statements, which inculpated defendant. As such, she was a prosecution witness and a *per se* conflict of interest existed.

2. The court also found that defendant had not properly waived the conflict. A waiver is not valid unless the defendant is admonished regarding the existence and significance of the conflict and the conflict is knowingly waived. Here, defendant and the witness signed an undated document which stated that they were aware that the same attorney represented them in their pending cases and that they waived "any potential conflict that may exist."

Counsel, however, never informed the trial court of the conflict and no waiver was filed or discussed with the court prior to trial. Since the court only became aware of the conflict after trial, the court never had an opportunity to admonish defendant about the potential consequences of dual representation. Additionally, the record did not reflect what counsel told defendant when the written waiver was signed. Under these circumstances, the record does not show that defendant was adequately informed of the significance of the conflict.

The Appellate Court reversed defendant's convictions and remanded for a new trial.

(Defendant was represented by Assistant Defender Kelly Weston, Springfield.)

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§13-5(b)(2)
Representing Co-defendants

Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) Where defense counsel who is representing multiple defendants makes a timely motion for the appointment of separate counsel for each defendant, on conflict of interest grounds, the trial court must either appoint separate counsel or take adequate steps to ascertain that the risk of a conflict is too remote to require separate counsel. Reversal is automatic when a trial court improperly requires joint representation over timely objection; the right to assistance of counsel is so basic to a fair trial that its infraction can never be treated as harmless. See also, People v. Morales, 209 Ill.2d 340, 808 N.E.2d 510 (2004) (Holloway applies only where defense counsel brings the possible conflict to the attention of the trial court; the rule did not apply where only the prosecutor brought up the possibility of a conflict).

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) 1. Holloway holds that where there is a timely objection to multiple representation, the trial court is required to investigate whether a conflict of interest exists. However, the trial judge is not required to initiate inquiries into the propriety of multiple representation in every case. "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." See also, People v. Precup, 73 Ill.2d 7, 382 N.E.2d 227 (1978) (trial court was under no obligation to sua sponte interrupt the trial to preserve the defendants' constitutional right to counsel; doing so may have interfered with defense strategy); People v. Williams, 139 Ill.2d 1, 563 N.E.2d 431 (1990) (where no trial objection was raised to representation of multiple defendants, to obtain relief the defendant "must now demonstrate an actual conflict of interest and how it adversely affected her lawyer's performance"; no such showing was made where defendant's argument "is composed of speculative allegations and conclusory statements").

2. Once a defendant shows that a conflict of interest adversely affected counsel's

representation, he need not demonstrate prejudice in order to obtain relief. However, a defendant must show an actual conflict, not merely the possibility of a conflict. See also, People v. Washington, 101 Ill.2d 104, 461 N.E.2d 393 (1984) (the per se conflict rule does not apply to the joint representation of codefendants, because a possible conflict is inherent in almost every instance; the defendant must show that an actual conflict of interest caused prejudice).

Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) 1. Under Holloway v. Arkansas, 435 U.S. 475 (1978), reversal is automatic where an attorney is forced, over timely objection, to simultaneously represent co-defendants, unless the trial court determined that there was no conflict. Holloway requires the trial court to inquire only where it knows or should know that a particular conflict exists, however; absent a timely objection, a defendant who alleges that his attorney suffered from a conflict of interest must show both a conflict and that counsel's representation was actually affected.

2. The court noted that lower courts have applied case law concerning the simultaneous representation of multiple defendants to a widespread variety of potential conflicts of interest, including those based on representation of former clients and an attorney's personal or financial interests. The court stressed that the precedent involving representation of multiple clients is based on the high likelihood of prejudice in such cases; it is an open question whether the same analysis applies to other types of conflicts.

U.S. v. Martin, 965 F.2d 839 (10th Cir. 1992) 1. Counsel had a conflict of interest where he represented four defendants and there was a viable claim that one co-defendant was less culpable than the others.

2. Defendant's statement at a pretrial hearing that dual representation would be "no problem" did not waive the conflict - the trial court gave insufficient admonishments to assure that the response was knowing, intelligent and voluntary. See also, In Re V.W., 112 Ill.App.3d 587, 445 N.E.2d 445 (1st Dist. 1983) (conflict of interest existed where respondent claimed self-defense but admitted that all three co-defendants were present, while the co-defendants presented alibi defenses; it appeared that at least one of the three was lying, but counsel could not examine his clients in detail to bring out the truth).

Griffin v. McVicar, 84 F.3d 880 (7th Cir. 1996) 1. Counsel does not provide effective assistance where his "joint representation precludes an obvious and viable alternative defense" for the defendant in favor of a common defense that is "completely untenable." An actual conflict of interest existed when defense counsel represented two defendants, one of whom claimed to have been at the scene only as a bystander and that the other defendant had been the shooter. Although there was evidence to corroborate that claim, counsel instead presented a much weaker joint alibi that did not damage the second defendant's interests.

2. The Court rejected the State's contention that reversal was unnecessary because it was unlikely that an "innocent bystander" defense would have been successful. Where an actual conflict of interest "constrains an attorney to choose the hopeless in favor of the unpromising, the defendant has received ineffective assistance of counsel." The record also showed other "specific instances" where an attorney representing only the defendant would have conducted the defense differently; in particular, counsel became so confused by the joint representation that during closing argument he mistakenly claimed that a witness who had identified one defendant as the shooter had identified the other instead. Compare, People v. Berland, 74 Ill.2d 286, 385 N.E.2d 649 (1978) (conflict was not shown where the record

revealed no basis for either defendant to assert that the other alone had burned down the building, the defendants did not have inconsistent defenses, and counsel was able to effectively cross-examine; to obtain a reversal, the defendant must show "an actual conflict of interest manifested at trial," not hypotheses and conjecture).

People v. Echols, 74 Ill.2d 319, 385 N.E.2d 644 (1978) 1. A conflict is not shown by the mere possibility that separate counsel might have pursued a different strategy, especially where the alternative strategy would have "risked the introduction of rebuttal evidence which would have justified the giving of the accountability instruction."

2. However, an actual conflict was shown where a witness erroneously identified defendant as the source of fingerprints found inside burglarized premises, where the actual source of the prints was one of the co-defendants. "[C]ompetent, independent counsel would have advised [defendant] to resolve that confusion, and would have argued in closing that, on balance, given all of the evidence, appellant never entered" the burglarized premises.

People v. Vriner, 74 Ill.2d 329, 385 N.E.2d 671 (1978) No conflict was shown where defendant and his brother were represented at a joint trial by one attorney, although an eyewitness identified the defendant at trial after having identified the brother before trial. First, **Holloway** did not apply because defendant made no conflict-based objection in the trial court. Second, defendant did not show an actual "conflict of interest manifested at trial"; counsel "rigorously cross-examined" the witnesses concerning the possible misidentification and lack of perception and the brother received a directed verdict at the end of the State's case, leaving the defendant as the only person charged.

People v. DeBusk & Shriner, 231 Ill.App.3d 229, 595 N.E.2d 1156 (1st Dist. 1992) Where defense counsel brought a conflict of interest to the trial court's attention four times prior to trial, the trial judge's failure to make more than a superficial inquiry required a new trial for one co-defendant, who proceeded pro se after the judge denied his request to appoint a different attorney. See also, People v. Hayes, 229 Ill.App.3d 55, 593 N.E.2d 739 (1st Dist. 1992) (the trial judge erred by failing to inquire into the possibility of a conflict of interest after counsel asserted his own ineffectiveness in the post-trial motion, and by denying a defense request to present evidence or make an offer of proof in support of the ineffectiveness claim.)

People v. Reyes, 251 Ill.App.3d 426, 622 N.E.2d 86 (2d Dist. 1993) 1. Once the trial court is advised of a conflict of interest, it is required to take adequate steps to remove it. Although counsel had previously denied the possibility of a conflict when asked by the judge, the judge failed to take any action in response to defense counsel's statement that his joint representation had prevented him from "forcefully" arguing defendant's interests.

2. In addition, defense counsel suffered from a conflict of interest where he could have argued that defendant was innocent only by asserting that a codefendant's inculpatory statement was truthful - a position in direct conflict to the codefendant's interests.

People v. Taylor, 165 Ill.App.3d 1016, 520 N.E.2d 907 (1st Dist. 1988) Trial counsel had an actual conflict of interest where he could either attempt to discredit one co-defendant's testimony and damage her defense, or refrain from responding to her testimony and damage the defendant's case. Defense counsel chose the latter course of action, but testified at the post-conviction hearing that at that point he thought the case was lost for both defendants. See also, People v. Lee, 271 Ill.App.3d 1093, 649 N.E.2d 457 (1st Dist. 1995) (counsel who

represented three defendants in a controlled substances defense was "between the proverbial rock and a hard place" where he could challenge the State's claim that defendant controlled the apartment where the substance was found only by asserting that a co-defendant was guilty).

People v. Turner, 375 Ill.App.3d 1101, 875 N.E.2d 175 (3d Dist. 2007) No conflict of interest existed where defense counsel represented defendant at a bench trial after previously representing a co-defendant who pleaded guilty, where the co-defendant did not testify against the defendant and was sentenced before the defendant's trial. "The attorney-client relationship between defense counsel and co-defendant was severed; defense counsel was free to represent the defendant in a similar capacity."

People v. White, 362 Ill.App.3d 1056, 842 N.E.2d 188 (1st Dist. 2005) Defense counsel suffered from an actual conflict of interest where he: (1) represented both defendant and a co-defendant, and (2) during cross-examination of the primary complainant highlighted the strength of her identification of defendant compared to the weakness of her identification of the co-defendant. "The prosecution could not have done a better job of eliciting facts that supported [the witness's] identification of defendant. . . . [T]he effect of counsel's cross-examination was to "'sacrifice'" him for the sake of" the co-defendant.

Cumulative Digest Case Summaries **§13-5(b)(2)**

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. Stoval, 40 Ill.2d 109, 239 N.E.2d 441 (1968) Generally, there is a per se conflict of interest where counsel has represented both the defendant and the alleged victim of the crime, without regard to whether counsel actively represents the victim and without any inquiry into the specific facts. See also, People v. Hernandez, 231 Ill.2d 134, 896 N.E.2d 297 (2008) (per se conflict of interest existed where counsel simultaneously represented the defendant and was attorney of record for alleged victim in an unrelated case, although the victim had fled the country and not contacted counsel for five years).

People v. Free, 112 Ill.2d 154, 492 N.E.2d 1269 (1986) Where defense counsel represents a State witness contemporaneously with the defendant, there is a per se conflict of interest which obviates the need to show prejudice. Where the attorney undertook representation of defendant after his relationship with the State's witness had ended, however, prejudice must be shown. See also, People v. Flores, 128 Ill.2d 66, 538 N.E.2d 481 (1989) (there was no conflict of interest where counsel's representation of a State's witness ended before defendants' trial and there was no showing that cross-examination of the witness was hampered by the prior representation); People v. Daly, Umphreyes, Thompson, Wickert & Jones, 341 Ill.App.3d 372, 792 N.E.2d 446 (4th Dist. 2003) (per se conflict of interest existed where defendants were charged with various drug offenses based on the testimony of a confidential informant whom defense counsel had represented as recently as a few weeks before the alleged sales and whose work with the local police was the result of an agreement which counsel negotiated to dismiss several criminal charges; counsel could not cross-examine informant about that agreement without risking that the arrangement would be ended and charges reinstated against the informant).

People v. Hillenbrand, 121 Ill.2d 537, 521 N.E.2d 900 (1988) Defense counsel did not have a conflict of interest on the ground that he had previously represented the parents of the murder victim. Counsel had no "contemporaneous professional commitment" to the parents which conflicted with his representation of defendant.

The Court rejected the contention that the attorney had a financial interest in seeking to maintain the parents' favor in order to continue receiving business from them. Since counsel did not receive significant income from the parents, the alleged pecuniary interest "is speculative at best." In addition, the attorney voluntarily undertook defendant's representation, which he would not have done if he was concerned about currying the parents' favor.

Cumulative Digest Case Summaries **§13-5(c)**

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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§13-5(d)
Conflict with Lawyer's Interests

§13-5(d)(1)
Financial Interests

Daniels v. U.S., 54 F.3d 290 (7th Cir. 1995) A conflict may arise when a client's interests are adverse to his lawyer's pecuniary interests. However, counsel's dissatisfaction with the fee arrangement or the nonpayment of legal fees is usually not enough to establish a conflict of interest, because lawyers are required to provide zealous advocacy regardless of the defendant's failure to pay fees. The cause was remanded to determine whether counsel improperly pressured defendant to plead guilty rather than go to trial because defendant had not been able to pay the balance of counsel's fee. Compare, People v. Falls, 235 Ill.App.3d 558, 601 N.E.2d 1276 (1st Dist. 1992) (defense counsel was ineffective where he attempted to withdraw because he had not been paid, made several questionable decisions, and asked the judge to revoke defendant's bond and pay it to counsel).

People v. Cunningham, 107 Ill.2d 143, 481 N.E.2d 722 (1985) A two-part test is used to determine whether counsel has undivided loyalties after representing a entity adverse to the defendant's interests. The first factor is whether the attorney's pecuniary interest and concern for possible future business might cause him to avoid vigorous cross-examination which might be embarrassing or offensive to the witness. The second factor is the possibility that privileged information obtained from the witness might be relevant to the cross-examination.

People v. Hillenbrand, 121 Ill.2d 537, 521 N.E.2d 900 (1988) Defense counsel did not have a conflict of interest on the ground that he had previously represented the parents of the murder victim. Counsel had no "contemporaneous professional commitment" to the parents which conflicted with his representation of defendant.

The Court rejected the contention that the attorney had a financial interest in seeking to maintain the parents' favor in order to continue receiving business from them. Since counsel did not derive significant income from the parents, the alleged pecuniary interest "is speculative at best." In addition, counsel voluntarily undertook defendant's representation, which he would not have done if he was concerned about currying the parents' favor.

People v. Collins, 382 Ill.App.3d 149, 886 N.E.2d 1248 (2d Dist. 2008) The trial court did not err by concluding that counsel suffered from a disqualifying conflict of interest where, in an unrelated case, he represented the son of a police officer who was a State's witness. Because the officer delivered counsel's fee (which may have been paid at least in part by a different relative), and there was also the possibility of representing the son in a civil case arising from his arrest, counsel had a financial incentive to please the witness.

People v. Fuller, 21 Ill.App.3d 437, 315 N.E.2d 687 (4th Dist. 1974) One of defendant's two appointed counsel had a contract with defendant to handle publication rights to materials relating to the crimes. Although counsel suffered from a conflict of interest, the court held that a showing of actual prejudice was required for reversal.

People v. Karas, 81 Ill.App.3d 990, 401 N.E.2d 1026 (1st Dist. 1980) Defendant, who was on trial for the murder of his two business partners, was denied effective representation of counsel where he was represented by counsel whose law firm had represented the decedents and the defendant in their business venture. The law firm was in possession of records for the business, and had not yet been paid for legal services rendered to the business.

People v. Peterson, 2015 IL App (3d) 130157 (No. 3-13-0157, 11/12/15)

The Sixth Amendment right to counsel includes the right to representation by an attorney who does not have conflicting obligations. Under Illinois law, a conflict of interest may be either "*per se*" or actual. A *per se* conflict of interest exists where certain aspects of defense counsel's status, in and of themselves, engender a disabling conflict.

Generally, a *per se* conflict of interest exists where defense counsel has a tie to some entity which would benefit from a verdict that is unfavorable to the defendant. The rules concerning *per se* conflicts are intended to both avoid unfairness to the defendant and to prevent later claims that counsel's representation was not devoted completely to the defendant.

Under Illinois law, a *per se* conflict 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 defendant's prosecution. Unless the defendant waives the right to conflict-free representation, a *per se* conflict of interest requires reversal even where there is no showing that counsel's performance was affected.

There was no *per se* conflict of interest where, before defendant was charged, defendant and counsel signed a media contract which ended before charges were filed in this case. The court concluded that the instant case did not present any of the three situations recognized in Illinois as creating *per se* conflicts.

The court acknowledged that under **People v. Gacy**, 125 Ill. 2d 117, 530 N.E.2d 1340 (1988), a *per se* conflict might arise if defense counsel enters into a contract to write a book about a case during the course of his or her representation. Here, however, the purpose of the contract was not for counsel to write a book, but an attempt by counsel and defendant to "get ahead" of the case and avoid having charges filed. The court also noted that it was not expressing any opinion whether counsel's actions violated the Rules of Professional Conduct and might justify disciplinary action.

Defendant's conviction for first degree murder was affirmed.

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§13-5(d)(2)
Non-financial Interests

§13-5(d)(2)(a)
Generally

People v. Lewis, 88 Ill.2d 429, 430 N.E.2d 994 (1981) Where a conflict arises in defense counsel's professional relationship and obligations, the defendant is entitled to relief without the need to show prejudice. However, that rule does not apply to supposed conflicts arising "from personal relationships which do not involve substantial emotional ties." To obtain a new trial where the alleged conflict involved an appointed attorney's personal, work-based acquaintance with the victim, the defendant "must demonstrate prejudice."

People v. Free, 112 Ill.2d 154, 492 N.E.2d 1269 (1986) The public defender did not have a "professional association or interest" with the decedent where he had represented the decedent's mother-in-law in a previous conservatorship proceeding; counsel had merely seen

the decedent on four to six occasions when she drove her mother-in-law to counsel's office. In the absence of a professional relationship, defendant was required to show prejudice.

People v. Davis, 97 Ill.2d 1, 452 N.E.2d 525 (1983) No per se conflict of interest existed where counsel was a personal friend of a person allegedly murdered by the defendant in another incident, and stated that he could not defend defendant because "if that case comes up . . . I would rather see him convicted." Nor could defendant show an actual conflict resulting in prejudice where a review of the record established that counsel presented a vigorous defense.

People v. Crews, 122 Ill.2d 266, 522 N.E.2d 116 (1988) The trial judge properly denied a motion to withdraw based on the concern of the defendant, who was charged with the murder of a correctional officer, that counsel was acquainted with a number of employees at the correctional center where the alleged offense occurred. The alleged conflict was based on personal rather than professional relationships, counsel made no claim that he was unable to fairly represent defendant, and there was no showing of actual prejudice.

People v. Hall, 114 Ill.2d 376, 499 N.E.2d 1335 (1986) The trial judge did not err by refusing to appoint new counsel after the defendant struck his attorney, a public defender, on the head with a chair. The record shows that defendant was competently represented although he "embarked on a deliberate course designed to delay and disrupt his trial." Furthermore, requiring the appointment of other counsel when a defendant strikes his counsel "could invite misconduct toward judges and lawyers, and a practice would develop that the grosser the misconduct the better the changes to avoid trial with an undesired [lawyer]." See also, People v. James, 362 Ill.App.3d 250, 839 N.E.2d 1135 (4th Dist. 2005) (no per se conflict existed where defendant spit on counsel and punched and swore at him; counsel did not seek to withdraw, felt that the incidents would not impact his representation, and asked that the State not file charges against the defendant for the incidents in question; finding a per se conflict whenever a defendant physically attacks counsel would encourage such attacks; per se conflict does not necessarily exist whenever the State files criminal charges based on defendant's attack of defense counsel).

People v. Holman, 164 Ill.2d 356, 647 N.E.2d 960 (1995) Counsel's derogatory remarks about defendant, which were made in private to a fellow attorney and were "no more than momentary, isolated and private remarks to another lawyer who had no current association with the case and was sympathetic to the defendant's interests," did not constitute a conflict of interest. Counsel mounted a "viable, although ultimately unsuccessful" defense, submitted significant mitigating evidence, and made cogent closing arguments that the defendant's life should be spared.

Cumulative Digest Case Summaries **§13-5(d)(2)(a)**

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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§13-5(d)(2)(b)
Client's Intent to Commit Perjury

Nix v. Whiteside, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) The Sixth Amendment right to assistance of counsel is not violated where counsel refuses to cooperate with the defendant in presenting perjured testimony at trial. Counsel acted well within accepted standards of professional conduct where he told defendant that if he testified falsely, counsel would disclose the perjury to the court and seek to withdraw.

People v. Flores, 128 Ill.2d 66, 538 N.E.2d 481 (1989) Under Nix, a defense attorney has discretion to make a good faith determination that a particular witness, or the defendant himself, will testify untruthfully. Counsel did not act improperly by declining to call alibi witnesses after making a reasonable, good faith determination that their proposed testimony would be perjured.

People v. Bartee, 208 Ill.App.3d 105, 566 N.E.2d 855 (2d Dist. 1991) Trial counsel has great discretion in determining whether, for purposes of Nix v. Whiteside, the defendant intends to commit perjury.

People v. Taggart, 233 Ill.App.3d 530, 599 N.E.2d 501 (2d Dist. 1992) Nix applies where counsel makes a good-faith determination that the defendant intends to commit perjury. Counsel should identify on the record the basis for his or her belief, so a proper determination of its reasonableness can be made.

Where counsel specified on the record the extent of his investigation, said that if defendant testified he would give a narrative of his version of events, but that for "ethical reasons" counsel would be precluded from doing more than asking defendant's name, there was a reasonable basis to conclude that counsel made a good faith determination that defendant's testimony would be perjured. Thus, no error occurred.

People v. Calhoun, 351 Ill.App.3d 1072, 815 N.E.2d 492 (4th Dist. 2004) Counsel lacked a reasonable basis to believe that defendant intended to commit perjury where defendant did not say he was going to lie and always gave a consistent story; the fact that counsel was not "comfortable" with defendant's story did not justify forcing defendant to testify without counsel's assistance. A good-faith belief that a client intends to commit perjury "cannot be based merely on defense counsel's assessment of the evidence" or on the fact that "other witnesses will contradict the defendant's version of events."

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§13-5(d)(2)(c)
Lawyers In Same Firm

People v. Coates, 109 Ill.2d 431, 488 N.E.2d 247 (1985) Members of a public defender office, unlike members of a private law firm, are not members of an entity "subject to the rule that

if one attorney is disqualified by reason of a conflict of interest then no other member of the entity may continue with the representation." Where the only relationship between counsel was that both were employed by the public defender, no conflict was shown by the record, and there was nothing to indicate that the representation of defendant was in any manner inhibited, the court did not err in denying counsel's motion to withdraw.

People v. Mahaffey, 165 Ill.2d 445, 651 N.E.2d 174 (1995) No conflict of interest existed where law partners represented co-defendants. Because the trial court was not advised of a potential conflict, reversal requires an "actual" conflict of interest manifested at trial. Defendant did not show an actual conflict where he could not point to any defect in strategy or decisionmaking that could be attributed to the conflict, but merely speculated as to arguments that might have been raised by a different attorney.

People v. Robinson, 79 Ill. 147, 402 N.E.2d 157 (1979) It is not a per se conflict for separate public defenders to represent co-defendants with antagonistic defenses. Application of a per se rule would, in many instances, require the appointment of counsel with "virtually no experience in the trial of criminal matters thus raising, with justification, the question of competency of counsel."

People v. Spicer, 79 Ill.2d 173, 402 N.E.2d 169 (1979) Defendant was not denied effective assistance of counsel though he and his co-defendant, who testified for the State, were represented by assistant public defenders from the same office. There was no indication that defendant's attorney was in any way impaired with regard to cross-examination, and counsel did not show or claim any conflicting duty to the co-defendant.

People v. Miller, 79 Ill.2d 454, 404 N.E.2d 199 (1980) No conflict of interest existed where assistant public defenders from the same office represented both defendant and a potential witness who exercised his right against self-incrimination when called to testify. Both assistants had "clearly independent responsibilities" - one to represent the defendant and the other to advise his client of the implications of confessing in court. The role of the latter assistant "was limited and did not conflict with that of defense counsel."

People v. Spreitzer, 123 Ill.2d 1, 525 N.E.2d 30 (1988) The entire Public Defender's office was not precluded from representing defendant because the public defender was a former prosecutor who had been involved in the decision to charge the defendant in this case. It would be "ludicrous" to disqualify a Public Defender's office from handling cases which were initiated at a time when the Public Defender was previously employed as an assistant State's Attorney. Furthermore, there was no per se conflict based on the alleged conflicting loyalties of defendant's trial counsel.

People v. Fife, 76 Ill.2d 418, 392 N.E.2d 1345 (1979) It is a conflict of interest for one member of a law firm to represent a criminal defendant when any member of the firm is a Special Assistant Attorney General.

People v. Banks, 121 Ill.2d 36, 520 N.E.2d 617 (1987) 1. A per se conflict does not necessarily exist where a post-conviction petitioner who alleges the ineffectiveness of an assistant public defender at trial is represented by a different member of the same public defender's office. In such cases, a case-by-case inquiry must be conducted to determine whether "any

circumstances peculiar to the case indicate the presence of an actual conflict of interest."

2. It is not a conflict of interest for a public defender, while representing a defendant at a post-conviction proceeding, to allege that the previous public defender rendered ineffective assistance at trial. "The successor public defender is not affiliated with an opposing party so as to raise the immediate appearance of a conflict," and "there is no reasonable basis to assume that a successor in office will strive to justify the actions of his predecessor." See also, People v. Vaughn, 200 Ill.App.3d 765, 558 N.E.2d 479 (1st Dist. 1990) (Banks "did not hold that there could never be a conflict of interest when one assistant defender must assert the ineffectiveness of another; rather . . . a case-by-case inquiry should be conducted to determine if any special circumstances indicate the existence of a conflict"; a potential conflict may have existed based upon the working relationship of two assistant public defenders who were trial partners; the trial judge should have conducted an inquiry into the defendant's claim before denying the request for other counsel).

People v. Karas, 81 Ill.App.3d 990, 401 N.E.2d 1026 (1st Dist. 1980) Defendant, who was on trial for the murder of his two business partners, was denied effective representation of counsel where he was represented by counsel whose law firm had represented the decedents and the defendant in their business venture. The law firm was in possession of records for the business, and had not yet been paid for legal services rendered to the business. See also, People v. Arreguin, 92 Ill.App.3d 899, 416 N.E.2d 402 (3d Dist. 1981) (a per se conflict existed where defendant was represented by a part-time public defender whose law firm represented a hospital that was the complaining witness in another criminal case pending against the defendant, even if one member of the firm represented defendant while another member represented the hospital; a conflict of interest on the part of one member of a firm is imputed to all members of the firm).

People v. Levesque, 256 Ill.App.3d 639, 628 N.E.2d 272 (1st Dist. 1993) No per se conflict existed where the supervisor of an assistant public defender whose competence was under attack represented the defendant concerning the alleged incompetence. The fact that defendant had filed an ARDC complaint against his public defender did not necessarily preclude subsequent representation by the attorney's supervisor.

However, the trial court erred by failing to determine whether the supervisor could overcome his natural loyalty to his subordinate and effectively argue defendant's claim of ineffectiveness. Compare, People v. Cano, 220 Ill.App.3d 725, 581 N.E.2d 236 (1st Dist. 1991) (per se conflict of interest existed where trial counsel's supervisor in the Public Defender's office was appointed to argue defendant's pro se motion pertaining to the failure to present evidence at trial, where defendant had also filed an ARDC complaint against trial counsel between the trial and sentencing).

People v. Hardin, 353 Ill.App.3d 522, 818 N.E.2d 1246 (3d Dist. 2004) 1. Under Banks, a case-by-case inquiry must be conducted to determine whether an actual conflict of interest exists when a public defender is appointed to represent a criminal defendant in a proceeding at which the effectiveness of another member of the same office is at issue. The trial court is not required to inquire into the possibility of a conflict of interest whenever it appoints a public defender to undertake representation in which he or she must attack another public defender's effectiveness; such an inquiry is required only if at an "early stage" of the proceedings, the defendant reports the possible conflict to the court.

If the defendant fails to bring the possible conflict to the court's attention early in the

proceedings, the conviction should be reversed only if the defendant can show an actual conflict of interest which adversely affected counsel's performance.

2. The trial court had no duty to inquire into the possibility of a conflict of interest at the outset of post-conviction proceedings, although it appointed an attorney of the DuPage County Public Defender's office on a petition which alleged that another member of the same office had been ineffective at trial. Although defendant raised the possibility of a conflict of interest early in the proceedings, he alleged only that a conflict existed because one assistant public defender was required to allege the ineffectiveness of another assistant. There was no evidence of an actual conflict, and the record did not suggest that the second assistant refrained from pursuing an ineffective assistance of counsel claim against the assistant who represented defendant at trial.

People v. Rogers, 101 Ill.App.3d 614, 428 N.E.2d 547 (5th Dist. 1981) No conflict of interest existed where the defendant and co-defendant were represented on appeal by different district offices of the Office of the State Appellate Defender. Appellate representation does not involve the same risk attending trial representation - that confidential communications will be abused or that divided loyalty will interfere with an attorney's ability to develop a favorable trial record.

People v. Black, 154 Ill.App.3d 1076, 507 N.E.2d 1237 (5th Dist. 1987) The Office of the State Appellate Defender is not synonymous with a private law firm for purposes of conflicts of interest. Any conflict of interest here was obviated by transferring the appeal from the Appellate Defender's Fifth District Office to another District Office.

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§13-5(d)(2)(d)
Counsel Has Connection to Prosecution

U.S. ex rel. Duncan v. O'Leary, 806 F.2d 1307 (7th Cir. 1986) The district court properly found that "collusion existed" between defense counsel and the prosecutor where defense counsel was the prosecutor's campaign manager in a race for State's Attorney. The conflict of interest adversely affected counsel's performance at trial, where he failed to interview witnesses and engaged in "rather limited" cross-examination.

People v. Kester, 66 Ill.2d 162, 361 N.E.2d 569 (1977) A conflict of interest exists when an Assistant State's Attorney who was personally involved in prosecuting the defendant subsequently is appointed defense counsel in the same proceeding. In such cases, reversal is required without a showing of actual prejudice.

Reversal of the conviction was required where defendant was represented at his guilty plea hearing by an attorney who, as an Assistant State's Attorney, appeared for the State and filed motions for discovery and bond forfeiture. The conflict was not waived by defendant's failure to object to the appointment of the former prosecutor, his statement that he was satisfied with the representation, or the guilty plea. See also, People v. Lawson, 163 Ill.2d 187, 644 N.E.2d 1172 (1994) (unless the conflict is waived, a defendant cannot be represented by an attorney who previously appeared as a prosecutor in the same case; because an attorney who has represented the opposing party might feel reluctant to attack actions in which he

participated, it is irrelevant that counsel appeared only once for the State and engaged in only minor activity; no valid waiver occurred where there was no indication that defendant was ever informed of the conflict and how it might affect counsel's representation; issue was not forfeited, although it was not raised in the post-trial motions, where there was no evidence that anyone other than defense counsel was aware of his dual roles).

People v. Hernandez, 231 Ill.2d 134, 896 N.E.2d 297 (2008) A per se conflict exists when defense counsel is a former prosecutor who was personally involved in prosecuting the defendant.

People v. Miller, 199 Ill.2d 541, 771 N.E.2d 386 (2002) A per se conflict of interest existed where the Assistant State's Attorney who appeared at the hearing on a motion to reduce the sentence imposed on a guilty plea had, as an Assistant Public Defender: (1) represented defendant when he waived a preliminary hearing, (2) filed a discovery motion and discovery answer, and (3) filed a bond reduction motion. A per se conflict of interest occurs whenever appointed defense counsel represents the defendant and thereafter represents the State in the same case.

People v. Wilkerson, 87 Ill.2d 151, 429 N.E.2d 526 (1981) Defendant should have been allowed to inquire as to a possible conflict of interest where defense counsel joined the State's Attorney's staff after having represented defendant for several months. Defendant was entitled to determine whether the special prosecutor was assisted by information that someone in the State's Attorney's office received from former defense counsel.

People v. Spreitzer, 123 Ill.2d 1, 525 N.E.2d 30 (1988) The entire Public Defender's office was not precluded from representing defendant because the chief public defender was a former prosecutor and had been involved in the decision to charge the defendant in this case. It would be "ludicrous" to disqualify a Public Defender's office from handling cases which were initiated at a time when the Public Defender was previously employed as an assistant State's Attorney, and there was no per se conflict based on the alleged conflicting loyalties of defendant's trial counsel. Compare, People v. Courtney, 288 Ill.App.3d 1025, 687 N.E.2d 521 (3d Dist. 1997) (per se conflict of interest exists where defendant's former attorney becomes the head of the office prosecuting the defendant).

People v. Fife, 76 Ill.2d 418, 392 N.E.2d 1345 (1979) There is a conflict of interest where defense counsel is a special assistant Attorney General, even though limited to specified noncriminal work, unless the defendant is adequately informed of the affiliation and makes a knowing and intelligent waiver. In these circumstances, there is no need to show actual prejudice.

The same rule applies when a member of a law firm has an affiliation with the Attorney General while another member of the firm represents a criminal defendant. Compare, People v. Ash, 102 Ill.2d 485, 468 N.E.2d 1153 (1984) (no conflict of interest existed where defense counsel was appointed by the circuit court as a special prosecutor in a traffic matter).

People v. Franklin, 75 Ill.2d 173, 387 N.E.2d 685 (1979) No conflict of interest existed where defense counsel, while employed as an Assistant State's Attorney 4½ years earlier, had successfully prosecuted defendant on an unrelated charge. Counsel had not been involved as a prosecutor in the instant proceeding, and until reminded had no recollection of the earlier

case.

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Generally

People v. Moore, 207 Ill.2d 68, 797 N.E.2d 631 (2003) 1. Appointment of new counsel is not required merely because a defendant presents a pro se motion alleging ineffective assistance of counsel. The trial court must examine the factual basis for the claim, and need not appoint new counsel if the inquiry reveals that the claim lacks merit or pertains only to matters of strategy. If the facts show possible neglect of the case, however, new counsel must be appointed to evaluate the claim.

2. Some interchange between the trial court and trial counsel regarding the facts of the allegedly ineffective representation is not only permissible, but usually necessary for the trial court to determine whether new counsel should be appointed. Trial counsel may answer questions and explain the facts and circumstances surrounding the allegations, and the court may consider its knowledge of defense counsel's performance at the trial and whether defendant's allegations are insufficient on their face.

3. The trial court erred by failing to conduct any investigation into defendant's claim that trial counsel had neglected his case, and by apparently concluding that questions concerning the ineffective assistance of trial counsel could be resolved by the appointment of different counsel for the appeal. Defendant did not waive the issue by failing to request further action after the trial court stated that it would appoint a different attorney for the appeal; it would have been inappropriate for trial counsel to argue a motion "predicated on allegations of counsel's own incompetence," and a pro se defendant need only bring his allegations of ineffectiveness to the trial court's attention.

4. Although the failure to appoint new counsel may be harmless where the record demonstrates that the pro se claims are meritless, no record was made on the defendant's claims. Thus, the error was not harmless. See also, People v. Friend, 341 Ill.App.3d 139, 793 N.E.2d 927 (2d Dist. 2003) (trial counsel should have moved to withdraw when defendant raised issues about counsel's effectiveness; trial court erred by conducting no inquiry into defendant's allegations and relying instead on one sentence from presentence report in which defendant said he pleaded guilty in hopes of obtaining leniency; failure to inquire was not harmless where allegations showed possible neglect of the case).

People v. Chapman, 194 Ill.2d 186, 743 N.E.2d 48 (2000) The trial judge properly inquired into defendant's allegations of ineffective assistance by ascertaining the factual basis for the claims. Because one of defendant's claims involved trial strategy and the other involved the failure to present evidence that would have been irrelevant, the trial court properly determined that the allegations had no merit. See also, People v. Robinson, 157 Ill.2d 68, 623

N.E.2d 352 (1993) (trial court erred by denying a motion for new counsel without any inquiry and without affording defendant an opportunity to substantiate his complaints); People v. Cabrales, 325 Ill.App.3d 1, 756 N.E.2d 461 (2d Dist. 2001) (trial court erred by failing to investigate pro se allegation that trial counsel had been ineffective, refusing request for different counsel before even reading the motion to withdraw the plea, and holding full hearing on the merits of the motion without any discussion of the need for a preliminary investigation or to appoint a new attorney); People v. Sanchez, 329 Ill.App.3d 59, 768 N.E.2d 99 (1st Dist. 2002) (trial court must examine the factual matters underlying a pro se claim concerning defense counsel's effectiveness; defendant must be afforded adequate opportunity to specify and support his complaints; motion for new counsel may not be "precipitously and prematurely" denied).

People v. Krankel, 102 Ill.2d 181, 464 N.E.2d 1045 (1984) The defendant should have had different counsel appointed to represent him at a post-trial hearing on his pro se motion for new trial alleging that trial counsel had been ineffective for failing to contact a known alibi witness. See also, People v. Nitz, 143 Ill.2d 82, 572 N.E.2d 895 (1991) (once the trial court determined that defendant's assertions had sufficient merit to justify a further hearing, trial counsel could not continue in his representation).

People v. Jocko, 389 Ill.App.3d 247, 906 N.E.2d 38 (1st Dist. 2009) 1. As a matter of first impression, the Appellate Court held that the **Krankel** line of authority applies to pretrial as well as post-trial pro se allegations of ineffective assistance of counsel. Thus, where the defendant raises a pretrial allegation of ineffective assistance, the trial court must examine the factual basis for the claim. If the allegation shows possible neglect of the case, new counsel must be appointed. If the trial court determines that the claim lacks merit or pertains to trial strategy, it need not appoint new counsel.

The court rejected the State's argument that a pretrial inquiry might force defense counsel to reveal trial strategy, noting that the trial court need make no further inquiry once it determines that trial strategy is involved. In addition, as a matter of judicial economy it makes sense to encourage defendants to bring claims of ineffective assistance of counsel before trial.

2. Where the trial court set defendant's pretrial claims of ineffective assistance of counsel for an inquiry, but defendant's claim was "simply lost in a shuffle of changing attorneys and adjourned dates," Krankel was not satisfied. The cause was remanded for the trial court to inquire as to the factual basis for defendant's claims.

People v. Bolton, 382 Ill.App.3d 714, 888 N.E.2d 672 (2d Dist. 2008) The judge need inquire only as to claims specifically raised by the defendant; "a fair degree of specificity is necessary to obligate the trial court to inquire regarding a particular subject." The court added, "Imposing a duty upon the trial court to investigate every potential unarticulated issue, or every such issue implicated by a general allegation, would . . . turn the trial court into counsel for the accused, combing the record for error."

People v. McCarter, 385 Ill.App.3d 919, 897 N.E.2d 265 (1st Dist. 2008) 1. In determining whether the trial court met its burden under Krankel, the question for the reviewing court is whether the judge conducted an adequate inquiry. In most cases, some interchange between the court and trial counsel is necessary; however, the trial court may also rely on its observation of counsel's performance at trial and the adequacy of defendant's pro se

allegations.

The trial court's refusal to appoint new counsel should be overturned on appeal only if the decision is manifestly erroneous. See also, People v. Rohlfs, 368 Ill.App.3d 540, 858 N.E.2d 616 (3d Dist. 2006) (trial court must examine factual basis of claim that counsel was ineffective to determine if it lacks merit or concerns only trial strategy; operative issue for the reviewing court is whether the trial court conducted an adequate inquiry into the allegations).

People v. Williams, 224 Ill.App.3d 517, 586 N.E.2d 770 (1st Dist. 1992) Where there is a clear basis for an allegation of ineffectiveness of counsel, a defendant's failure to explicitly make such an allegation does not waive a Krankel problem. Where the trial court's remarks showed an awareness of counsel's possible neglect of the case, an inquiry should be made despite defendant's failure to explicitly raise the issue.

People v. Gilmore, 356 Ill.App.3d 1023, 828 N.E.2d 293 (2d Dist. 2005) The trial judge erred by summarily denying an untimely pro se post-trial motion alleging ineffective assistance of counsel. The trial court has authority to consider an untimely post-trial motion so long as it retains jurisdiction over the cause, and the judge denied the motion on grounds other than timeliness. "Given the nature of defendant's pro se claims, we are reluctant to rely on the untimeliness of the motion where the trial court never did so."

The trial court could not resolve the claims by relying on facts within its own knowledge; at least one of the claims concerned the failure to call a witness to testify, which required at least a brief inquiry into the substance of the witness's potential testimony and counsel's reason for not calling her. See also, People v. Serio, 357 Ill.App.3d 806, 830 N.E.2d 749 (2d Dist. 2005) (trial court failed to conduct a sufficient inquiry into defendant's pro se motion alleging ineffective assistance of counsel where it placed the motion in the record but declined to consider it because it believed jurisdiction had vested in the Appellate Court; the trial court has jurisdiction to rule on a successive post-judgment motion that is filed within 30 days after the ruling on a preceding post-judgment motion).

People v. Pence, 387 Ill.App.3d 989, 902 N.E.2d 164 (2d Dist. 2009) Where defendant stated at the sentencing hearing that his defense attorney "did not thoroughly represent" him, that "there were issues of fact that my defense overlooked," and that the trial court had been denied a "full picture for which you[r] verdict may have changed," the trial judge should have inquired into the factual matters underlying the claim. The need to inquire was not obviated by the fact that before sentencing the trial judge had inquired about an ARDC complaint which the defendant had filed against counsel, and had been told that the complaint concerned a different matter. There was nothing in the record to show that the ARDC filing involved the same ineffectiveness claims raised at the sentencing hearing.

People v. Peacock, 359 Ill.App.3d 326, 833 N.E.2d 396 (4th Dist. 2005) The trial judge failed to conduct an adequate investigation where it made no inquiry into the post-trial motion, which raised allegations that were beyond the trial court's personal knowledge.

Defendant did not waive the issue merely because at sentencing, he did not mention the alleged ineffectiveness when asked if he had anything to say. To trigger the trial court's duty to inquire as to possible ineffective assistance of counsel, a pro se defendant need only bring his claim to the trial court's attention. Defendant did so by writing a post-trial letter to the judge.

People v. Whirl, 351 Ill.App.3d 464, 814 N.E.2d 872 (2d Dist. 2004) The trial court failed to properly consider defendant's claims of ineffective assistance. After defendant claimed that trial counsel was ineffective, the judge allowed counsel to withdraw and appointed new counsel, but without explanation allowed the original attorney to conduct the defense without the involvement of the new counsel. "The court made no effort to ensure that the attorney that it appointed actually represented defendant, and allowed a withdrawn attorney, whom defendant accused several times of ineffective assistance, to represent him through a jury trial and sentencing."

People v. James, 362 Ill.App.3d 250, 839 N.E.2d 1135 (4th Dist. 2005) The trial court did not fail to conduct an adequate inquiry. At sentencing, defendant presented a letter which trial counsel had written before trial and which stated that counsel would give defendant discovery materials. Defendant claimed that the discovery had not been provided to him.

The court concluded that the trial court had investigated the same claim before trial, and found that trial counsel has discretion whether to provide discovery materials to the client. Compare, People v. Haynes, 331 Ill.App.3d 482, 771 N.E.2d 643 (3d Dist. 2002) (trial judge erred by finding that defense counsel's failure to call certain witnesses involved matters of strategy where counsel and defendant made conflicting claims concerning the witness's testimony; given the conflicting nature of the claims, the trial court "should have either examined the police reports if they were available, continued the hearing until they could be obtained, or . . . simply appointed new counsel").

Cumulative Digest Case Summaries **§13-5(d)(3)(a)(1)**

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. Downs, 2016 IL App (2d) 121156-B (No. 2-12-1156, 6/30/16)

After the verdict at his trial for first degree murder but before sentencing, defendant filed two *pro se* motions alleging that trial counsel had provided ineffective assistance of counsel. The trial court did not conduct a preliminary **Krankel** inquiry, but did appoint counsel who filed an amended motion raising five of defendant's 34 allegations. Defendant then filed a third *pro se* motion raising 13 additional claims of ineffective assistance.

The trial court then vacated its appointment of counsel and held a hearing at which

defendant stated each issue, trial counsel and the prosecutor responded, and defendant was given a chance for rebuttal. The trial court then ruled that there was no need to continue the hearing or appoint counsel, and "[e]ffectively" dismissed defendant's claims.

On appeal, the Appellate Court determined that the trial court had improperly converted the preliminary inquiry into an adversarial hearing at which defendant was not represented. The cause was remanded for the appointment of counsel and further proceedings.

On remand, the court appointed the same attorney to represent defendant. Counsel filed a third amended **Krankel** motion which raised only a general allegation of ineffective assistance without asserting any specific acts by trial counsel or any prejudice. Counsel stated that he had consulted with defendant to ascertain his allegations of ineffectiveness, but when defendant stated that he had not met with counsel the latter stated that he had reviewed the transcript of the first hearing.

The trial court denied the third amended motion, stating that it failed to allege any specific acts of deficient performance or prejudice. The Appellate Court reversed a second time, finding that defense counsel failed to assert nonfrivolous allegations of trial counsel's ineffectiveness.

1. When determining whether **Krankel** counsel was ineffective, the standard of **Strickland v. Washington** is applied. Thus, defendant must show that counsel's representation was deficient and that prejudice resulted.

The court concluded that counsel appointed after a preliminary **Krankel** claim has been conducted is obligated to present defendant's non-frivolous claims to the trial court. The court also stressed that there is a distinction between a frivolous claim and a claim that is not frivolous but which is likely to be unsuccessful. A non-frivolous claim is one which has at least an arguable basis in law or fact.

The court concluded that **Krankel** counsel did not provide adequate "representation" where he failed to present all non-frivolous claims, apparently because he believed that he had an ethical duty not to present claims which he believed "don't make sense and don't meet standards."

2. The Appellate Court also stressed that **Krankel** counsel must consult with the defendant to determine the grounds for defendant's claims of ineffectiveness. The court criticized counsel for evaluating the strength of defendant's claims based on the transcript of an earlier **Krankel** hearing which involved procedures previously determined by the Appellate Court to be improper. By basing his analysis on the faulty hearing, counsel "would inevitably determine that all of defendant's claims were going to fail, because they had already been presented once to the trial court which rejected them."

Because counsel appointed on defendant's **Krankel** claims abdicated his responsibility to present non-frivolous claims of ineffective assistance of counsel, the lower court's denial of defendant's **Krankel** motion was vacated and the cause remanded for a second-stage **Krankel** hearing. The court also directed the trial judge to appoint different counsel to represent defendant and ordered that the new attorney be allowed to investigate defendant's claims and present any non-frivolous claims supported by the record or such investigation.

(Defendant is represented by Assistant Defender Bruck Kirkham, 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. Jackson, 2016 IL App (1st) 133741 (No. 1-13-3741, 3/10/16)

1. Under **People v. Krankel**, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), new counsel is not automatically required if a defendant raises a post-trial claim of ineffective assistance of trial counsel. Instead, the trial court must make a preliminary examination of the factual basis for the claim. New counsel need not be appointed if the claim lacks merit or pertains only to matters of trial strategy.

If the allegations show possible neglect of the case, on the other hand, new counsel must be appointed to fully prosecute the ineffectiveness claim in the trial court. The **Krankel** procedure is intended to fully address *pro se* post-trial claims of ineffective assistance of counsel at the trial level and provide a sufficient record for the reviewing court to consider.

Here, the trial court erred by failing to conduct a preliminary inquiry and deciding whether to appoint independent counsel. Instead, the judge proceeded immediately to the merits of the issue and found that defendant had failed to establish ineffective assistance of counsel under the **Strickland** standard.

In addition, the trial court erroneously relied on evidence outside the record in rejecting defendant's claim that trial counsel had failed to conduct an adequate investigation. Furthermore, this case had been previously appealed and remanded, and upon remand the trial court misinterpreted the mandate and erroneously refused to consider one of defendant's issues.

Finally, the court erred by failing to inquire of trial counsel about defendant's complaints of ineffectiveness, and in fact failed to require defendant's lead counsel to even appear at the **Krankel** hearing. Although the trial judge need not automatically inquire of counsel during the preliminary phase of a **Krankel** hearing, some interchange between the court and counsel is usually necessary to assess what further action should be taken.

The cause was remanded for a further **Krankel** hearing.

2. A defendant has a constitutional right to represent himself so long as he knowingly and intelligently waives his right to counsel. The appropriate inquiry where a defendant wishes to represent himself is not the extent to which he is qualified or capable of doing so, but whether he is fully aware of the nature of the right to counsel and the consequences which may follow if counsel is waived. Thus, a defendant who requests to proceed *pro se* should be made aware of the dangers and disadvantages of self representation so that the record will establish that he made his choice intelligently.

Defendant stated that he wanted to represent himself at the post-trial proceedings and sentencing hearing. The trial court asked if defendant understood the "perils" of representing himself. When defendant responded "no," the trial judge refused to allow the defendant to

represent himself on the grounds that he was "not qualified."

Because the trial court failed to make the defendant aware of the dangers and disadvantages of self-representation, and concluded that he was unqualified merely because before he was admonished by the judge he did not understand the "perils" of self-representation, the trial court erroneously denied defendant's right to self-representation.

3. Finally, the court concluded that where the trial judge criticized defendant for reading his *pro se* argument, corrected defendant's pronunciation of several words, and held defendant in contempt of court when he turned his back after stating that the judge was not being fair to him, the proceedings on remand should be conducted before a different judge.

(Defendant was represented by Assistant Defender David Harris, 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. Mourning, 2016 IL App (4th) 140270 (No. 4-14-0270, 3/31/16)

1. When a defendant files a post-trial claim of ineffective assistance, the trial court should first examine the factual basis of the claim. If the claim lacks merit then the court may deny the motion without appointing new counsel. But if the claim shows possible neglect, new counsel should be appointed.

To decide whether there was possible neglect, some interchange between the court and counsel regarding the facts and circumstances of the claim is permissible and usually necessary. But an interchange is not always necessary where the court can make its decision based on counsel's performance at trial and the facial insufficiency of defendant's claims.

2. Defendant hired private counsel to represent him at trial. Following his conviction, defendant filed a *pro se* letter in the trial court stating that he had "fired" his counsel because counsel never informed him of the possibility of a bench trial, failed to present certain evidence, and failed to impeach a witness. Defendant asked the court to appoint a public defender to represent him.

The court denied defendant's request without conducting any inquiry into defendant's claims. The court found that there was "no suggestion of any possible neglect" except "defendant disagreeing with trial strategy." The court further stated that defendant could not just "snap your fingers and get a different lawyer...at public expense, it doesn't work that way." The court gave defendant the option to hire new counsel, but defendant was unable to do so and continued through sentencing with his current counsel.

3. The Appellate Court held that the trial court failed to conduct an adequate hearing into defendant's claims. The court first rejected the State's argument that the trial court had no obligation to conduct any inquiry because defendant was represented by private counsel. The court could find no reason why in this context a defendant represented by private counsel should be treated differently than a defendant represented by appointed counsel, especially where the defendant is unable to hire substitute counsel and requests a public defender.

The court thus held that **Krankel** applies when a defendant represented by private counsel makes a claim of ineffectiveness and informs the court that he desires new counsel and cannot afford new private counsel.

4. The Appellate Court also found that the trial court improperly denied defendant's claims without conducting any interchange with defendant or counsel, incorrectly deciding that his claims were meritless on their face because they involved trial strategy. Defendant's claims about the right to a bench trial, failure to present evidence, and impeachment of a

witness all required some questioning to uncover their underlying factual basis. The trial court's preliminary inquiry was thus insufficient.

The court remanded the case for a new preliminary hearing into defendant's claims.

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

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. Shamhart, 2016 IL App (5th) 130589 (No. 5-13-0589, 6/13/16)

1. After being convicted but prior to sentencing, defendant filed a letter and a *pro se* motion for a new trial making several detailed allegations of ineffective assistance of trial counsel. The trial court allowed defense counsel to withdraw and appointed new counsel to represent defendant for post-trial motions and sentencing.

At the hearing on post-trial motions, defendant's new counsel asked to call defendant as a witness in support of the claims of ineffective assistance. The State objected to counsel's request, arguing that defendant's claims were "extraneous to the record," and were not a matter for post-trial motions. The court denied counsel's request to allow defendant to testify and said it would take judicial notice of defendant's filings. Following argument, the court denied defendant's post-trial motions.

2. The Appellate Court held that the trial court improperly refused to allow defendant to present evidence in support of his claim of ineffective assistance. Defendant raised several claims of ineffectiveness with some support in the record for his claims. Even if these claims were ultimately without merit, defendant should have had the chance to specify and support his claims at an evidentiary hearing.

3. The Appellate Court rejected the State's argument that because the trial court took judicial notice of the documents defendant filed in support of his allegations, there was no need for an evidentiary hearing. Under the Illinois Rules of Evidence, judicial notice only applies to facts that are not subject to reasonable dispute. Ill. R. Evid. 201. Here, the documents filed by defendant raised a multitude of issues, and the court did not believe "the State would stand idly by and have no response" to defendant's claims, thereby conceding those claims. The factual allegations were thus not proper subjects for judicial notice.

The cause was remanded for an evidentiary hearing on defendant's post-trial claims.

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

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. Krankel, 102 Ill.2d 181, 464 N.E.2d 1045 (1984) The defendant should have had different counsel appointed to represent him at a post-trial hearing on his pro se motion for new trial alleging that trial counsel had been ineffective for failing to contact a known alibi witness. See also, People v. Nitz, 143 Ill.2d 82, 572 N.E.2d 895 (1991) (once the trial court

determined that defendant's assertions had sufficient merit to justify a further hearing, trial counsel could not continue in his representation).

People v. Haynes, 331 Ill.App.3d 482, 771 N.E.2d 643 (3d Dist. 2002) The trial judge erred by finding that defense counsel's failure to call certain witnesses involved matters of strategy where counsel and defendant made conflicting claims concerning the witness's testimony. Given the conflicting nature of the claims, the trial court "should have either examined the police reports if they were available, continued the hearing until they could be obtained, or . . . simply appointed new counsel." Although the trial judge need not appoint new counsel every time a defendant claims that his attorney failed to call all favorable witnesses, "where a defendant's assertions, if true, strongly suggest possible neglect, and those assertions may be readily proved or disproved by consulting the record, we believe it is incumbent upon the trial judge to do so."

Cumulative Digest Case Summaries **§13-5(d)(3)(a)(2)**

People v. Demus, 2016 IL App (1st) 140420 (No. 1-14-0420, 2/10/16)

1. Where the defendant makes a post-trial *pro se* claim of ineffective assistance of counsel, the trial court should examine the factual basis underlying the claim. **People v. Krankel**, 102 Ill.2d 181, 464 N.E.2d 1045 (1984). The **Krankel** rule also applies to *pro se* motions alleging ineffective assistance of counsel at probation revocation hearings.

The first step in determining if **Krankel** applies is to ascertain whether the defendant has adequately raised a claim of ineffective assistance of counsel. To do so, the defendant must make an allegation of ineffective assistance and provide some factual specificity for the allegation. A bald allegation that counsel's representation was ineffective does not trigger the trial court's duty to conduct a preliminary inquiry under **Krankel**.

2. Defendant sufficiently raised a *pro se* claim of ineffective assistance of counsel where he claimed that his attorney disregarded his requests to obtain documents which would have shown that the arresting officer committed perjury when he testified at defendant's trial. The court concluded that the claim was sufficiently specific to trigger the **Krankel** rule, that defendant repeated the claim at several post-trial appearances, and that the trial court recognized the claim when it stated that defendant could file a *pro se* motion alleging ineffective assistance of counsel. The Appellate Court concluded:

> [T]he trial court was aware Demus wanted his trial counsel to subpoena a document that would have allegedly provided evidence to impeach the officer who testified at his violation of probation hearing and which counsel failed to do. Therefore, despite the fact Demus did not file a written, *pro se* motion or even utter the words "ineffective assistance of counsel," he sufficiently alleged his trial counsel's ineffectiveness and brought his claim to the trial court's attention.

3. When the defendant makes an adequate allegation of ineffective assistance, the trial court must examine the factual basis of the claim. If the claim lacks merit or pertains to trial strategy, the trial court may deny the motion without appointing new counsel. However, if the allegations show possible neglect of the case, new counsel should be appointed.

Although the trial court held an evidentiary hearing, tried to help defendant explore the merits of his claim, and allowed great latitude in examining the police officer in question, the focus of the hearing was whether the underlying claim of perjury had merit rather than

whether trial counsel was ineffective. In addition, the trial court allowed the defense attorney whose performance was being questioned to participate in the hearing, causing defendant to leave the courtroom "to express his disagreement with counsel's participation." The trial court then ruled that defendant had abandoned his ineffective assistance claim by leaving the courtroom.

The Appellate Court concluded that by failing to appoint new counsel and forcing defendant to proceed, the trial court deprived defendant of the assistance of new counsel in developing his claim of ineffective assistance. The court rejected the State's argument that the error pertained only to matters of trial strategy, noting that the claim stemmed from a failure to obtain a potentially impeaching document that was readily available and did not involve the strategic decision whether to use that document after it was obtained.

The cause was remanded for the appointment of new counsel and a hearing on defendant's *pro se* claim of ineffective assistance of counsel.

(Defendant was represented by Assistant Defender Chan Yoon, Chicago.)

People v. Downs, 2016 IL App (2d) 121156-B (No. 2-12-1156, 6/30/16)

After the verdict at his trial for first degree murder but before sentencing, defendant filed two *pro se* motions alleging that trial counsel had provided ineffective assistance of counsel. The trial court did not conduct a preliminary **Krankel** inquiry, but did appoint counsel who filed an amended motion raising five of defendant's 34 allegations. Defendant then filed a third *pro se* motion raising 13 additional claims of ineffective assistance.

The trial court then vacated its appointment of counsel and held a hearing at which defendant stated each issue, trial counsel and the prosecutor responded, and defendant was given a chance for rebuttal. The trial court then ruled that there was no need to continue the hearing or appoint counsel, and "[e]ffectively" dismissed defendant's claims.

On appeal, the Appellate Court determined that the trial court had improperly converted the preliminary inquiry into an adversarial hearing at which defendant was not represented. The cause was remanded for the appointment of counsel and further proceedings.

On remand, the court appointed the same attorney to represent defendant. Counsel filed a third amended **Krankel** motion which raised only a general allegation of ineffective assistance without asserting any specific acts by trial counsel or any prejudice. Counsel stated that he had consulted with defendant to ascertain his allegations of ineffectiveness, but when defendant stated that he had not met with counsel the latter stated that he had reviewed the transcript of the first hearing.

The trial court denied the third amended motion, stating that it failed to allege any specific acts of deficient performance or prejudice. The Appellate Court reversed a second time, finding that defense counsel failed to assert nonfrivolous allegations of trial counsel's ineffectiveness.

1. When determining whether **Krankel** counsel was ineffective, the standard of **Strickland v. Washington** is applied. Thus, defendant must show that counsel's representation was deficient and that prejudice resulted.

The court concluded that counsel appointed after a preliminary **Krankel** claim has been conducted is obligated to present defendant's non-frivolous claims to the trial court. The court also stressed that there is a distinction between a frivolous claim and a claim that is not frivolous but which is likely to be unsuccessful. A non-frivolous claim is one which has at least an arguable basis in law or fact.

The court concluded that **Krankel** counsel did not provide adequate "representation" where he failed to present all non-frivolous claims, apparently because he believed that he had

an ethical duty not to present claims which he believed "don't make sense and don't meet standards."

2. The Appellate Court also stressed that **Krankel** counsel must consult with the defendant to determine the grounds for defendant's claims of ineffectiveness. The court criticized counsel for evaluating the strength of defendant's claims based on the transcript of an earlier **Krankel** hearing which involved procedures previously determined by the Appellate Court to be improper. By basing his analysis on the faulty hearing, counsel "would inevitably determine that all of defendant's claims were going to fail, because they had already been presented once to the trial court which rejected them."

Because counsel appointed on defendant's **Krankel** claims abdicated his responsibility to present non-frivolous claims of ineffective assistance of counsel, the lower court's denial of defendant's **Krankel** motion was vacated and the cause remanded for a second-stage **Krankel** hearing. The court also directed the trial judge to appoint different counsel to represent defendant and ordered that the new attorney be allowed to investigate defendant's claims and present any non-frivolous claims supported by the record or such investigation.

(Defendant is represented by Assistant Defender Bruck Kirkham, Elgin.)

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. Pecoraro, 144 Ill.2d 1, 578 N.E.2d 942 (1991) Appointment of new counsel was not required where defendant claimed that his privately retained counsel was incompetent. Defendant and his attorney "were the only parties who could have altered their attorney-client relationship." See also People v. Cunningham, 376 Ill.App.3d 298, 875 N.E.2d 1136 (1st Dist. 2007) (at least one court has held that Pecoraro does not require a trial court to automatically deny pro se requests for new counsel whenever a defendant has retained private representation).

People v. Chapman, 194 Ill.2d 186, 743 N.E.2d 48 (2000) The trial judge properly inquired into defendant's allegations of ineffective assistance by ascertaining the factual basis for the claims. Because one of defendant's claims involved trial strategy and the other involved the failure to present evidence that would have been irrelevant, the trial court properly determined that new counsel was not required.

People v. Towns, 174 Ill.2d 427, 675 N.E.2d 99 (1996) Trial court properly denied a motion for new counsel where several of defendant's allegations were conclusory and the remaining claim involved a strategic decision. See also, People v. Kidd, 175 Ill.2d 1, 675 N.E.2d 910 (1996) (whether to call alibi witnesses was clearly matter of trial strategy).

Cumulative Digest Case Summaries **§13-5(d)(3)(a)(3)**

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. Cunningham, 376 Ill.App.3d 298, 875 N.E.2d 1136 (1st Dist. 2007) The mere filing of an ARDC complaint does not constitute an allegation of ineffectiveness sufficient to trigger the trial court's duty to inquire under Krankel.

People v. Childress, 321 Ill.App.3d 13, 746 N.E.2d 783 (1st Dist. 2001) A lawsuit or ARDC claim against defense counsel does not create a per se conflict. It is the defendant's responsibility to provide the court with legitimate reasons supporting a request for new counsel.

People v. Jackson, 243 Ill.App.3d 1026, 614 N.E.2d 94 (1st Dist. 1993) Although the mere filing of an ARDC complaint does not create a conflict of interest, the trial court should have inquired into the nature of the complaint that defendant had filed to see if it showed possible neglect of the case.

People v. Massa, 271 Ill.App.3d 75, 648 N.E.2d 123 (1st Dist. 1995) The fact that defendant filed a federal lawsuit against defense counsel did not, in and of itself, create a conflict of interest.

Cumulative Digest Case Summaries **§13-5(d)(3)(b)**

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

Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981) Defendants, former employees of an adult bookstore, were convicted of obscenity but failed to pay their fines. The Supreme Court granted certiorari to decide whether a probationer may be imprisoned solely because of his inability to pay a fine, but found that the record revealed the "possibility" of a conflict of interest because trial counsel had been hired by the employer. The cause was remanded to determine if an actual conflict of interest existed due to counsel's divided loyalties. See also, People v. Hanson, Tracy, Yager & Beavers, 273 Ill.App.3d 332, 652 N.E.2d 824 (5th Dist. 1995) (per se conflict of interest existed where the attorney who represented four defendants charged with criminal offenses resulting from the unauthorized disposal of hazardous waste also represented their employer, who was under civil investigation for the same incidents).

People v. Moore, 189 Ill.2d 521, 727 N.E.2d 348 (2000) 1. A per se conflict of interest was not created when a potential witness paid for defendant's representation. Defense counsel was paid only to represent defendant, had no contemporaneous professional relationship with the

potential witness or her attorney, and at no time acted as the witness's attorney.

2. Nor was there an actual conflict of interest. To establish an actual conflict, the defendant must show that counsel actively represented conflicting interests and that the conflict adversely affected counsel's performance. Although counsel elected not to call defendant's girlfriend, who paid had defendant's attorney fees, the record showed that his decision was due not to a conflict. Instead, the witness had exercised her Fifth Amendment rights when called by the State and made clear that she would do the same if called by the defense.

People v. Johnson, 206 Ill.2d 348, 794 N.E.2d 294 (2002) A public defender appointed by the vote of a majority of the judges in a circuit does not operates under an inherent conflict of interest on the ground that he or she might avoid actions that would increase the county's costs and invoke the "displeasure" of the circuit judges. The court noted the absence of any authority in which a public defender or court-appointed attorney "was deemed to be operating under an inherent conflict of interest merely because his paycheck comes from county coffers."

People v. Palmer, 141 Ill.App.3d 234, 490 N.E.2d 154 (1st Dist. 1986) At least a "potential conflict" of interest existed where defendant's wife was the complaining witness for charges of aggravated arson and aggravated battery, and also hired defense counsel to represent her husband. The trial court denied a motion to withdraw, but subsequently admonished counsel for giving advice to the wife about the effect of the martial privilege.

Cumulative Digest Case Summaries **§13-5(e)**

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

Wheat v. U.S., 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) The trial court has substantial latitude to refuse an attempt to waive a conflict of interest - not only when an actual conflict exists, but also "in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." Where counsel's representation of a co-defendant created a potential conflict of interest, the trial court properly refused to allow counsel to represent the defendant despite the latter's willingness to waive the conflict. Compare, People v. Crowe, 327 Ill.App.3d 930, 764 N.E.2d 1174 (1st Dist. 2002) (trial court abused its discretion by granting State's motion to disqualify counsel where the parties disagreed on what the evidence would show and the judge failed to determine whether defense counsel could be called as a rebuttal witness under the more credible factual scenario).

People v. Ortega, 209 Ill.2d 354, 808 N.E.2d 496 (2004) 1. The trial court may refuse a defendant's attempt to waive a conflict of interest if it finds that defense counsel has a specific professional obligation that either conflicts with the defendant's interests or poses a "serious potential" of such a conflict. Although there is a presumption in favor of defendant's counsel of choice, that presumption may be overcome by "weighty" interests, including: (1) the defendant's interest in having the undivided loyalty of counsel; (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 continued representation by counsel of choice will result in reversal on appeal.

2. The trial court may consider any other interests affected by the conflict, including whether the claimed conflict is a result of prosecutorial "overreaching." In other words, the prosecution may not "manufacture" a conflict to deprive defendant of his attorney of choice.

3. There was at least a serious potential for a conflict of interest arising from representation of a confidential informant by defense counsel's law partner, because defense counsel had professional obligations to both protect confidential information which he had learned from his law partner and to thoroughly cross-examine the informant. Under these circumstances, the trial court did not err by finding that the interests threatened by the conflict outweighed the defendant's interest in counsel of his choice.

The court noted that at least two of the relevant concerns - the State's right to a fair trial in which defense counsel does not have access to confidential information about a State's witness and the appearance of impropriety should the jury learn that defense counsel's law partner had represented a State's witness concerning the same incident - would not be protected even if the informant and the defendants waived the conflict. See also, People v. Holmes, 141 Ill.2d 204, 565 N.E.2d 950 (1990) (trial court did not violate defendant's right to counsel by granting the State's motion to disqualify defense counsel due to the serious potential for a conflict of interest; counsel previously represented both the State's key witness and the witness's brother, and the trial court found that counsel's cross-examination might be restricted; People v. House, 377 Ill.App.3d 9, 878 N.E.2d 1171 (1st Dist. 2007) (trial judge has wide discretion whether to accept a waiver of a conflict of interest; defendant's inability to fully appreciate the consequences of a waiver is a relevant concern).

People v. Lawson, 163 Ill.2d 187, 644 N.E.2d 1172 (1994) No valid waiver of a conflict of interest can occur unless the defendant is informed of the conflict and how it might affect

counsel's representation.

People v. Olinger, 112 Ill.2d 324, 493 N.E.2d 579 (1986) A valid waiver of a conflict of interest occurred where defendant was apprised of the potential conflict and "made aware" of its "general significance." The trial court is not required to "engage in counseling the defendant" and need not "painstakingly detail every potential ramification of a potential conflict."

People v. Coleman, 301 Ill.App.3d 290, 703 N.E.2d 137 (5th Dist. 1998) Before a conflict of interest can be waived, the trial court must inform the defendant of the conflict's significance - in other words, "how the conflict can affect his attorney's representation." Because the trial court never admonished defendant concerning the ways in which his case could be affected by his attorney's conflict of interest, defendant did not knowingly surrender his right to a conflict-free attorney.

People v. Palmer, 141 Ill.App.3d 234, 490 N.E.2d 154 (1st Dist. 1986) At least a "potential conflict" of interest existed where defendant's wife was the complaining witness for charges of aggravated arson and aggravated battery, and also hired defense counsel to represent her husband. Defendant did not adequately waive the conflict where there was nothing in the record to indicate that anyone explained the conflict of interest or that defendant intentionally and knowingly waived it.

Cumulative Digest Case Summaries **§13-5(f)**

People v. Poole, 2015 IL App (4th) 130847 (No. 4-13-0847, 9/16/15)

1. A *per se* conflict of interest exists where 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) was a former prosecutor who had been personally involved with the prosecution of defendant. When a *per se* conflict exists, a defendant does not need to show prejudice to obtain relief.

Here, defense counsel contemporaneously represented both defendant and a witness who was called by the State to testify at defendant's trial. The State argued that the witness, although called by the State, was not a prosecution witness because she had been declared a hostile witness and all of her testimony benefitted defendant. The Appellate Court rejected this argument since it was clear that the State used the witness to introduce her prior inconsistent statements, which inculpated defendant. As such, she was a prosecution witness and a *per se* conflict of interest existed.

2. The court also found that defendant had not properly waived the conflict. A waiver is not valid unless the defendant is admonished regarding the existence and significance of the conflict and the conflict is knowingly waived. Here, defendant and the witness signed an undated document which stated that they were aware that the same attorney represented them in their pending cases and that they waived "any potential conflict that may exist."

Counsel, however, never informed the trial court of the conflict and no waiver was filed or discussed with the court prior to trial. Since the court only became aware of the conflict after trial, the court never had an opportunity to admonish defendant about the potential consequences of dual representation. Additionally, the record did not reflect what counsel told defendant when the written waiver was signed. Under these circumstances, the record does not show that defendant was adequately informed of the significance of the conflict.

The Appellate Court reversed defendant's convictions and remanded for a new trial. (Defendant was represented by Assistant Defender Kelly Weston, Springfield.)

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§13-5(g)
Other Conflict Issues

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