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## CH. 14 COUNSEL

### §14-1 Right to Counsel

#### §14-1(a) Generally

#### United States Supreme Court

**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.

**McCoy v. Louisiana**, 584 U.S. \_\_\_, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018) A defendant's Sixth Amendment right to the assistance of counsel does not require that he or she surrender complete control over the case to counsel. Where defense counsel determines that the best strategy is to concede defendant's guilt in the hopes of avoiding a death sentence, but the defendant objects and insists on presenting an alibi defense, counsel is forbidden from conceding guilt. The Supreme Court distinguished **Florida v. Nixon**, 543 U.S. 175 (2004), because there the defendant neither objected nor approved of counsel's planned strategy of conceding guilt.

Here, defendant was charged with three counts of first degree murder for which the State was seeking the death penalty. Defense counsel informed defendant of his plan to concede guilt and urge the jury to exercise mercy and reject a death sentence. Defendant, who had maintained his innocence all along, repeatedly objected to counsel's proposed strategy. Nevertheless, counsel conceded guilt, and, after defendant was convicted, argued for mercy at sentencing. The jury imposed a death sentence.

Defendant's autonomy to decide the objective of the defense belongs in the category of rights personal to the defendant, along with the decisions whether to plead guilty, waive his jury trial right, testify in his defense, and forego an appeal. The violation of defendant's right to assert an innocence defense constitutes structural error and is not subject to harmless error review.

In dissent, Justice Alito, joined by Justices Thomas and Gorsuch, concluded that defendant should have sought new counsel sooner if he was dissatisfied where counsel proposed the concession-of-guilt strategy eight months before trial. The dissent criticized the majority for finding structural error where that question had not been briefed. And, the dissent noted that the alleged error in this case was not of the sort likely to recur.

**Maples v. Thomas**, 565 U.S. 266, 132 S.Ct. 912, 181 L.Ed.2d 807 (2012) 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 whom 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.

**Rothgery v. Gillispie County**, 554 U.S. 191, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008) 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.

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).

**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.

**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.

### **Illinois Supreme Court**

**People ex rel. Glasgow v. Kinney**, 2012 IL 113197 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. 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 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**, 236 Ill.2d 417, 925 N.E.2d 1122 (2010) 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 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.

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.

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

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.

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.

The court also 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.

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.

### **Illinois Appellate Court**

**People v. Anderson**, 2021 IL App (2d) 190128 Defendant challenged the elevation of his DUI to a Class 2 felony, arguing that one of the two prior DUI convictions which the State used as a basis for enhancement was invalid. Specifically, defendant asserted that the prior DUI conviction in question was obtained while he was not represented by counsel and had not entered a valid waiver of counsel.

Defendant’s challenge to his prior DUI conviction in the instant appeal amounted to a collateral attack. Accordingly, defendant bore the burden of presenting some evidence to rebut the presumption that he validly waived counsel in the prior proceedings. Had defendant made the challenge on direct appeal from the prior conviction, the record would have had to affirmatively show a knowing and voluntary waiver of the right to counsel. Here, the docket sheet in the prior DUI file was silent on the subject, and defendant failed to present transcripts, court documents, or affidavits to rebut the presumption that the prior conviction was validly obtained. The Appellate Court affirmed the enhancement of defendant’s DUI to a Class 2 felony.

**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.

## **§14-1(b)**

### **Right to Counsel at Various Stages of Proceeding**

#### **United States Supreme Court**

**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.

**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.

**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).

**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).

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

#### **Illinois Supreme Court**

**People v. Gawlak**, 2019 IL 123182 Defendant filed a 2-1401 petition, a post-conviction petition, and a section 116-3 motion for DNA testing. He hired a private attorney to represent him on the 2-1401, and a second attorney to represent him on the 116-3 motion. The latter attorney, clarifying to the court that he did not want to represent defendant on the 2-1401 or the PC, asked to enter a “limited appearance.” The circuit court denied counsel’s request because it preferred to have one attorney represent defendant on all pending matters. The



court held a hearing on the 116-3 motion at which defendant appeared pro se, and denied defendant's request for DNA testing.

The Appellate Court held that Rule 13(c)(6), allowing for limited scope appearances in civil cases, applies to 116-3 motions, and the trial court's refusal to allow counsel's limited scope appearance was arbitrary, in violation of defendant's due process rights. The Supreme Court reversed, agreeing with the State that, although Rule 13(c)(6) applies, the rule requires attorneys to fill out a form, and here, the attorney failed to comply with this requirement. This gave the circuit court a non-arbitrary reason to deny the limited scope appearance. Although the State did not raise this argument below, or in its PLA, the court declined to find the issue forfeited, noting forfeiture is a limitation on the parties not the courts, and that here, the issue is "inextricably intertwined" with the question presented.

However, the court also reversed the circuit court's denial of the 116-3 motion, because the record did not establish that the attorney sought a true limited scope appearance. The proceeding on the 116-3 motion was distinct from the other collateral filings, and counsel did not indicate he intended limit his role within the 116-3 proceedings. At a minimum, counsel's request was unclear, and pursuant to its supervisory authority, the court remanded the case to give defendant an opportunity to retain counsel in accordance with its rules.

**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. 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.

### **Illinois Appellate Court**

**People v. Lathem**, 2024 IL App (1st) 220380 At his murder trial, defendant testified on direct examination that his co-defendant committed the murder without his knowledge. Before cross, the State moved to introduce evidence of prior statements going to defendant's knowledge and intent to commit murder. The trial court ruled that the State could confront defendant with these statements. Defense counsel asked to discuss the ruling with defendant during the overnight recess between direct and cross. The trial court denied the motion, finding it would be improper for a witness to discuss his testimony with his attorney while under oath and between direct and cross. The court forbade all conversations between defendant and his attorney until after he testified.

The appellate court reversed and remanded for a new trial. As the State conceded, an order forbidding a testifying defendant from consulting with his attorney “about anything” during an overnight recess violates the Sixth Amendment right to the assistance of counsel. **Geders v. United States**, 425 U.S. 80 (1976). The Illinois Supreme Court has previously held that the denial of access to counsel for consultation during a critical stage is *per se* reversible, and does not require a showing of prejudice. **People v. Noble**, 42 Ill. 2d 425 (1969).

The State argued that the court’s order did not foreclose all discussion, but merely warned defendant not to discuss his testimony. The record showed, however, that the trial court warned defendant not to speak with his attorneys “about anything, including your testimony.” In other statements, the court suggested its ban covered any and all conversations. These admonishments served as a clear warning to defendant to avoid all discussions with his attorney. As **Geders** held, if the court and State were concerned about coaching, there were other ways to solve the problem, including through cross-examination, but denial of consultation with counsel was not a solution.

**People v. Rudd**, 2020 IL App (1st) 182037 Defendant did not have the right to an attorney during a consensual station-house interview, despite the fact that the State had filed a complaint for an arrest warrant. The Sixth Amendment right to counsel attaches “at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” A felony cannot be charged via complaint. A complaint is merely a request for a probable cause hearing so as to obtain an arrest warrant.

It is true that Illinois precedent holds that the filing of a complaint for an arrest warrant may trigger a defendant’s Sixth Amendment right to counsel where there was “significant prosecutorial involvement in procuring the arrest warrant.” **People v. Hayes**, 139 Ill. 2d 89 (1990). Since then, however, the United States Supreme Court has cast doubt on this principle. **Rothgery v. Gillespie County**, 554 U.S. 191, 198 (2008).

Either way, in this case there was insufficient prosecutorial involvement. The prosecutor approved the complaint as part of the detective’s attempt to seek an interview, but the detective filed the complaint and conducted the interview. Following the interview, the complaint was withdrawn at the prosecution’s request. All of the other steps taken by prosecutors, including issuing subpoenas and assisting with the interrogation, were investigatory rather than accusatory.

Finally, defendant could and did waive his right to counsel despite not knowing of the complaint. A waiver taken after proper **Miranda** warnings is valid regardless of whether defendant knows all of the investigatory steps that the State has taken against him.

**People v. Woosley**, 2020 IL App (3d) 170307 Defendant was denied his right to counsel where his attorney appeared at a hearing remotely over telephone. The hearing involved both an arraignment on an amended indictment, and the defendant’s waiver of counsel/request to proceed *pro se*. While a remote appearance by defense counsel is not *per se* inappropriate, the circumstances of this case – an impromptu arraignment without advance notice, and no opportunity to consult with counsel about the new charges before waiving counsel – led to second-prong plain error.

**People v. Nemec**, 2019 IL App (2d) 170382 The trial court violated defendant’s right to counsel at a supervision revocation hearing. When defendant appeared at the hearing, the

court recognized that he lacked counsel, and advised him pursuant to Rule 401(a)(1) and (a)(2). But the court never informed defendant that he had a right to counsel, nor did defendant ever express a desire to waive counsel. In a case where defendant never waives counsel, substantial compliance with Rule 401 does not negate the denial of counsel.

**People v. Walker, 2018 IL App (3d) 150527** Although section 2-1401 does not provide for the appointment of counsel, a court has discretion to appoint counsel in such proceedings. Here, the court appointed counsel on defendant's 2-1401 petition, but counsel failed to satisfy either the reasonable-assistance-of-counsel or due-diligence standards.

**People v. Lewis, 2015 IL App (1st) 130171** 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 to stand trial. An extradition hearing does not commence adversary proceedings and is not a critical stage for Sixth Amendment purposes.

**People v. Merriweather, 2013 IL App (1st) 113789** 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. Defendant's filing of a pro se notice of appeal, without the requisite post-plea motion, does not trigger the court's duty to appoint counsel.

**People v. Stephens, 2012 IL App (1st) 110296** 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.

**People v. Black, 2011 IL App (5th) 080089** 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.

The Sixth 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 (4<sup>th</sup> Dist. 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. 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. The failure to provide counsel at a preliminary hearing is not cured because the defendant is represented by counsel at trial.

**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.

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

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).

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. The failure to give the admonitions required by Rule 401(a), and the associated deprivation of counsel at a critical stage "is a classic area of plain-error review."

**People v. Kruger**, 363 Ill.App.3d 1113, 845 N.E.2d 96 (4th Dist. 2006) 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. 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.

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.

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. 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 that 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. 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.

#### **§14-1(c)** **Counsel of Choice**

#### **United States Supreme Court**

**Luis v. United States**, 578 U.S. \_\_\_, 136 S.Ct. 1083, 194 L.Ed.2d 256 (2016) 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, and 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. A pretrial order freezing assets which are not related to the charged crime violates the Sixth Amendment right to hire counsel of choice.

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. 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.



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. 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.

**U.S. v. Gonzalez-Lopez**, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) 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.

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.”

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).

### **Illinois Supreme Court**

**People v. Gawlak**, 2019 IL 123182 Defendant filed a 2-1401 petition, a post-conviction petition, and a section 116-3 motion for DNA testing. He hired a private attorney to represent him on the 2-1401, and a second attorney to represent him on the 116-3 motion. The latter

attorney, clarifying to the court that he did not want to represent defendant on the 2-1401 or the PC, asked to enter a “limited appearance.” The circuit court denied counsel’s request because it preferred to have one attorney represent defendant on all pending matters. The court held a hearing on the 116-3 motion at which defendant appeared pro se, and denied defendant’s request for DNA testing.

The Appellate Court held that Rule 13(c)(6), allowing for limited scope appearances in civil cases, applies to 116-3 motions, and the trial court’s refusal to allow counsel’s limited scope appearance was arbitrary, in violation of defendant’s due process rights. The Supreme Court reversed, agreeing with the State that, although Rule 13(c)(6) applies, the rule requires attorneys to fill out a form, and here, the attorney failed to comply with this requirement. This gave the circuit court a non-arbitrary reason to deny the limited scope appearance. Although the State did not raise this argument below, or in its PLA, the court declined to find the issue forfeited, noting forfeiture is a limitation on the parties not the courts, and that here, the issue is “inextricably intertwined” with the question presented.

However, the court also reversed the circuit court’s denial of the 116-3 motion, because the record did not establish that the attorney sought a true limited scope appearance. The proceeding on the 116-3 motion was distinct from the other collateral filings, and counsel did not indicate he intended limit his role within the 116-3 proceedings. At a minimum, counsel’s request was unclear, and pursuant to its supervisory authority, the court remanded the case to give defendant an opportunity to retain counsel in accordance with its rules.

**People v. Baez**, 241 Ill.2d 44, 946 N.E.2d 359 (2011) 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 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. 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, and counsel was uncertain how long he would be gone or even if he would return.

**Burnette v. Terrell**, 232 Ill.2d 522, 905 N.E.2d 816 (2009) 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.

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. The Public Defender has both the statutory authority and the responsibility to assign assistant public defenders to 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.

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 clients to which she had been assigned. 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. 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. 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).

**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").

### **Illinois Appellate Court**

**People v. Smollett**, 2023 IL App (1st) 220322 The trial court did not abuse its discretion when it ruled that defendant's chosen trial attorney could not cross-examine the State's two key witnesses due to a conflict of interest.

Defendant had been charged with disorderly conduct for making a false police report. Two State witnesses claimed they were hired by defendant to participate in a fake battery and hate crime against him. Defendant's trial attorney had several phone calls with these witnesses and their mother, discussing immunity, the search warrant issued in the case,



relevant laws, and other legal issues. The trial court held that these discussions created an attorney-client relationship between defendant's attorney and the State's witnesses.

The appellate court agreed with the trial court's finding and its solution. By preventing defense counsel from cross-examining these witnesses, while allowing him to continue to represent defendant, and be present for the cross-examination, the trial court appropriately balanced the interests of all parties.

**People v. Trejo**, 2022 IL App (2d) 190424-B After remand from the Appellate Court for a new **Batson** hearing (**People v. Trejo**, 2021 IL App (2d) 190424), the trial court found no **Batson** violation. Defendant again appealed. He did not contest the **Batson** ruling, but rather alleged a denial of his right to counsel.

Specifically, defendant alleged that it was improper to conduct the new **Batson** hearing with a public defender who was not present for *voir dire*, during which two private attorneys represented defendant. These private attorneys were allowed to withdraw before the first appeal, at which time OSAD was appointed. On remand, they were not reappointed because the court made a finding of indigency. The appointed public defender complained that he could not assess the **Batson** claim without having been present for *voir dire*. In particular, the PD believed that he would not be able to determine the ethnicities of the venirepersons from a cold record. He therefore presented no evidence, and the court found, after detailing its observations from *voir dire*, no *prima facie* case of discrimination. Defendant alleged on appeal that the trial court erred when it failed to reappoint the private attorneys.

The Appellate Court disagreed. No authority supported the idea of reappointment of private attorneys whom defendant could not afford to pay. Defendant's primary argument for reappointment of private counsel was that, in order to conduct a proper **Batson** hearing, these attorneys' firsthand observations were necessary. But the Appellate Court found that defendant had other methods of obtaining an accurate reconstruction of *voir dire*, including the ethnicities of the stricken and accepted members. The defense could have called the private attorneys as witnesses. It could have sought affidavits, issued subpoenas, or attempted to introduce relevant personally identifying information of the veniremembers. Instead, the PD failed to try anything. He thus procedurally defaulted any claim of error, and in fact invited error through his own inaction.

**People v. Roberts**, 2021 IL App (3d) 190445 Under the sixth amendment to the United States Constitution, a criminal defendant is guaranteed the right to the assistance to counsel of his or her choice. Where a defendant requests a continuance for the purpose of obtaining new counsel, the court must inquire to determine whether the request is being used merely as a delay tactic. The failure to make a proper inquiry may be grounds for reversal.

Here, defendant repeatedly complained about her appointed counsel prior to trial. Each time, the court addressed defendant and her counsel, but did not appoint new counsel. Defendant hired private counsel at one point, but that attorney later withdrew based on financial concerns, and the public defender was reappointed. On the day prior to trial, defendant again complained about appointed counsel and told the court that she had been in contact with an attorney associated with the NAACP who was "willing to look into" her case but would need a continuance. After inquiring further of defendant, appointed counsel, and his boss, the court denied the continuance, and defendant proceeded to trial with her appointed public defender.

On appeal, defendant argued that the court failed to make an adequate inquiry before denying her request for a continuance to obtain new counsel. The Appellate Court rejected this argument, noting that the trial court had inquired into defendant's reasons for wanting new counsel and her cooperation with existing counsel, both relevant factors to consider. While the court did not ask defendant specific questions about her proposed new counsel, defendant conveyed enough information to allow the court to assess her request. Notably, defendant explained that the attorney was "willing to look into" her case, indicating that discussions were in the preliminary stage likely to require a more lengthy continuance, and that counsel was associated with the NAACP, indicating the possibility of a no-fee or low-fee arrangement such that payment issues were unlikely to arise. When considered in the context of the court's existing knowledge of the case, this inquiry provided the court enough information to properly exercise discretion on defendant's request for a continuance to obtain new counsel.

Defendant did not argue that the court's denial of her request constituted an abuse of discretion, so the court did not address that question. The Appellate Court affirmed.

**People v. Heinemen, 2021 IL App (2d) 190689** Defendant sought to hire substitute counsel for post-trial motions, but the trial court denied the request. The court found the request dilatory, citing the fact that the case was three years old, defendant had asked for 25 prior continuances, and a sentencing date had been set. It rejected defendant's assertion that his new attorney was more experienced in post-trial matters. It allowed the new attorney to represent defendant only as co-counsel.

The trial court abused its discretion in denying the motion to substitute counsel, because the record did not support its conclusion that the motion was a delaying tactic or was otherwise calculated to thwart the administration of justice. Of the 25 continuances, most were by agreement during the discovery phase. Defendant filed the motion to substitute about a month after trial, before any post-trial proceedings commenced. He kept the same attorney throughout the pre-trial proceedings and the entire trial. Thus, the evidence did not show a propensity for delay. It was therefore an abuse of discretion to deny substitute counsel on the grounds that doing so would push back the date for post-trial motions and sentencing. Even if the trial court disagreed with defendant's opinion that his post-trial interests would be better served by the new attorney, the right to select defendant's privately retained counsel belonged to defendant, not the trial court. The court remanded for new post-trial proceedings.

**People v. Jenkins, 2020 IL App (1st) 172422** The trial court erred when it denied defendant his attorney of choice before adequately weighing the necessary factors. Defendant was charged with retail theft and appointed a public defender. Private counsel moved to substitute in and file his appearance. The court asked new counsel if he was prepared to go to trial that day, and when private counsel stated he would not, the court denied the motion, citing a desire not to delay the proceedings.

The Appellate Court found a Sixth Amendment violation and second-prong plain error. A judge has discretion to deny the defendant's request to substitute counsel if it finds the request will interfere with the orderly administration of justice. But before doing so, the court must weigh several factors, including whether defendant has a valid reason for the request, how long new counsel would require to get ready for trial, and whether defendant had a functioning relationship with current counsel. Here, the judge asked a single question - whether counsel would be ready for trial that day. The court did not inquire into any of the other factors that it needed to consider before denying the request. Moreover, the case had

only been pending for five months and had never been continued. And defendant had not previously sought to change attorneys, so there was no suggestion that the request was dilatory. Accordingly, the trial court abused its discretion by denying the motion without adequate consideration of the relevant factors.

**People v. Ramsey, 2018 IL App (2d) 151071** When a trial court conducts an inquiry into the circumstances of a defendant's motion to substitute counsel and those circumstances demonstrate that substitute counsel does not stand ready, willing, and able to make an unconditional appearance, the court does not abuse its discretion by denying the defendant's motion. Here, the court did not abuse its discretion in denying a continuance for substitute counsel, as counsel was not ready, willing, and able to enter an unconditional appearance and the trial court reasonably concluded that defendant, through his prior failures to appear and tardiness, was attempting to delay the proceedings.

**People v. Buckhanan, 2017 IL App (1st) 131097** As part of the right to the assistance of counsel there is a presumption in favor of counsel of choice and the State may overcome this presumption only if it proves that there is either an actual conflict or serious potential for conflict. If such a conflict or potential conflict exists, the court must determine if the interests threatened by the conflict are weighty enough to overcome the right to counsel of choice.

Courts must consider: (1) the likelihood that a conflict will actually occur; (2) the defendant's interest in having the undivided loyalty of counsel; (3) the State's right to a fair trial in which defense counsel does not use confidential information to attack a State's witness; (4) the appearance of impropriety if the jury learns of the conflict; and (5) the probability that continued representation will provide grounds for reversal on appeal. In weighing these interests, courts should always consider alternatives to disqualification.

Defendant hired private counsel to represent him in a first degree murder case. Counsel's father, also a lawyer, represented a potential witness for the State. Shortly before the start of trial, the State moved to disqualify the son as counsel for defendant. The State's witness gave a statement to police that indicated defendant knew the police were looking for him shortly after the offense occurred. The father was present for this statement and, even though there were several other people present including a detective and a prosecutor, the State argued that it might need to call the father to impeach the witness if she changed her story at trial.

The State also argued that counsel might obtain confidential information about the witness from his father that would give the defense an unfair advantage, and that if the jury learned that counsel's father represented a State witness it would create an appearance of impropriety. At a hearing on the State's motion, the father denied disclosing any confidential information to defendant's counsel. And defendant formally waived any conflict of interest. The trial court granted the State's motion to disqualify defense counsel.

Defendant was improperly denied his right to counsel of choice. There was no serious potential for conflict here, certainly not enough to overcome the constitutional presumption in favor of defendant's right to counsel of choice. The State's concern about the exchange of confidential information was "soundly refuted" by the record. And, the State's other concern about the need to potentially impeach the witness was groundless since there was never any inconsistency in her testimony. Even if some inconsistency arose and the State needed to call the father to testify, this would at most only create an appearance of impropriety and would be "a slender reed on which to justify disqualification of counsel."

The denial of a defendant's right to counsel of choice is a structural error not subject to harmless error review. The court thus reversed defendant's conviction and remanded for a new trial.

**People v. Adams, 2016 IL App (1st) 141135** 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.

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.

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.

Defendant appeared before the court for a bench trial 70 days after he was arraigned. 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.

The trial court abused its discretion in denying defendant's request where it considered only two factors in ruling: that it was the day of trial and both witnesses were present. The court made no inquiry 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.

**People v. Koen, 2014 IL App (1st) 113082** 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.

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 ultimately was not called as a witness is irrelevant.

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.

**People v. Brisco, 2012 IL App (1st) 101612** Defendant sought 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.

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. It was not 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. A trial court's interest in ruling on post-trial motions does not outweigh a defendant's right to counsel of his choice, particularly where there was no finding that defendant's request was dilatory or lacking in good faith.

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.

**People v. Nevarez, 2012 IL App (1st) 093414** 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.

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. 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 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 intended to call the father as a witness at the defendant's trial, and possibly to call the brother as a rebuttal witness.

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. The trial court did not abuse its discretion by disqualifying the third attorney from entering the case.

**People v. Tucker**, 382 Ill.App.3d 916, 889 N.E.2d 733 (1st Dist. 2008) 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.

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. 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; 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. 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.

**People v. Childress**, 276 Ill.App.3d 402, 657 N.E.2d 1180 (1st Dist. 1995) 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.

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. 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, witnesses 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. 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. 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. 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.

#### **§14-1(d)**

#### **Indigency**

#### **United States Supreme Court**

**Alabama v. Shelton**, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002) 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.

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.

**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.

**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).

**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.

**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.

### **Illinois Supreme Court**

**People ex rel. Glasgow v. Kinney**, 2012 IL 113197 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. 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 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.

**Burnette v. Terrell**, 232 Ill.2d 522, 905 N.E.2d 816 (2009) 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. The Public Defender has the sole statutory authority to make work assignments to assistant public defenders.

**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. 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).

### **Illinois Appellate Court**

**People v. Medina**, 2022 IL App (3d) 180493 Defendant argued that the trial court erred when it refused to appoint the public defender to represent him. Defendant was initially represented by the public defender, but the court discharged appointed counsel on the basis that a third party had posted bond on defendant's behalf. After the court discharged the public defender, defendant did not request reappointment. Defendant was given additional time to hire private counsel when he asked for it, and defendant did not indicate he was unable to retain counsel. Aside from a single status date, defendant was represented by private counsel throughout the remainder of the proceedings. Accordingly, the Appellate Court concluded that there was no error in refusing to appoint the public defender because defendant did not request appointed counsel.

The dissenting justice would have held that the court's dismissal of the public defender was reversible plain error. The dissent stated that the court had no right to discharge appointed counsel solely on the basis that a third party posted bond. The trial court failed to conduct any meaningful inquiry into defendant's assets and liabilities and failed to even offer defendant the option to renew his request for the public defender. Instead, defendant was faced with either representing himself or hiring private counsel. The dissent would have reversed defendant's convictions and remanded for further proceedings.

**People v. Moore**, 2020 IL App (3d) 180172 Defendant was arrested for driving on a revoked license and a third party posted \$2000 bond. Defendant initially stated he would hire private counsel, but at one point in pretrial proceedings, he also requested appointment of counsel, stating that he contacted the public defender. Noting the bond, the court indicated it could not appoint counsel, and gave defendant "one more chance" to hire an attorney. Defendant ultimately hired private counsel, and was convicted and sentenced to 300 days in jail.

On appeal defendant argued that the court denied him his right to counsel when it refused to appoint counsel on the basis that a third party had posted bond on defendant's behalf. The Appellate Court disagreed. A court should not appoint counsel until it has conducted an indigency hearing. Here, defendant initially said he would hire private counsel, did not persist in his demand for the appointment of counsel, and retained private counsel. Thus, the need to make an indigency determination never arose.

**People v. MacTaggart**, 2019 IL App (3d) 160583 A defendant's ability to post bail does not preclude a finding of indigency. Bail is commonly posted by friends and family. While

bail may be presumed to belong to defendant as to fines, costs, and judgments against him, a court may not presume that bail funds are available for the purposes of paying attorney fees.

Here, defendant was found indigent, and the public defender was appointed. After defendant's mother posted \$25,000 bail, the State moved to reconsider the public defender's appointment. At a hearing on the State's motion, at which the public defender did not participate, the court concluded that because defendant had been able to post bail, he would be able to get credit either from a bank or friends and family to pay counsel. The court vacated appointment of the public defender, and defendant was forced to hire private counsel and assign a portion of the bond to pay counsel's fees.

The Appellate Court found that even though defendant was able to retain private counsel, the denial of the public defender was improper and violated defendant's right to counsel. And, although defendant failed to raise this issue in his post-trial motion, the Appellate Court found that it constituted structural error affecting the integrity of the judicial system and therefore was reviewable as second prong plain error.

The dissenting justice would have found that the court's finding that defendant was not indigent was not an abuse of discretion. When defendant's mother posted his bail, she signed a written acknowledgment that indicated the bond may be used to satisfy various financial obligations, including attorney fees.

**People v. Abernathy**, 399 Ill.App.3d 420, 926 N.E.2d 435 (2d Dist. 2010) An indigent defendant has the right to appointed counsel when charged with a crime which could result in imprisonment.

A person need not be entirely without funds in order to be found indigent. The fact that a defendant is able to obtain funds from others does not in itself establish that he or she is not indigent.

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 trial judge erred by failing to determine whether the defendant was indigent and whether the appointment of counsel was appropriate. 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.

**People v. Adams**, 388 Ill.App.3d 762, 903 N.E.2d 892 (3d Dist. 2009) 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.

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.

**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. Ellis**, 309 Ill.App.3d 443, 722 N.E.2d 254 (4th Dist. 1999) 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. 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).

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.

## **§14-1(e)**

### **Right to Self-Representation**

#### **United States Supreme Court**

**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**, 554 U.S. 164, 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 on 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).

### **Illinois Supreme Court**

**People v. Baez**, 241 Ill.2d 44, 946 N.E.2d 359 (2011) 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*. 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 reviewed all of the discovery materials. The court made it clear to defendant that it was not denying defendant's request 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.

**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. 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.

### **Illinois Appellate Court**

[People v. Brown, 2023 IL App \(3d\) 210181](#) In determining whether the trial court denied defendant the right to self-representation, courts of review must determine whether the defendant's request to waive counsel was clear and unequivocal. A defendant's actions subsequent to a request to proceed *pro se* can be a significant part of this analysis. If a defendant acquiesces, vacillates, or abandons a previous request, the request for self-representation could be considered too equivocal, or forfeited.

In this case, defendant requested to proceed *pro se*, and trial counsel filed a motion to withdraw. But three days later, trial counsel withdrew the motion, telling the court that defendant reconsidered his request. Thus, defendant equivocated. Without a clear and unequivocal request, the trial court did not deny defendant the right to self-representation.

Nor did reversible error occur where the trial court granted defendant's right to proceed *pro se* at sentencing without substantially complying with Rule 401(a). Although the court neglected to inform defendant of the sentencing ranges for the lesser offenses of which he was convicted, and did not mention the possibility of consecutive sentencing, the appellate court found no denial of real justice or prejudice. Defendant had just been through an entire trial on a 10-count indictment during which he was represented by an experienced attorney; he was not an unsophisticated defendant where his criminal history included four felony convictions; he was informed of the sentencing range on his most serious conviction, which covered the sentencing range he would face on concurrent sentences; and while the court did not inform him of the possibility of consecutive sentencing, he did not receive consecutive sentences.

[People v. Talidis, 2023 IL App \(2d\) 220109](#) Prior to his DWLR trial, defendant's private attorney withdrew over a disagreement about discovery, and defendant moved to proceed *pro se*. The court accepted defendant's waiver of counsel. After six months of continuances so that defendant could file motions, defendant never filed any, and the court appointed standby counsel. Four days later, on the day of trial, defendant refused to participate. The court ordered standby counsel to act as counsel of record. Counsel asked for a continuance to prepare, but the trial court denied the motion, reasoning that an attorney appointed for a defendant tried *in absentia* need not be prepared for trial under [725 ILCS 5/115-4.1\(a\)](#).



Defendant was found guilty, and on appeal, argued the court erred in denying the request for a continuance.

The appellate court affirmed. It initially determined that section 115-4.1(a), which sets forth the procedures for a trial *in absentia*, including the appointment of counsel, did not apply to defendant. See [People v. Eppinger, 2013 IL 114121](#) (section 115-4.1 applies only to defendants not in custody). As such, before reaching the ruling on the continuance, the appellate court first determined whether the court erred in appointing counsel despite defendant's desire to represent himself. The appellate court found a proper termination of the right to self-representation. Defendant intentionally disrupted the trial process, first dragging it out for several months with false assurances of an imminent motion, and then refusing to participate on the day of trial. Appointing counsel at this point was a proper exercise of discretion. For similar reasons, the trial court exercised proper discretion when it appointed standby counsel as the counsel of record.

Nor did the trial court error in denying counsel's request for a continuance. A court's decision to deny a continuance for the preparation of trial is reviewed for an abuse of discretion. Reviewing courts consider several factors, including the movant's diligence, the seriousness of the charges, judicial economy, the complexity of the case, and the reason for counsel's unpreparedness. Here, although counsel acted diligently in requesting the continuance, and only two witnesses would be inconvenienced, other factors supported the denial of the continuance, including the fact that counsel "had at least the lunch break to prepare for defendant's case, which was not complex."

Finally, the court found counsel was not ineffective where she participated in *voir dire*, made objections, moved to suppress evidence, cross-examined witnesses, and argued in opening and closing.

[People v. Hilliard, 2022 IL App \(1st\) 200744](#) At arraignment, defendant asked to proceed "in proper persona" [*sic*] three times and objected to his attorney's agreement to a continuance. The trial court overruled his requests. On the next court date, 29 days later, the trial court granted defendant's request to represent himself. Defendant persisted in his demand for a speedy trial, and by the time of trial the parties agreed the State occasioned 93 days of delay. Following his conviction, defendant appealed and argued a speedy trial violation because the 29 days between arraignment and the day his counsel withdrew should have been attributed to the State, meaning the State did not take him to trial within 120 days.

Defendant did not move to dismiss on speedy trial grounds below, and therefore forfeited the claim. But the majority found the error reviewable as second-prong plain error, citing [People v. Staake, 2017 IL 121755](#). Significantly, the State in its brief asserted only that no error occurred, and therefore forfeited any argument as to second-prong plain error.

A defendant who makes a clear and unequivocal request for self-representation should be admonished and given the chance to make a knowing waiver of counsel. The State argued that defendant's request to proceed "in proper persona" was not a clear request, as defendant did not state that he wanted to proceed "*pro se*." The majority found this argument overly formalistic. It noted that "*in propria persona*" is a Latin phrase equivalent to "*pro se*," and therefore defendant's attempt at this phrase could be considered a clear and unequivocal request. Although the State and

dissent pointed out that the trial court explicitly stated it did not understand what defendant meant, the majority found that in context it was clear defendant meant to represent himself.

Because defendant's initial request to represent himself was clear and unequivocal, neither counsel's agreement to a continuance, nor the 29 ensuing days, should have been attributed to him. The court reversed the conviction on speedy trial grounds.

**People v. Rodriguez-Aranda, 2022 IL App (2d) 200715** The trial court erred when it denied defendant's request to represent himself at trial.

In order to invoke the right to self-representation a defendant must knowingly and intelligently waive the right to counsel. The waiver must be clear, unequivocal, and unambiguous. A trial court's denial of a defendant's request to represent oneself is reviewed for an abuse of discretion. A trial court does not abuse its discretion when defendant's lack of civility and decorum would result in an abuse of the dignity of the courtroom, where the request is dilatory, or where a defendant suffers from a severe mental illness. A defendant's lack of legal knowledge and ability is no basis for denying a defendant's request for self-representation.

Here, defendant made an unequivocal request to represent himself despite the fact that he first asked for a new attorney who spoke Spanish. A preference for a different attorney does not diminish a clear request to proceed *pro se* in the alternative. Even though the bulk of the proceedings concerned defendant's request for a new attorney, defendant requested to represent himself three times, and the trial court clearly understood the request given that it admonished defendant of his rights and formally ruled against the request to proceed *pro se*.

The trial court abused its discretion because it based its denial primarily on defendant's inability to speak English, an inaccurate portrayal of defendant's courtroom conduct as "disruptive," and on an outdated diagnosis of schizophrenia. No authority supports the notion that an inability to speak English is a legitimate ground to deny a defendant the right to self-representation. The record showed defendant persistent but polite in his discussions with the court. And before denying the right on the grounds of mental illness, courts must engage in a careful analysis of defendant's capacity to perform at trial after considering the symptoms of the mental illness. Here, the trial court simply heard that defendant was diagnosed with schizophrenia two years earlier, and did not consider or discuss any particular symptoms that would have made it difficult for defendant to represent himself.

The denial of a defendant's right to self-representation is a structural defect requiring automatic reversal. The defendant's case was remanded for a new trial.

**People v. Span, 2021 IL App (2d) 180966** The trial court substantially complied with Rule 401(a) even though it described the charges immediately after, rather than before, accepting defendant's waiver of counsel. Defendant was educated, had some experience in the justice system, and had an independent reason for self-representation. Accordingly, the waiver was voluntary and a post-conviction petition alleging appellate counsel's failure to raise a 401(a) issue on direct appeal was properly dismissed at the second stage.

**People v. Rainey, 2019 IL App 1st 160187** Prior to trial, defendant's disagreements with his public defender caused him to waive counsel and proceed *pro se*. Shortly thereafter he

requested re-appointment of the public defender before waiving counsel and going *pro se* a second time, then finally accepting the appointment of counsel. On the eve of trial, defendant again requested to represent himself. The trial court denied the request. Defendant pled guilty and received a 40-year sentence. He moved to withdraw the plea, arguing the court's refusal to allow him to proceed *pro se* rendered his guilty plea involuntary. The trial court denied the motion to withdraw the plea.

The Appellate Court affirmed. Assuming denial of the right to self-representation could render a plea involuntary (an unsettled principle of law that the court declined to decide), there was no improper denial here. Waiver of counsel must be "clear and unequivocal." While defendant's waiver here was clear, it was not unequivocal. Defendant repeatedly equivocated, and in doing so sought to delay the proceedings. The fact that defendant's decisions were impulsive and his behavior dilatory and disrespectful supported the trial court's decision.

Although the trial court did mention that it found defendant "incapable" of self-representation, which would not be a proper ground for denial of the right to proceed *pro se* if it referred to the legal ability to conduct a defense, the court's comments here clearly referred to defendant's inability to comport himself in a dignified manner in the courtroom, as exhibited by his outbursts, incessant profanity (spanning 80 pages of record), and flight from the courtroom. Under these circumstances, a defendant forfeits his right to self-representation. Thus, the trial court did not abuse its discretion in refusing a third request for self-representation, or in denying the motion to withdraw his guilty plea.

**People v. Gold-Smith, 2019 IL App (3d) 160665** On the date defendant's case was assigned to a judge, defendant appeared in court with counsel and requested to proceed *pro se* because his appointed counsel was refusing to file a motion to substitute judge. The judge denied the request citing his concern that defendant was asking to represent himself solely to file the substitution motion and would then request that the public defender be re-appointed. The Appellate Court held that defendant had an absolute right to seek substitution and that he was not engaging in serious and obstructionist conduct by requesting to proceed *pro se* in order to do so. The judge and defense counsel had "placed themselves squarely between defendant and his unconditional statutory right to obtain" a substitution of judge. Thus, the trial court abused its discretion in refusing to permit defendant to proceed *pro se*, and the matter was reversed and remanded for a new trial.

**People v. Hunt, 2016 IL App (1st) 132979** As a general rule, a criminal defendant has a constitutional right to represent himself if he makes an unequivocal request to do so. 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. A request to proceed *pro se* that is not accompanied by a request for additional time to prepare should be regarded as timely.

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 delay tactic.

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. 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.

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. There were two outstanding pretrial motions which needed to be addressed, and 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.

**People v. Brzowski, 2015 IL App (3rd) 120376** 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 waiver under Rule 401(a). Thus, Rule 401(a) admonitions are not required so long as standby counsel is present at all times during the trial.

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 trial court also abused its discretion by dismissing defendant's standby counsel before the trial was concluded. 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.

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, which was not true.

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; no Rule 401(a) admonitions were given.

The trial court erred by failing to give Rule 401(a) admonishments before the second trial. Defendant's responses during a pretrial fitness evaluation did not satisfy substantial compliance with Rule 401.

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

Also, the questions asked during the fitness examination were not designed to notify defendant of the possible dangers of self-representation.

Finally, 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.

**People v. Sheley**, 2012 IL App (3d) 090933 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. 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)).

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.

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*. While defendant showed a lack of control after his request to proceed *pro se* was denied, 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.

**People v. Woodson**, 2011 IL App (4th) 100223 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.

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*.

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.

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

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. Although the charge of attempt murder was serious, the facts and the law involved in the charge were not. 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.

**People v. Fisher**, 407 Ill.App.3d 585, 944 N.E.2d 485 (4th Dist. 2011) 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 abused its discretion by denying defendant's motion to represent himself. Defendant 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 based on evidence of innocence, the judge found that defendant did not know the law and needed an attorney.

Defendant's request was not ambiguous where 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 conviction for criminal drug conspiracy was reversed, and the cause was remanded for a new trial.

**People v. Rohlfs**, 368 Ill.App.3d 540, 858 N.E.2d 616 (3d Dist. 2006) 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.

#### **§14-1(f)**

#### **Standby Counsel**

#### **United States Supreme Court**

**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).

Although some of standby counsel's actions "should not serve as a model," defendant's rights under **Faretta** were not violated. The Sixth Amendment is not violated when a trial judge appoints standby counsel, even over the defendant's objection.

However, **Faretta** imposes limits on standby counsel's unsolicited participation. "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).

#### **Illinois Supreme Court**

**People v. Simpson**, 204 Ill.2d 536, 792 N.E.2d 265 (2001) 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 to present mitigation.

**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).

### Illinois Appellate Court

[People v. Allen](#), 2024 IL App (1st) 221681 Defendant's waiver of counsel was valid despite his history of mental illness. Prior to accepting his waiver, the court admonished defendant in accordance with Supreme Court Rule 401(a). Additionally, defendant had been examined for fitness and was found fit to stand trial and to represent himself. And defendant insisted on proceeding *pro se*, even after the court informed him of the pitfalls of doing so. While a defendant who is fit to stand trial may still be unable to validly waive his right to counsel in some circumstances, such was not the case here. Defendant's history indicated that he suffered psychotic episodes when abusing cannabis, a circumstance not present at the time he waived counsel. And, defendant repeatedly acknowledged the disadvantage of proceeding *pro se* but persisted in his desire to do so.

The appellate court also rejected defendant's assertion that the court should have provided specific admonishments about the potential consequences of proceeding with an insanity defense before accepting his waiver of counsel. Specifically, defendant argued that because he was asserting insanity, the court should have informed him that a finding of not guilty by reason of insanity might result in involuntary commitment. Such admonishments are not required by Rule 401 or the insanity statutes, and the appellate court declined to impose a requirement that the Supreme Court and the legislature had not seen fit to mandate.

Finally, the trial court did not abuse its discretion in failing to appoint standby counsel for defendant. While defendant faced trial on multiple felony charges, the case was not particularly complex where defendant did not dispute that he had committed the acts in question and instead argued that he lacked the requisite mental state and that he was insane at the time of the offenses. Defendant presented expert testimony in support of his insanity defense, and the record demonstrated that defendant was of at least moderate intelligence. Thus, the court found that there was no error in declining to appoint standby counsel.

[People v. Talidis](#), 2023 IL App (2d) 220109 Prior to his DWLR trial, defendant's private attorney withdrew over a disagreement about discovery, and defendant moved to proceed *pro se*. The court accepted defendant's waiver of counsel. After six months of continuances so that defendant could file motions, defendant never filed any, and the court appointed standby counsel. Four days later, on the day of trial, defendant refused to participate. The court ordered standby counsel to act as counsel of record. Counsel asked for a continuance to prepare, but the trial court denied the motion, reasoning that an attorney appointed for a defendant tried *in absentia* need not be prepared for trial under [725 ILCS 5/115-4.1\(a\)](#). Defendant was found guilty, and on appeal, argued the court erred in denying the request for a continuance.

The appellate court affirmed. It initially determined that section 115-4.1(a), which sets forth the procedures for a trial *in absentia*, including the appointment of counsel, did not apply to defendant. See [People v. Eppinger](#), 2013 IL 114121 (section 115-4.1 applies only to defendants not in custody). As such, before reaching the ruling on the continuance, the



appellate court first determined whether the court erred in appointing counsel despite defendant's desire to represent himself. The appellate court found a proper termination of the right to self-representation. Defendant intentionally disrupted the trial process, first dragging it out for several months with false assurances of an imminent motion, and then refusing to participate on the day of trial. Appointing counsel at this point was a proper exercise of discretion. For similar reasons, the trial court exercised proper discretion when it appointed standby counsel as the counsel of record.

Nor did the trial court error in denying counsel's request for a continuance. A court's decision to deny a continuance for the preparation of trial is reviewed for an abuse of discretion. Reviewing courts consider several factors, including the movant's diligence, the seriousness of the charges, judicial economy, the complexity of the case, and the reason for counsel's unpreparedness. Here, although counsel acted diligently in requesting the continuance, and only two witnesses would be inconvenienced, other factors supported the denial of the continuance, including the fact that counsel "had at least the lunch break to prepare for defendant's case, which was not complex."

Finally, the court found counsel was not ineffective where she participated in *voir dire*, made objections, moved to suppress evidence, cross-examined witnesses, and argued in opening and closing.

**People v. Moore**, 2023 IL App (1st) 211421 The trial court did not abuse its discretion when denying defendant's request for standby counsel. Nor did it exhibit prejudicial bias against the *pro se* defendant, despite showing impatience with his attempts to introduce evidence and examine witnesses.

A trial court has no obligation to provide standby counsel once a defendant validly waives the right to counsel. But a court's refusal to appoint counsel can be an abuse of discretion. When deciding whether to appoint standby counsel, the trial court considers "the nature and gravity of the charge, the expected factual and legal complexity of the proceedings, and the abilities and experience of the defendant." **People v. Gibson**, 136 Ill. 2d 362, 380 (1990).

Here, defendant faced an armed robbery charge with a 45-year maximum, but defendant also had ample experience, having faced 13 prior charges of armed robbery. Although none of those went to trial, the case here was relatively straightforward, as it involved two eyewitness identifications and fingerprint evidence. Defendant pointed out that his attempts to examine witnesses and introduce evidence were often ineffectual, but courts do not use hindsight to evaluate the trial court's decision to deny standby counsel.

The appellate court also held that the trial court's conduct did not show prejudicial bias. Defendant first complained that the court made *sua sponte* objections when defendant attempted to examine witnesses or introduce evidence, thereby serving as an advocate for the State. The appellate court disagreed, finding the trial court was merely attempting to guide defendant and ensure evidence was admitted correctly. Defendant also alleged the judge showed hostility and belittled defendant. Defendant noted that at one point, the court appeared to refer to defendant as "Boy." After asking defendant a question, the judge stated: "Uh? Boy, that's not an answer. That's the only answer that you're really good at is 'uh'."

The appellate court conceded that the judge showed impatience and made "uncomplimentary remarks," but in context, they were aimed at controlling defendant's repeated attempts to refer to inadmissible evidence and therefore not suggestive of bias. As for the "Boy" comment, the appellate court noted the judge had previously used the expression "oh boy," and agreed with the State that the judge was most likely not calling the defendant "boy" but rather using this expression to express frustration. Nevertheless, the

appellate court acknowledged that defendant could have reasonably taken this comment as racist, and cautioned judges to “aspire to be patient, dignified, and courteous to litigants and those they encounter in the courtroom” and “refrain from using language that can be easily misinterpreted.”

**People v. Hood**, 2022 IL App (4th) 200260 The trial court did not err in denying a *pro se* defendant’s request for standby counsel.

Defendant first alleged that the trial court failed to exercise discretion, and instead implemented a blanket policy against standby counsel. But a review of the complete record established that the trial court merely stated it disfavored standby counsel, before expressly stating that it did not have a blanket policy.

In **People v. Gibson**, 136 Ill. 2d 362 (1990), the Illinois Supreme Court set forth relevant factors for deciding whether to appoint standby counsel: (1) the nature and gravity of the charge, (2) the factual and legal complexity of the proceedings, and (3) the abilities and experience of the defendant.

Rather than applying the **Gibson** factors, the appellate court focused on the many “pitfalls” of self-representation, and expressed its view that denial of standby counsel was an effective way to dissuade self-representation. It pointed out that no appellate court has ever found a trial court’s decision not to appoint standby counsel to be an abuse of discretion. Defendant argued that the seriousness of the charges (sexual assault and unlawful restraint) together with the complexity of the DNA evidence in the case, weighed in favor of appointment of standby counsel under **Gibson**. But the appellate court viewed these facts as evidence only of “the foolishness of defendant’s decision to proceed *pro se*.”

**People v. Hui**, 2022 IL App (2d) 190846 The trial court substantially complied with Rule 401(a) before accepting defendant’s waiver of counsel. Although the court did not explicitly inform defendant of the right to counsel, the record established defendant knew he had a right to counsel. Defendant was initially represented by private counsel, and later requested a public defender. That request was granted before defendant decided to proceed *pro se*. The trial court repeatedly warned defendant about the benefits of counsel. Thus, it can be reasonably inferred that defendant understood he had a right to counsel before waiving counsel and proceeding *pro se*.

The court did not err in refusing defendant’s request for stand-by counsel. In determining whether to appoint standby counsel, a trial court should consider (1) the nature and gravity of the charge, (2) the factual and legal complexity of the proceedings, and (3) the abilities and experience of the defendant. Here, defendant faced 13 counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse, and his convictions led to a sentence of 75 years in prison. However, the facts and law at issue were not complex, with straightforward allegations and no scientific or expert testimony. Finally, defendant was college-educated and had litigated multiple complex pretrial motions. Therefore, the trial court did not abuse its discretion in denying standby counsel.

**People v. Harris**, 2020 IL App (3d) 160169 The trial court did not abuse its discretion in denying standby counsel for defendant who elected to proceed *pro se*. In **People v. Gibson**, 136 Ill. 2d 362 (1990), the Illinois Supreme Court set out the factors to be considered in determining whether to appoint standby counsel: (1) the seriousness of the charge, (2) the complexity of the proceedings, and (3) the abilities and experience of the defendant.

Here, defendant was charged with delivery of a controlled substance within 1000' of a school, which is a serious offense, but the evidence was not complicated. Defendant did not deny selling the drugs but instead asserted an entrapment defense. While his closing argument at trial was “somewhat inarticulate,” the court concluded that defendant had been able to argue motions, conduct *voir dire*, and present his entrapment defense. The court also cited defendant’s lengthy criminal history in support of its finding that he had extensive familiarity with the court system.

The dissenting justice noted that the trial court’s decision to deny standby counsel was based solely on its determination that defendant was able to read and write, which is too low a bar and fails to relate to the **Gibson** factors. The dissenting justice also concluded that all three of the **Gibson** factors weighed in favor of stand-by counsel and would have found an abuse of discretion by the trial court.

**People v. Brzowski**, 2015 IL App (3rd) 120376 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 waiver under Rule 401(a). Thus, Rule 401(a) admonitions are not required so long as standby counsel is present at all times during the trial.

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 trial court also abused its discretion by dismissing defendant’s standby counsel before the trial was concluded. 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.

**People v. Ware**, 407 Ill.App.3d 315, 943 N.E.2d 1194 (1st Dist. 2011) 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. 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. Additionally, 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. Although the charge of attempt murder



was serious, the facts and the law involved in the charge were not. 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.

## **§14-2**

### **Waiver of Counsel**

#### **United States Supreme Court**

**Iowa v. Tovar**, 541 U.S. 77, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) 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.

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.

**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).

**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.

**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.

**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.

#### **Illinois Supreme Court**

**People v. Marcum**, 2024 IL 128687 The trial court substantially complied with Rule 401(a) prior to accepting defendant's waiver of counsel, despite making a number of misstatements

about the charges and terms. Defendant was told he faced a single 7-to-14 year extended-term sentence. In reality, he faced two non-extendible 3- to 7-year sentences that could be served consecutively. He was also informed he faced an MSR term of four years-to-life rather than the correct term of four years. The appellate court found the issue forfeited and no clear error because the admonishments substantially complied with Rule 401(a).

The Supreme Court affirmed. “Substantial compliance with Rule 401(a) will effectuate a valid waiver ‘if the record indicates that the waiver was made knowingly and voluntarily, and the admonishment the defendant received did not prejudice his rights.’” The Supreme Court “has consistently found substantial compliance with Rule 401(a) when the trial court accurately stated the maximum sentence prescribed by law.” The court has even found an understatement of the maximum substantially complied when the record established the defendant’s waiver was motivated by other reasons. [People v. Wright, 2017 IL 119561](#) (valid waiver where defendant was told he faced 60 years rather than 75, because decision was motivated by speedy trial concerns).

In this case, defendant knew of the potential maximum prison sentence even if he was not correctly informed as to how that maximum could arise. And while the court gave an incorrect maximum MSR term, the record indicated this did not prejudice defendant because he was intent on discharging his attorney for a variety of reasons having nothing to do with his sentence, including the attorney’s perceived aggressive demeanor toward defendant and his refusal to file a bond motion.

Finally, the mistakes in the admonishments pertaining to defendant’s eligibility for an extended-term did not require new admonishments before defendant represented himself at sentencing. The continuing waiver rule applies, and the misstatements were not a substantial change in circumstances that would affect that continuing waiver, because the court consistently provided the correct maximum term.

[People v. Reese, 2017 IL 120011](#) Under [Illinois Supreme Court Rule 401\(a\)](#), before accepting a waiver of counsel the trial court must admonish a defendant of, among other things, the minimum and maximum sentences he faces, including any consecutive sentences. The purpose of the rule is to ensure that a waiver of counsel is knowing and intelligent. Strict compliance with the rule is not required. A court substantially complies with the rule if the record shows that the waiver was knowing and intelligent and the court’s admonitions did not prejudice defendant.

Here the trial court admonished defendant about the potential sentences he faced, including that some of his sentences could run consecutively, and that two charges alone carried a maximum potential sentence of 160 years. The court however failed to admonish defendant that his sentences would run consecutively to his existing natural life sentence for a previous murder conviction.

The trial court substantially complied with [Rule 401\(a\)](#). Defendant was informed that he faced “massive time” and the admonitions “surely impressed upon defendant the gravity of the potential punishments.” The failure to inform defendant that his potential sentences could run consecutive to his natural life sentence could not have affected his decision to waive counsel.

[People v. Wright, 2017 IL 119561](#) Under [Illinois Supreme Court Rule 401\(a\)](#), the trial court shall not permit a defendant to waive counsel without first informing him of, among other things, the minimum and maximum sentence prescribed by law. Strict technical compliance with [Rule 401\(a\)](#) is not always required. Instead, substantial compliance is sufficient if the

record indicates that defendant's waiver was knowing and voluntary.

Here, the trial court incorrectly admonished defendant that the maximum sentence he faced was 60 years' imprisonment rather than the correct 75-year sentence. The Supreme Court nonetheless held that under the facts of this case, the trial court substantially complied with [Rule 401\(a\)](#). Defendant was 37 years old, had attended college for two years, and had previously represented himself on appeal in a felony case. He repeatedly expressed his desire to represent himself from the beginning of the case, and the reason he wanted to go *pro se* - for speedy trial reasons - had nothing to do with the maximum sentence.

The court also found that defendant was not prejudiced by the incorrect admonishment. Defendant never alleged that he would not have waived counsel if he had known the correct maximum sentence, and the sentence he received was only 50 years imprisonment.

**People v. Campbell**, 224 Ill.2d 80, 862 N.E.2d 933 (2007) 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."

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\(a\)](#), making defendant's waiver of counsel ineffective. "The 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."

**People v. Redd**, 173 Ill.2d 1, 670 N.E.2d 583 (1996) 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 an understanding of the charges and potential penalties. The record clearly showed that defendant was able to understand the proceedings and assist in his defense.

Defendant was not required to be readmonished of the right to counsel after the verdict and before sentencing. Illinois follows the "continuing waiver" rule, and the Court rejected the argument that the "continuing waiver" rule should not apply in capital cases.

The passage of three years between the remand and trial did not require 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).

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) 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.

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.

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. Lego**, 168 Ill.2d 561, 660 N.E.2d 971 (1995) 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.

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. 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. 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. 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) (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) (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. 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).

### **Illinois Appellate Court**

**People v. Williams**, 2025 IL App (1st) 230584-B The trial court failed to inform defendant of the potential sentencing range before accepting his waiver of counsel, in violation of Rule 401(a). Defendant was found guilty and, while he initially raised the 401(a) issue in a post-trial motion, he filed an amended motion which did not include the issue.

The appellate court initially reversed and remanded, finding the 401(a) violation to be second-prong plain error. But the supreme court ordered reconsideration in light of **People v. Ratliff**, 2024 IL 129356. In **Ratliff**, the court found defendant's failure to challenge a 401(a) violation in a post-plea motion resulted in a waiver of the issue. The supreme court then held that even if the issue was merely forfeited rather than waived, a 401(a) violation is not second-prong plain error.

Even though the plain error portion of the decision was judicial *dicta*, the appellate court was bound to follow it. Here, defendant's second post-trial motion negated his first motion, meaning the 401(a) issue was forfeited. Because the issue was not cognizable as second-prong plain error, defendant's conviction was affirmed.

**People v. Allen**, 2024 IL App (1st) 221681 Defendant's waiver of counsel was valid despite his history of mental illness. Prior to accepting his waiver, the court admonished defendant in accordance with Supreme Court Rule 401(a). Additionally, defendant had been examined



for fitness and was found fit to stand trial and to represent himself. And defendant insisted on proceeding *pro se*, even after the court informed him of the pitfalls of doing so. While a defendant who is fit to stand trial may still be unable to validly waive his right to counsel in some circumstances, such was not the case here. Defendant's history indicated that he suffered psychotic episodes when abusing cannabis, a circumstance not present at the time he waived counsel. And, defendant repeatedly acknowledged the disadvantage of proceeding *pro se* but persisted in his desire to do so.

The appellate court also rejected defendant's assertion that the court should have provided specific admonishments about the potential consequences of proceeding with an insanity defense before accepting his waiver of counsel. Specifically, defendant argued that because he was asserting insanity, the court should have informed him that a finding of not guilty by reason of insanity might result in involuntary commitment. Such admonishments are not required by Rule 401 or the insanity statutes, and the appellate court declined to impose a requirement that the Supreme Court and the legislature had not seen fit to mandate.

Finally, the trial court did not abuse its discretion in failing to appoint standby counsel for defendant. While defendant faced trial on multiple felony charges, the case was not particularly complex where defendant did not dispute that he had committed the acts in question and instead argued that he lacked the requisite mental state and that he was insane at the time of the offenses. Defendant presented expert testimony in support of his insanity defense, and the record demonstrated that defendant was of at least moderate intelligence. Thus, the court found that there was no error in declining to appoint standby counsel.

**People v. Brooks, 2024 IL App (3d) 220407** Defendant did not enter a valid waiver of counsel where, at the time of the waiver, the court failed to inform defendant of the nature of the charge, the minimum and maximum sentence, and the right to be represented by counsel. The only time defendant was informed of the nature of the charge or the sentencing range was at his initial appearance, nearly three years prior. At the time of the waiver, the court made significant efforts to convince defendant that it was in his best interest to have counsel, but such admonishments are not a substitute for those required by Rule 401(a).

And while counsel was re-appointed at defendant's request prior to trial, he had been unrepresented at critical pre-trial stages of the proceedings, including a discovery hearing. This was second-prong plain error, requiring reversal and remand for a new trial.

**People v. Anderson, 2024 IL App (2d) 230077** As a matter of second-prong plain error, defendant's waiver of his right to counsel was invalid where the court failed to admonish him at the time of the waiver about the nature of the charges brought against him, the minimum and maximum sentences he faced if convicted, or his right to be represented by counsel, as required by Supreme Court Rule 401(a). Admonishments given 26 days prior, before defendant expressed a desire to proceed *pro se*, were insufficient to satisfy the rule. And, while the record may have shown that defendant was competent to waive counsel, his competence is irrelevant where he was not timely admonished in substantial compliance with Rule 401(a).

The court clarified that admonishments need not always be given on the same day the court accepts a waiver of counsel. But, they must be given at a time when defendant has at least expressed a desire to waive, even if the ultimate waiver does not come until later.

**People v. Finlaw, 2023 IL App (4th) 220797** Defendant, who had been found unfit and then subsequently found restored to fitness, waived his right to counsel and proceed *pro se* at trial.

On appeal, defendant argued that the trial court erroneously believed defendant had an “unfettered constitutional right” to self-representation and that the court had failed to determine that he had the mental capacity to waive counsel.

Nothing in the record supported the assertion that the trial court believed defendant’s right to proceed *pro se* was “unfettered.” The court simply observed that defendant had a constitutional right to self-representation. A defendant who is fit to stand trial, may proceed *pro se* even if mentally ill, so long as his waiver of counsel is both knowing and voluntary. Here, defendant was twice admonished in strict compliance with Rule 401(a) on two separate dates, and he was given additional written and verbal admonishments consistent with **People v. Ward**, 208 Ill. App. 3d 1073 (1991). While the United States Supreme Court noted in **Indiana v. Edwards**, 554 U.S. 164 (2008), that a court may inquire of a defendant whether he is mentally competent to represent himself before allowing him to waive counsel, a court is not *required* to conduct any additional inquiry before permitting a defendant to proceed *pro se*. The record established that defendant’s waiver here was knowing and voluntary.

**People v. Dyas**, 2023 IL App (3d) 220112 The appellate court concluded that Rule 401(a) admonishments are required for there to be a valid waiver of counsel even after a defendant is sentenced following a guilty plea, thereby disagreeing with **People v. Young**, 341 Ill. App. 3d 379 (4th Dist. 2003). The language in the rule, requiring that admonishments be given to one “accused” of an offense does not limit its application to the pre-trial or pre-plea context. Admonishments after the fact are equally important given that, if a defendant is successful in seeking to withdraw his plea or overturn a verdict, he could again become an “accused” facing any statutorily-available sentence. Accordingly, it is important the defendant be advised of the nature of the charges he is facing and the minimum and maximum available sentence before he chooses to waive counsel at any stage of the proceedings.

Here, the circuit court failed to substantially comply with Rule 401(a) where it provided absolutely no admonishments at the time the court discharged the public defender and permitted defendant to proceed *pro se* on his motion to withdraw guilty plea. An admonishment as to the maximum sentence, given more than six months prior, was insufficient to satisfy the substantial-compliance standard. Thus, the denial of defendant’s motion to withdraw guilty plea was vacated, and the matter was remanded for new post-plea proceedings.

**People v. Stewart**, 2023 IL App (1st) 210912 The trial court failed to comply with Rule 401(a) before accepting the waiver of counsel prior to defendant’s murder trial. The appellate court remanded for a new trial.

The State alleged forfeiture, an argument the appellate court found “absurd.” Defendants cannot be expected to object to the absence of required admonishments. Regardless, the absence of an effective waiver of counsel is second-prong plain error.

The appellate court acknowledged that strict compliance with Rule 401(a) is not necessary. But in cases finding substantial compliance, the admonishments were imperfect or incomplete, and the record otherwise demonstrated a knowing and intelligent waiver of counsel.

Here, by contrast, the trial court almost completely neglected Rule 401(a). Although defendant’s argument on appeal concerned only Rule 401(a)(1) (nature of the charge), and 401(a)(2) (sentencing range), the appellate court noted that the trial court also failed to inform defendant he had the right to counsel as required by Rule 401(a)(3). Instead, the trial

court merely stated that the public defender is “appointed to represent defendants who cannot afford a lawyer.” This statement did not sufficiently apprise defendant of his constitutional right to counsel.

The State urged the appellate court to piece together various references to the charges and sentencing range that were mentioned at the bond hearing or arraignment, both of which occurred long before the waiver, or at the first day of trial, which occurred *after* the waiver. The appellate court refused. The entirety of the charges and sentencing range were never fully explained at the time of the waiver, and regardless, the defendant was never asked if he understood the charges or sentencing ranges as required by Rule 401(a).

**People v. Johnson, 2023 IL App (4th) 210662** At the time of defendant’s ultimate decision to waive counsel, the trial court did not provide admonishments about the nature of the charges or the minimum or maximum sentences he faced, as required by Supreme Court Rule 401(a). Nevertheless, the appellate court held that the waiver was not invalid. Rule 401(a) requires substantial compliance, and any failure to comply will be overlooked if the record otherwise shows a knowing and intelligent waiver and lack of prejudice.

Here, the trial court twice admonished defendant in accordance with Rule 401(a), and only the third and final admonitions were imperfect. Defendant was also informed of the charges and sentencing ranges after the waiver, and subsequent to that was continually offered counsel up until the day before trial. He also made a conscious decision to prioritize his own *pro se* motions over the assistance of both his original private attorney and a public defender. Thus, the record showed a knowing and intelligent decision.

**People v. McKee, 2022 IL App (2d) 210624** The record failed to show a valid waiver of counsel under Rule 401(a), a second-prong plain error requiring a new trial.

Before defendant’s trial for two Class A misdemeanors and two petty offenses, at which he represented himself, the report of proceedings showed discussions between the judge and defendant concerning the right to counsel. During these discussions, the judge advised defendant about the nature of one of the misdemeanor charges and the petty offenses. The judge did not clarify that defendant faced potential consecutive sentences. After his conviction, defendant alleged on appeal an invalid waiver of counsel due to insufficient admonishments. The appellate court agreed. Rule 401(a) requires the judge to inform the defendant of the nature of all pending charges, and all potential maximum sentences, including consecutive sentences, even if not sought by the prosecution. By mentioning only one of the two pending misdemeanors, and neglecting to discuss consecutive sentences, the judge failed to substantially comply with Rule 401(a).

The State pointed out that the record contained a written waiver on a prior court date, presumably following full admonishments. But the waiver was executed on a date that was not transcribed by the court reporter. The appellate court refused to consider the written waiver. Rule 401(b) provides that “[t]he proceedings required by this rule to be in open court shall be taken verbatim, and upon order of the trial court transcribed, filed and made a part of the common law record.” Courts have consistently required strict compliance with Rule 401(b), so any off-the-record waivers or admonishments are ineffective. Rule 401(b) abrogates other general presumptions that may apply in the case of an incomplete record, such as the presumption that the common law record is correct, or the rule that an incomplete record must be construed against the appellant.

**People v. Hui, 2022 IL App (2d) 190846** The trial court substantially complied with Rule 401(a) before accepting defendant’s waiver of counsel. Although the court did not explicitly

inform defendant of the right to counsel, the record established defendant knew he had a right to counsel. Defendant was initially represented by private counsel, and later requested a public defender. That request was granted before defendant decided to proceed *pro se*. The trial court repeatedly warned defendant about the benefits of counsel. Thus, it can be reasonably inferred that defendant understood he had a right to counsel before waiving counsel and proceeding *pro se*.

The court did not err in refusing defendant's request for stand-by counsel. In determining whether to appoint standby counsel, a trial court should consider (1) the nature and gravity of the charge, (2) the factual and legal complexity of the proceedings, and (3) the abilities and experience of the defendant. Here, defendant faced 13 counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse, and his convictions led to a sentence of 75 years in prison. However, the facts and law at issue were not complex, with straightforward allegations and no scientific or expert testimony. Finally, defendant was college-educated and had litigated multiple complex pretrial motions. Therefore, the trial court did not abuse its discretion in denying standby counsel.

**People v. Khan, 2021 IL App (1st) 190051** While the Illinois Supreme Court has never held that Rule 401(a) applies to probation revocation proceedings, similar requirements have been imposed. Specifically, for a court to find a knowing and voluntary waiver of counsel in probation revocation proceedings, the court should address the defendant in open court and determine that he or she understands: (1) the purpose of the revocation proceedings and the nature of the violation(s) alleged; (2) that the defendant has the rights of confrontation, cross-examination, and representation by counsel to be provided at no cost if the defendant is indigent; and (3) the minimum and maximum penalties.

Here, defendant was not properly admonished, and accordingly his waiver of counsel was not knowing and voluntary. The court told defendant that the alleged probation violation was a new DUI charge, when it was actually defendant's failure to report to his probation officer that was at issue. And, the court did not advise defendant of the applicable sentencing range on the probation violation prior to his counsel waiver, although it did tell him the sentencing range for the new DUI charge. Defendant's counsel waiver was invalid as to the probation revocation, even though it was upheld as to the new DUI charge.

**People v. Khan, 2021 IL App (1st) 190679** **Indiana v. Edwards, 554 U.S. 164 (2008)** does not require a trial court to deny defendant the right to represent himself where defendant has been examined and found fit to stand trial. Defendant here was subject to two separate behavioral clinical examinations at the court's request, and both times was deemed fit. Further, the record showed that defendant used the legal processes available to him to file motions, call and examine witnesses, and present legal argument, albeit unsuccessfully. Defendant's choice to represent himself may have been unwise, but the record failed to show it was the result of mental incompetence.

The court did not abuse its discretion by allowing defendant to waive counsel. Defendant was admonished, more than once, in accordance with Supreme Court Rule 401(a). While defendant indicated several times that he did not believe the charges against him were valid, the record showed that he understood the nature of those charges. And, the court did not err in refusing defendant's request for standby counsel. The case was not particularly complex, and the appointment of standby counsel is a matter of discretion which the court properly exercised here.

**People v. Anderson, 2021 IL App (2d) 190128** Defendant challenged the elevation of his DUI to a Class 2 felony, arguing that one of the two prior DUI convictions which the State used as a basis for enhancement was invalid. Specifically, defendant asserted that the prior DUI conviction in question was obtained while he was not represented by counsel and had not entered a valid waiver of counsel.

Defendant's challenge to his prior DUI conviction in the instant appeal amounted to a collateral attack. Accordingly, defendant bore the burden of presenting some evidence to rebut the presumption that he validly waived counsel in the prior proceedings. Had defendant made the challenge on direct appeal from the prior conviction, the record would have had to affirmatively show a knowing and voluntary waiver of the right to counsel. Here, the docket sheet in the prior DUI file was silent on the subject, and defendant failed to present transcripts, court documents, or affidavits to rebut the presumption that the prior conviction was validly obtained. The Appellate Court affirmed the enhancement of defendant's DUI to a Class 2 felony.

**People v. Moore, 2021 IL App (1st) 172811** Before a defendant may validly waive counsel and proceed *pro se*, Supreme Court Rule 401(a) requires that the trial court admonish him and determine that he understands the nature of the charges, the minimum and maximum penalties, and the right to counsel. Substantial compliance with the Rule will suffice.

Here, defendant faced charges including theft of greater than \$1 million, financial institution fraud, and financial criminal enterprise, based on allegations that he fraudulently attempted to obtain title to five Chicago properties. Another individual, Farr, was targeted during the same investigation and was similarly charged under a separate indictment number. Defendant and Farr were present at a pretrial hearing during which both were permitted to waive counsel. At that hearing, Farr was given the Rule 401 admonishments, but defendant was not.

Rule 401(a) admonishments to another individual in defendant's presence are insufficient to render defendant's waiver of counsel knowing and voluntary. To hold otherwise would assume that defendant heard and understood everything the other individual was told and that defendant was subject not just to the same charges but also to the same sentencing range based on his own personal criminal history. Defendant was never given any Rule 401 admonishments, and the court declined to comb through the record "to scrap together bits and pieces" to support a finding that he was aware of the nature of the charge, the potential penalties, and his right to counsel. Such a procedure would render Rule 401(a) meaningless. Reversed and remanded for a new trial.

**People v. Martin, 2021 IL App (4th) 180267** After representing himself at various times during pretrial and trial proceedings, and having the assistance of counsel at other times, defendant sought and obtained the reappointment of counsel for sentencing. Before being sentenced, defendant again expressed the desire to proceed *pro se*, and the court allowed his request. However, the court did not admonish defendant in accordance with Supreme Court Rule 401(a) at that time, rendering his waiver of counsel invalid. Even though defendant had been admonished during a pretrial waiver of counsel, sentencing is a separate critical stage of the proceedings and separate admonishments were required where defendant had accepted the appointment of counsel in between. And, while defendant did not raise the issue in his post-sentencing motion, it was reviewable as second-prong plain error as the right to counsel is a substantial right.



**People v. Miller, 2020 IL App (1st) 163304** When a defendant complained about his attorney at the post-trial motion stage, the trial court granted his request to proceed *pro se* to file new post-trial motions. The court also scheduled a **Krankel** hearing. While the trial court acted properly in admonishing defendant and allowing him to proceed *pro se* for post-trial motions, the court erred when it failed to inform defendant of his right to a new attorney for purposes of the **Krankel** hearing. Absent knowledge of his right to counsel for the **Krankel** hearing, defendant's waiver of counsel was not made knowingly and voluntarily. The Appellate Court remanded for further proceedings on the ineffectiveness claim.

**People v. Smith, 2020 IL App (3d) 160454** The trial court failed to comply with Rule 401(a) before accepting defendant's waiver of counsel, and therefore committed plain error requiring a new trial. Defendant was initially charged with multiple counts of forgery and fleeing and eluding. The court admonished him as to these counts and sentencing ranges. After this appearance, the State filed a superseding indictment adding charges of weapon possession. During the next court hearing, his counsel waived the reading of the additional charges and corresponding sentencing ranges. The defendant ultimately waived counsel, but the court never mentioned the new charges or sentencing ranges until a subsequent hearing. Thus, the trial court failed to admonish defendant as to the nature of the charges or the minimum or maximum sentence he faced before allowing him to waive counsel. The lack of any admonishments whatsoever until the hearing following defendant's waiver failed the test of substantial compliance.

**People v. Maxey, 2018 IL App (1st) 130698-B** Defendant's waiver of counsel was upheld despite the fact that the circuit court provided erroneous admonishments as to the potential sentence. While the court told defendant he faced Class 1 sentencing from 4-to-15 years, he was actually required to be sentenced as a Class X offender, with a range of 6-to-30 years, and he received a 20-year sentence following his conviction.

In **People v. Wright, 2017 IL 119561**, the trial court similarly misstated the maximum sentence during counsel-waiver admonishments, but the Supreme Court looked to the specific facts of the case and found substantial compliance with Rule 401(a) where the defendant was educated, had previously represented himself in a separate case, and wanted to proceed *pro se* to preserve his speedy trial right. Similarly, defendant here had an extensive criminal background, had represented himself previously, filed appropriate pre-trial motions, and ultimately had counsel reappointed for trial and sentencing after losing a pre-trial motion to suppress. Nothing in the record suggested defendant would have changed his mind about waiving counsel had he been properly admonished as to the sentencing range.

**People v. Owens, 2018 IL App (3d) 150616** During a lengthy exchange with the trial judge, defendant at various points asked to represent himself, said he was not prepared to represent himself, and asked for a new lawyer. While the trial court initially erred in concluding that defendant could not represent himself because he was illiterate, the judge did go on to consider defendant's ability to waive counsel under the correct standard, *i.e.*, whether he could knowingly and intelligently relinquish his right to counsel. The trial court determined he could not make a knowing waiver because he admitted he was not prepared to represent himself, did not know the law, and had "educational issues." The Appellate Court affirmed, but on the alternative ground that defendant had not even made a clear and unambiguous request to proceed *pro se*.

The dissent believed there was a clear request to proceed *pro se* and would have reversed and remanded for further proceedings. Noting that the constitutional right to self-representation should be balanced with the competing need to protect the integrity of the judicial process, however, the dissent proposed that the counsel-waiver standard be modified to permit a trial court to decline a defendant's waiver of counsel where defendant does not have "the ability to competently perform 'trial tasks'" such as preparing a defense, making motions, and conducting a trial.

**People v. Perkins**, 2018 IL App (1st) 133981 The trial court did not err in denying defendant's request to represent himself at his murder trial, because the record showed that defendant did not have the mental capacity to understand Rule 401(a) and waive counsel. When defendant made his request, the court asked him if he understood what was involved in a death penalty case, and defendant responded, "Sir, I don't - I'm not interested in that right now." The Appellate Court found this response sufficient to show defendant's inability to knowingly waive his right to counsel. Also, defendant had a history of schizophrenia and psychotropic medication, and demanded trial before discovery had been completed. Nor did the trial court err in failing to admonish defendant under Rule 401(a), as the admonishments need only be read when the defendant is allowed to proceed *pro se*.

**People v. Redmond**, 2018 IL App (1st) 151188 Defendant had been represented by six different attorneys during the 17 months leading up to the trial in this case, some private and some from the public defender's office. After asking to proceed *pro se* on several occasions, and telling the court that he "understood the seriousness of the charge," defendant waived counsel and represented himself at trial on a misdemeanor charge of domestic battery. He was convicted and sentenced to 364 days in jail. On appeal, defendant challenged his waiver of counsel, because he had not been admonished of the potential sentence. The Appellate Court concluded that defendant's own statements showed that his waiver was knowing and voluntary, even though the court did not specifically state the sentencing range. Further, this was the third time defendant had been charged with domestic battery, and the record established that the absence of a sentencing admonishment did not influence defendant's decision to waive counsel.

**People v. Harrison**, 2018 IL App (3d) 150419 A defendant has the right to proceed *pro se* in post-conviction proceedings. If a defendant seeks to waive post-conviction counsel after appointment, the court is not required to admonish him in accordance with **Faretta v. California**, 422 U.S. 806 (1975), or **Illinois Supreme Court Rule 401**, even where a new trial is possible if defendant is successful on the petition. The Court distinguished **People v. Lesley**, 2017 IL App (3d) 140793, where **Rule 401(a)** admonishments were required for a post-conviction counsel waiver; **Lesley** involved a waiver due to the defendant's misconduct and not an affirmative request to proceed *pro se*, which was at issue here. Likewise, **Rule 401(a)** admonishments would serve no purpose here because defendant had already been convicted and sentenced and thus was aware of the information contained in such admonishments.

**People v. Williamson**, 2018 IL App (3d) 150828 The trial court's admonishments about the pitfalls of proceeding *pro se* and refusal to consider appointing standby counsel did not interfere with defendant's right of self-representation where defendant was permitted to waive counsel. The fact that defendant retained private counsel two weeks later was an

abandonment of his right of self-representation and nothing in the record suggested that the court's earlier comments changed defendant's mind.

**People v. Washington, 2017 IL App (4th) 150054** A waiver of the right to the assistance of counsel is valid only if the record shows that it was made knowingly and intelligently. Where the trial court finds a *bona fide* doubt of fitness to stand trial, the defendant loses the ability to knowingly and intelligently waive the right to counsel. Allowing a defendant to proceed *pro se* while there is a bona fide doubt of fitness violates the Sixth Amendment right to counsel.

Thus, once a *bona fide* doubt of fitness is established, the trial court is required to appoint counsel - even over the defendant's objections - until defendant regains fitness to stand trial. The trial court's order finding defendant unfit to stand trial was reversed and the cause remanded with instructions to conduct a new fitness hearing at which the defendant is to be represented by counsel, whether or not she objects.

**People v. Albea, 2017 IL App (2d) 150598** The trial court committed plain error when it denied defendant's unequivocal request to represent himself at trial. Defendant's request to proceed *pro se* was not untimely where it was made three weeks prior to trial. While the case had been pending for more than three years before defendant's request, only the arraignment and discovery hearings had been held during that time. Those were not "meaningful proceedings" which might permit a court to deny an unequivocal request to proceed *pro se*. The trial court also erred in focusing only on defendant's legal abilities in denying his request. While the issue was not preserved in the motion for new trial, erroneous denial of self-representation is second-prong plain error. The Appellate Court reversed and remanded for a new trial.

**People v. Mitchell, 2016 IL App (2d) 140057** 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.

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 could not change his mind later. Defendant pled guilty that same day.

The trial court improperly refused to reappoint counsel. 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, the Court 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.

**People v. Henry, 2016 IL App (1st) 150640** 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 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. 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. Under Supreme Court [Rule 401](#), a defendant 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.

**People v. Jackson, 2016 IL App (1st) 133741** 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.

**People v. Washington, 2016 IL App (1st) 131198** 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.

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.

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.

Here, 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 trial court erred by failing to give new [Rule 401\(a\)](#) admonishments before accepting defendant’s waiver of counsel. The original waiver did not continue in light of defendant’s request for counsel on the post-trial motion.

**People v. Seal, 2015 IL App (4th) 130775** 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.

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.

**People v. Bartholomew, 2015 IL App (4th) 130575** 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).

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 asked a series of questions 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.



**People v. Brzowski, 2015 IL App (3rd) 120376** 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 waiver under Rule 401(a). Thus, Rule 401(a) admonishments are not required so long as standby counsel is present at all times during the trial.

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) admonishments were required.

The trial court also abused its discretion by dismissing defendant's standby counsel before the trial was concluded. 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.

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, which was not true.

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; no Rule 401(a) admonishments were given.

The trial court erred by failing to give Rule 401(a) admonishments before the second trial. Defendant's responses during a pretrial fitness evaluation did not satisfy substantial compliance with Rule 401.

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

Also, the questions asked during the fitness examination were not designed to notify defendant of the possible dangers of self-representation.

Finally, 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) admonishments.

**People v. Jamison, 2014 IL App (5th) 130150** 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 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.

**People v. Moore**, 2014 IL App (1st) 112592 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 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.

**People v. LeFlore**, 2013 IL App (2d) 100659 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\(a\)](#).

Further, the prosecution's later informing defendant that it "believed" that he was Class X mandatory based on his prior history was insufficient to comply with [Rule 401\(a\)](#), which requires that defendant be admonished *before* waiving counsel.

Likewise, defendant's criminal history did not demonstrate the high degree of legal sophistication which would cure the defect. 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*."

**People v. Bahrs**, 2013 IL App (4th) 110903 Whether a court complied with [Rule 401\(a\)](#) 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\(a\)\(2\)](#). Citing **People v. Koch**, 232 Ill.App.3d 923, 598 N.E.2d 288 (4<sup>th</sup> Dist. 1992), the Court held that 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.

**People v. Gillespie, 2012 IL App (4th) 110151** Supreme Court [Rule 401\(a\)](#) requires that the court admonish defendant at the time that it accepts defendant's waiver of his right to counsel. 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\(a\)](#).

**People v. Ames, 2012 IL App (4th) 110513** The right to counsel may be relinquished in three ways: (1) waiver, (2) forfeiture, and (3) waiver by conduct.

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\(a\)](#).

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.

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.

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\(a\)](#).

**People v. Vazquez, 2011 IL App (2d) 091155** 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.

Here, 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.

**People v. Black**, 2011 IL App (5th) 080089 In two situations, substantial compliance with Rule 401 may be sufficient: (1) where the defendant was not prevented by the incomplete admonitions from giving a knowing and intelligent waiver; and (2) 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 defendant proceeded to preliminary hearing without counsel. 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.

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

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

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

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. It is irrelevant whether the issue is analyzed under the constitutional right to counsel or the statutory right to counsel.

Where defendant was charged with 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.

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."

The fact that defendant was represented by counsel at 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.

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

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

**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."

**People v. Jiles**, 364 Ill.App.3d 320, 845 N.E.2d 944 (2d Dist. 2006) 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.

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.

Admonitions given to the defendant at his arraignment - some three months before the waiver – did not constitute 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. Young**, 341 Ill.App.3d 379, 792 N.E.2d 468 (4th Dist. 2003) The trial court did not err 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."

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).

**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. 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) (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. 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. 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.

## **§14-3**

### **Attorney Fees and Costs**

#### **§14-3(a)**

##### **Generally**

### **United States Supreme Court**

**Luis v. United States**, 578 U.S. \_\_\_, 136 S.Ct. 1083, 194 L.Ed.2d 256 (2016) 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, and 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. A pretrial order freezing assets which are not related to the charged crime violates the Sixth Amendment right to hire counsel of choice.

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. 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.

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. 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.

**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.

### **Illinois Appellate Court**

**People v. Aguirre-Alarcon**, 2016 IL App (4th) 140455 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.

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. 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.

### **§14-3(b)**

#### **Public Defender Fees**

### **United States Supreme Court**

**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.

### **Illinois Supreme Court**

**People v. Hardman**, 2017 IL 121453 Before a trial court imposes a public defender fee pursuant to 725 ILCS 5/113-3.1(a), it must hold a hearing on the defendant's ability to pay. The hearing must be held within 90 days of the final order disposing of the case. Here, the trial court did not hold a sufficient hearing when it merely asked how many times the public defender appeared in court and asked no questions about the defendant's ability to pay before imposing a \$500 fee. But the failure to hold a sufficient hearing within 90 days of the judgment did not require that the fee be vacated outright. Instead, the case could be remanded for a hearing despite the 90-day time limit, because when the trial court asked how many times the public defender appeared, it conducted "some sort of hearing," however inadequate. A hearing is ordinarily defined as a judicial proceeding at which a legal question is raised and resolved, and such a proceeding occurred here. Thus, the trial court did not fail to hold a hearing within 90 days, and the appropriate remedy is a remand to complete the hearing.

**People v. Somers**, 2013 IL 114054 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.

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.

Because a hearing was held within 90 days, the Appellate Court had jurisdiction to remand the cause for a further hearing.

**People v. Gutierrez**, 2012 IL 111590 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."

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. 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.

The court also stated:

[W]e must express our disappointment that, fourteen years after this court's decision in [[People v. Love](#), [177 Ill.2d 550, 687 N.E.2d 32 \(1997\)](#)], defendants are still routinely being denied proper hearings before public defender fees are imposed. . . . In some of these cases, the fee was imposed by the circuit court without a hearing, and in some it was imposed by the circuit clerk. In the present case, . . . the fee was imposed by the Lake County circuit clerk. At oral argument, defense counsel represented that this is a particular problem in Lake County, with the circuit clerk routinely imposing the fee on its own. Even the State referred to the "rogue actions of the Lake County Circuit Clerk."

We admonish the circuit clerks in general, and the Lake County circuit clerk in particular, that they may not impose public defender fees on their own. Pursuant to statute, a public defender fee may be imposed only by the circuit court after notice and a hearing on the defendant's ability to pay. We again remind the trial courts of their duty to hold such a hearing before imposing these fees, and we trust that we will not have to speak on this issue again.

[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. 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.

### **Illinois Appellate Court**

[People v. Mullen](#), [2018 IL App \(1st\) 152306](#) The trial judge's inquiry of the public defender as to how many times he had appeared in court on defendant's case was inadequate to form the basis for assessment of a public defender fee, consistent with [People v. Hardman](#), [2017 IL 121453](#). The inquiry was sufficient to constitute "some sort of hearing," however, such that remand for a new public defender fee hearing was permitted.

[People v. Adame](#), [2018 IL App \(2d\) 150769](#) The Appellate Court vacated a \$250 public defender fee because the trial court had not considered the cost of representation or defendant's ability to pay when imposing the fee at sentencing. Remand for a new hearing to impose the public defender fee was proper because there had been "some sort of a hearing" where the fee was discussed at the sentencing hearing. Further, while defendant was



previously assessed a public defender fee when the State entered a *nolle prosequi* of the charge in this case, assessment of a second public defender fee following reinstatement was not precluded. Counsel had been appointed on both occasions and presumably expended additional resources in representing defendant the second time. Nothing in the statute limits a court to a single public defender fee.

**People v. Shaw, 2016 IL App (4th) 150444** 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 judgment 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.

**People v. Applewhite, 2016 IL App (4th) 140558** Defendant was initially represented by the public defender before he hired private counsel. At defendant's sentencing hearing, the State filed an affidavit of services. When defendant's private counsel objected to this document, the trial court stated that the county incurs expenses when the public defender is appointed to represent a defendant, and that the public defender represented defendant before private counsel entered his appearance. Private counsel stated that defendant had assigned him his bond to cover his fees. The court then imposed a \$1250 fee and ordered that the fee was "not to be taken from the bond assignment."

On appeal, the parties agreed that the trial court improperly imposed the fee. The Appellate Court remanded for a hearing on the fee. In **People v. Somers, 2013 IL 114054**, the Supreme Court held that where the trial court fails to comply with the statute but still conducts "some sort of hearing," the proper remedy is to remand the cause for a new hearing, not outright vacation of the fee. Here, the exchange between defendant's counsel and the court constituted "some sort of hearing."

**People v. Moore, 2015 IL App (1st) 141451** Under **People v. Somers, 2013 IL 114054**, where a timely but insufficient public defender fee 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.

**People v. McClinton, 2015 IL App (3d) 130109** The trial court erred by failing to give defendant notice of the public defender fee 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.

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 trial judge’s actions constituted “some sort of hearing.”

**People v. Dunlap**, 2013 IL App (4th) 110892 A hearing on public defender 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, 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.

**People v. Williams**, 2013 IL App (2d) 120094 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 725 ILCS 5/113-3.1(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.

**People v. Wynn**, 2013 IL App (2d) 120575 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.

**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)).

**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. Barbosa**, 365 Ill.App.3d 297, 849 N.E.2d 152 (4th Dist. 2006) 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.

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) 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.

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."

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.

**People v. McCaskill**, 298 Ill.App.3d 260, 698 N.E.2d 690 (4th Dist. 1998) The 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. Webb**, 276 Ill.App.3d 570, 658 N.E.2d 852 (3d Dist. 1995) 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.

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. 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. 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.

## §14-4 Effective Assistance of Counsel

### §14-4(a) Generally

### §14-4(a)(1) Standards

#### United States Supreme Court

**Hinton v. Alabama**, 571 U.S. 263, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) Under **Strickland**, 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.

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. 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 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.

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**."

**Harrington v. Richter**, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) 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. **Strickland** allows counsel to make a reasonable decision not to investigate a particular line of defense.

Counsel did not act unreasonably by failing to consult a forensic blood expert or offer expert testimony on blood evidence. It was only after trial, when forensic evidence concerning the source of blood found at the scene "emerged," that it could be concluded that blood evidence was a critical issue.

Likewise, 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.



**Wright v. Van Patten**, 552 U.S. 120, 128 S.Ct. 743, 169 L.Ed.2d 583 (2008) 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.

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 had 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."

**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").

**Bell v. Cone**, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) 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.

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.

**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.

**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).

**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) 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.

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).

**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.

### **Illinois Supreme Court**

**People v. Johnson**, 2021 IL 126291 When a defendant alleges ineffective assistance of counsel for failing to submit a piece of evidence for forensic testing, a defendant cannot show prejudice without knowing the test results.

Here, defendant was charged with both aggravated robbery (robbery while indicating he was armed with a firearm), and armed robbery (robbery while armed with a firearm). The victim testified that defendant carried a handgun and struck him in the head with it. Defendant was later seen entering and leaving a residence in which police ultimately found a handgun and a BB gun. The handgun was swabbed for DNA evidence but never tested. During deliberations, the jury asked why no DNA testing had been done. Defendant moved for testing. Counsel admitted he did not know the swabs were available. The trial court found the request untimely and denied the motion. The jury found defendant guilty of armed robbery with a firearm and aggravated robbery.

In the Appellate Court, defendant successfully argued that his trial attorney was ineffective for failing to test DNA swabs of the handgun because his counsel did not act strategically, having been unaware of the swabs, and because “a negative DNA test would likely have resulted in, at the very least, an acquittal on the armed robbery charge.”

The Supreme Court reversed. The Appellate Court did not properly apply the **Strickland** prejudice prong, which requires actual prejudice, not speculation. Because defendant could not show the swabs of the handgun contained DNA sufficient for testing, let alone whether the results would be exculpatory, he could not show a reasonable probability of a different outcome.

**People v. Cherry**, 2016 IL 118728 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**.

**In re Danielle J.**, 2013 IL 110810 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.

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 it was statutorily precluded.

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.

**People v. English**, 2013 IL 112890 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. Counsel is not incompetent for failing to accurately predict that existing law will change.

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.

**People v. Henderson**, 2013 IL 114040 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. Here, 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.

**People v. Manning**, 241 Ill.2d 319, 948 N.E.2d 542 (2011) 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. 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, he also said he did not think that defendant's background would influence his decision.

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, 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.

**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. 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. Simpson**, 204 Ill.2d 536, 792 N.E.2d 265 (2001) 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.

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."

Nothing in the record suggested 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. 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.

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.

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. 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.

### **Illinois Appellate Court**

**People v. Pickett**, 2023 IL App (1st) 221304 Defendant did not suffer a *per se* violation of his sixth amendment right to the effective assistance of counsel where he was represented at trial by an individual who had been removed from the master roll of attorneys for failure to complete mandatory continuing legal education (MCLE) requirements. The appellate court rejected the argument that counsel's removal from the roll meant that counsel was not "a duly licensed and qualified lawyer." Instead, the court concluded that counsel's removal was merely a technical defect in his ARDC registration status having no relation to his skill, fitness, or competency to practice law. While MCLE requirements exist to assure that attorneys maintain current knowledge and skills, the court held that the failure to comply with those requirements does not necessarily mean that the individual is incapable of providing quality representation. Accordingly, defendant's conviction was affirmed.



**People v. Boots, 2022 IL App (2d) 200640** Counsel did not fail to subject the State's case to meaningful adversarial testing per **Cronic**. During opening statements, counsel acknowledged that the "incident" between defendant and the minor occurred in 2010, but counsel did not concede that any specific acts occurred. Counsel went on to argue that the prosecution could not prove defendant's guilt, cross-examined witnesses, and asserted that, at most, the court should find guilt on a lesser offense. While the defense arguments may have been weak, the record did not show a complete failure by counsel. Likewise, counsel's performance did not constitute ineffective assistance under **Strickland**.

**People v. Holt, 2019 IL App (3d) 160504-B** Prosecutor committed misconduct by noting in closing argument that defendant had not offered the police an explanation for why he had stolen goods and arguing that "if I didn't commit a crime, I would say something to the officers." This invited the jurors to use defendant's post-arrest silence as evidence against him. Defense counsel did not object, however, and the error did not rise to the level of first prong plain error where the evidence was not closely balanced. Similarly, because the ineffective-assistance-of-counsel prejudice analysis is similar to the first-prong plain-error analysis, defense counsel did not render ineffective assistance by failing to object.

**People v. Dupree, 2014 IL App (1st) 111872** 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.

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. Counsel's strategy was to cast doubt on the witness's credibility by referring to his inconsistent statements, and such a strategy did not require counsel to open the door to admission of the second statement. 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.

Defendant was prejudiced by counsel's errors because the result of the trial was unreliable. The evidence against defendant was far from compelling, as there was no physical evidence linking him to the shooting, 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.

**People v. Bowens, 2013 IL App (4th) 120860** 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.

**People v. Coleman**, 2012 IL App (4th) 110463 Defendant filed a post-conviction petition claiming, among other things, that 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 defense counsel was ineffective for entering a stipulation that the large bag contained 926 grams of cocaine. The trial court summarily dismissed the petition.

In a *pro se* motion to reconsider the summary dismissal, defendant submitted an affidavit from a private investigator who had interviewed the lab analyst. 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 petition showed an arguable case of ineffective assistance concerning counsel's agreement to the stipulation that the entire large bag contained cocaine. 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.

**People v. Gamino**, 2012 IL App (1st) 101077 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.

**People v. Stanford**, 2011 IL App (2d) 090420 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, including 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.

**People v. Woods**, 2011 IL App (1st) 092908 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.

Here, 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.

Defendant could not show that defense counsel acted unreasonably. 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 person 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.

Furthermore, defendant could not show prejudice. In light of the overwhelming evidence of guilt, there was no reasonable probability that different tactics would have led to a different result.

**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. 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.

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

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.

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."

**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.

#### **§14-4(a)(2)**

#### **Counsel's Control of Case & Strategic Decisions**

#### **United States Supreme Court**

**McCoy v. Louisiana**, 584 U.S. \_\_\_, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018) A defendant's Sixth Amendment right to the assistance of counsel does not require that he or she surrender complete control over the case to counsel. Where defense counsel determines that the best strategy is to concede defendant's guilt in the hopes of avoiding a death sentence, but the defendant objects and insists on presenting an alibi defense, counsel is forbidden from conceding guilt. The Supreme Court distinguished **Florida v. Nixon**, 543 U.S. 175 (2004), because there the defendant neither objected nor approved of counsel's planned strategy of conceding guilt.

Here, defendant was charged with three counts of first degree murder for which the State was seeking the death penalty. Defense counsel informed defendant of his plan to concede guilt and urge the jury to exercise mercy and reject a death sentence. Defendant, who had maintained his innocence all along, repeatedly objected to counsel's proposed strategy. Nevertheless, counsel conceded guilt, and, after defendant was convicted, argued for mercy at sentencing. The jury imposed a death sentence.

Defendant's autonomy to decide the objective of the defense belongs in the category of rights personal to the defendant, along with the decisions whether to plead guilty, waive his jury trial right, testify in his defense, and forego an appeal. The violation of defendant's right to assert an innocence defense constitutes structural error and is not subject to harmless error review.

In dissent, Justice Alito, joined by Justices Thomas and Gorsuch, concluded that defendant should have sought new counsel sooner if he was dissatisfied where counsel proposed the concession-of-guilt strategy eight months before trial. The dissent criticized the majority for finding structural error where that question had not been briefed. And, the dissent noted that the alleged error in this case was not of the sort likely to recur.

**Hinton v. Alabama**, 571 U.S. 263, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) Under **Strickland**, 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.

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. 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 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.

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**."

**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.

### **Illinois Supreme Court**

**People v. Holt**, 2014 IL 116989 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.

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. 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 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."

**People v. English**, 2013 IL 112890 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. Therefore, appellate counsel's forfeiture of the issue on appeal is not excused based on ineffective assistance of appellate counsel.

**People v. Manning**, 241 Ill.2d 319, 948 N.E.2d 542 (2011) 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. 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, he also said he did not think that defendant's background would influence his decision.

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, 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.

**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. **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 did not stipulate 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'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. 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. 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 its terms it contested the correctness of the court's ruling on the motion to suppress.

**People v. Medina**, 221 Ill.2d 394, 851 N.E.2d 1220 (2006) 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.

Requesting a lesser included instruction, however, 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 he might have chosen to forego based on trial counsel's recommendation.

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 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) 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.

## Illinois Appellate Court

**People v. Williams, 2022 IL App (2d) 200455** The trial court did not err in honoring defendant's demand for a speedy trial over defense counsel's objection and request for a continuance. While the decision to request a continuance is generally a matter of strategy, it is well-established that a trial court has the discretion to proceed on defendant's demand for trial against the advice of counsel, provided that the court ensures that defendant understands the consequences of that decision.

Here, the COVID-19 pandemic began while defendant's case was pending in the trial court. At the time defendant demanded to proceed to trial, in June 2020, various precautions were still in place, including masking and social distancing. The court explained how defendant's trial would be conducted in light of those precautions, including voir dire. After being fully informed of the procedures, defendant persisted in his demand to proceed to trial, and the court honored that demand. The trial court did not abuse its discretion under the circumstances.

**People v. Gunn, 2021 IL App (4th) 200398** Defendant was convicted of murder after alleging self-defense at trial. In a post-conviction petition, defendant claimed his attorney was ineffective where, at defendant's jury trial, counsel promised the jury in opening statement that it would hear from defendant, and waived admonishments concerning defendant's failure to testify, before changing course midtrial and advising him not to testify.

The facts at the third stage evidentiary hearing established that both counsel and defendant expected that defendant would testify in his own defense. Defense counsel testified that after hearing the State's case, including favorable testimony from a State's witness that she did not anticipate, she made a strategic decision to advise defendant not to testify. Counsel explained that the unanticipated weakness of the State's case, and the risks posed by submitting defendant to cross-examination, militated against having defendant testify. The circuit court found this testimony credible and dismissed the petition.

Defendant argued on appeal that based on counsel's review of police reports, she would have been aware of the "surprise" testimony prior to trial. She also would have understood, prior to trial, the risks of calling defendant to the stand. Thus, no event occurred after the promise to the jury and the waiver of admonishments that would warrant the change in strategy. The Appellate Court disagreed and deferred to the circuit court's credibility determination. While the risk of calling defendant was known, counsel credibly testified that it was only after she heard the State's case that she concluded it was a risk not worth taking.

**People v. Gunn, 2020 IL App (4th) 170653** In a murder case where the defense argued self-defense or second-degree murder, defense counsel told the jury multiple times during opening statements that defendant would testify and explain why he stabbed the decedent and why he lied to the police during his interrogation. Defense counsel also told the trial court it did not need to read the **Zehr** principle concerning the defendant's failure to testify, since defendant would in fact be testifying. During trial, however, counsel advised defendant not to testify, and defendant did not take the stand.

After his conviction for first-degree murder, defendant filed a post-conviction petition alleging ineffective assistance of counsel. The Appellate Court reversed the second-stage dismissal of the petition and remanded for an evidentiary hearing. While in an ordinary appeal this type of claim might be rejected as trial strategy, in post-conviction proceedings this assumption is not applicable because the proceeding allows for a defendant to develop a record as to the basis for counsel's decision. Here, nothing unforeseeable occurred at trial

after counsel promised the testimony, and therefore an explanation from counsel should be elicited at an evidentiary hearing.

**People v. Walker**, 2019 IL App (3d) 170374 The trial court properly dismissed defendant's post-conviction petition at the first stage. Defendant alleged that his attorney withheld discovery from him and that as a result he entered into an involuntary guilty plea. The petition, however, lacked documentation in support of a claim that counsel withheld any information helpful to his defense. Also, a decision regarding which discovery items to share with a client is a matter of trial strategy. Here, defendant could not defeat the presumption that counsel's decision was sound, because he failed to specify how missing discovery would affect his decision to plead guilty.

**People v. Higgins**, 2016 IL App (3d) 140112 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. 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). 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.

In this case, the decision to not object to the lesser-included offense instruction appears to have been a valid and effective trial strategy. 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

**People v. Tayborn**, 2016 IL App (3d) 130594 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.

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 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. Wood**, 2014 IL App (1st) 121408 Under Illinois law, a defendant must first raise an insanity defense to be eligible for a finding of guilty but mentally ill (GBMI). Then, 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.

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.

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.

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.

**People v. Hill**, 2014 IL App (2d) 120506 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. Defendant argued that under **People v. Smith**, 233 Ill. 2d 1, 906 N.E.2d 529 (2009), trial counsel's failure to request separate verdicts deprived him of the opportunity to obtain an acquittal on intentional and knowing murder and to avoid a consecutive sentence for the predicate offense if the only conviction entered was on felony murder.

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."

**People v. Holt**, 2013 IL App (2d) 120476 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. 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. 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.

**People v. Pacheco**, 2013 IL App (4th) 110409 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."

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."

**People v. Poole**, 2012 IL App (4th) 101017 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."

**People v. Stanford**, 2011 IL App (2d) 090420 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.

**People v. Gonzalez**, 407 Ill.App.3d 1026, 944 N.E.2d 834 (2d Dist. 2011) 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. In view of her relationship to the defendant, the girlfriend would not have been a credible witness. Therefore, the record demonstrated that the decision to not call the girlfriend was a matter of reasonable trial strategy.

**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.

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.

**People v. Dupree**, 397 Ill.App.3d 719, 922 N.E.2d 503 (2d Dist. 2010) **People v. Brocksmith**, 162 Ill.2d 224, 642 N.E.2d 1230 (1994), 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 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.

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.

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

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.

**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.

#### **§14-4(a)(3)**

##### **Other**

#### **Illinois Supreme Court**

**People v. Veach**, 2017 IL 120649 Generally, constitutional claims of ineffective assistance of counsel are forfeited unless raised on direct appeal. Furthermore, procedural default applies to issues which could have been raised on direct appeal, but were not. Collateral review is not a remedy for claims that could have been presented on direct review. However, procedural default does not apply to constitutional issues which depend on facts that are not in the record on direct appeal. Such issues may be raised on collateral review.

The court rejected the Appellate Court's practice of applying a "categorical approach" to determine whether ineffective assistance of counsel claims should be considered on direct appeal. Reviewing courts are required to consider ineffective assistance claims on a case-by-case basis, and to resolve such issues on direct appeal unless the record is insufficient to allow

the claim to be considered.

The record was sufficient to resolve defendant's ineffective assistance claim on direct appeal. Defendant claimed that defense counsel was ineffective for stipulating to the admission of recordings of statements by three state witnesses and for agreeing to allow the recordings to be played in their entirety.

The record showed that defense counsel wanted to use parts of the recordings for impeachment purposes, and believed that by doing so he would open the door for the State to admit bad character evidence and the witness's prior consistent statements. In addition, defense counsel initially questioned why the entire video should be played for the jury, but acquiesced to the State's response that under the "doctrine of completeness, the entire recording had to be seen by the jury."

The Supreme Court expressed no opinion whether defense counsel was ineffective, but remanded the cause with instructions to the Appellate Court to consider the merits of the issue.

**People v. Austin M., 2012 IL 111194** 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.

Here, 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*. 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*."

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

**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).

[\*\*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.

### **Illinois Appellate Court**

[\*\*People v. Bass\*\*, 2022 IL App \(1st\) 210249](#) The circuit court erred in dismissing defendant's post-conviction petition at the second stage where he made a substantial showing of ineffective assistance of counsel. Specifically, defendant alleged that his counsel failed to consult with him in private at any time prior to trial. Instead, all of their conversations occurred in a holding cell behind the courtroom while other detainees were present. Defendant alleged that this led him to be misinformed regarding critical evidence, which ultimately led him to reject a favorable plea offer.

It is crucial to the attorney-client relationship that a client and his lawyer be able to engage in full and open communication. Indeed, the attorney-client privilege is meant to foster such communication and requires that conversations occur in private. Here, defendant was facing a murder charge, and evidence provided in discovery consisted of surveillance video, phone calls, and text messages, among other things. The presence of other detainees made it impossible for counsel to engage in a meaningful review of the State's evidence with defendant. Thus, counsel's performance in failing to meet privately with defendant was deficient. In reaching this conclusion, the court was careful to note that it was not setting out a categorical rule requiring private consultation in every case.

The court went on to find that defendant also made a substantial showing of prejudice where he alleged that he would have accepted a 20-year plea offer had he not been misadvised of the significance of certain evidence against him. Instead, defendant proceeded to trial and received a 55-year sentence after conviction. While the State argued that the significance of the evidence in question was not material to the plea decision, the appellate court found that such an analysis should be made at an evidentiary hearing rather than at the second stage.

[\*\*People v. Janosek\*\*, 2021 IL App \(1st\) 182583](#) Defendant argued that his trial attorney provided deficient representation where counsel failed to file a motion to suppress evidence obtained as a result of a warrantless search of his backyard. To establish ineffective assistance based on counsel's failure to file a motion to suppress, a defendant must show both that the motion was meritorious and that there exists a reasonable probability that the outcome of the trial could have been different had the evidence been suppressed. Often, the

record on direct appeal will be inadequate to evaluate such a claim because the trial was not developed for that purpose.

Here, the court concluded that the record was inadequate to determine whether the officers' presence on defendant's property was improper, and thus the court could not assess whether counsel's failure to file a motion to suppress was ineffective. The facts necessary to determine the issue were only discussed in passing at trial, and the State could have called an additional witness had a motion been filed. Accordingly, the court could not consider the claim on its merits.

**People v. Henry, 2016 IL App (1st) 150640** 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 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. 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. Under Supreme Court Rule 401, a defendant 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.

**People v. Gilbert, 2013 IL App (1st) 103055** 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.

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.

**People v. Carballido**, 2011 IL App (2d) 090340 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.

## **§14-4(b)**

### **Examples**

## **§14-4(b)(1)**

### **Failure to Investigate**

## **§14-4(b)(1)(a)**

### **Generally**

## **United States Supreme Court**

**Sears v. Upton**, 561 U.S. 945, 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.

First, unless a reasonable investigation has been made, counsel's subsequent tactical decisions cannot be deemed to be "reasonable." 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."

**Porter v. McCollum**, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) 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.

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 briefly with defendant on only one occasion. Counsel failed to obtain records, 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.

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."

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.

**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) (decision not to investigate an impaired capacity defense was reasonable where defendant repeatedly insisted that he had not been involved in the crime).

**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.

### Other Federal Court

**Griffin v. Pierce**, 622 F.3d 831 (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. 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.

### Illinois Supreme Court

**People v. Domagala**, 2013 IL 113688 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.

**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.

**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. 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.

### **Illinois Appellate Court**

**People v. Calloway**, 2019 IL App (1st) 160983 Counsel performed deficiently by failing to file a routine discovery motion, but defendant could not show prejudice. Defendant was charged with cannabis possession, but at some point between forensic testing and trial, the State destroyed the evidence. Had defense counsel filed a discovery motion, he could have sought sanctions once the State destroyed the evidence. But unlike **People v. Newberry**, 166 Ill. 2d 310 (1995), defendant here could not show any possibility that re-testing the evidence would have been beneficial to his case, particularly where defendant never contested the test results or otherwise disputed the fact that the recovered substance was cannabis.

**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.

### **§14-4(b)(1)(b)**

#### **Counsel Not Ineffective**

### **United States Supreme Court**



**Harrington v. Richter**, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) 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.

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.

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, the prosecution’s case did not stress blood evidence. And, 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.

Also, 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. Defense counsel conducted a skillful cross-examination, elicited concessions from the State’s experts, and drew attention to weaknesses in their conclusions.

### Illinois Supreme Court

**People v. Harris**, 206 Ill.2d 1, 794 N.E.2d 314 (2002) 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 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. Jackson**, 205 Ill.2d 247, 793 N.E.2d 1 (2001) Counsel was not ineffective at sentencing for failing to discover mitigating evidence that defendant's family had an extensive history of mental illness. Extensive mitigating evidence was presented, making it clear that counsel conducted a reasonable investigation into potential mitigation. 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."

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. 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.

**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. Holman**, 164 Ill.2d 356, 647 N.E.2d 960 (1995) 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.

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.

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.

### **Illinois Appellate Court**

**People v. Griffin**, 2024 IL App (1st) 191101-C Defendant pled guilty to murder after eyewitnesses identified him as the shooter and he confessed to the police. His successive post-conviction petition alleged that his counsel was ineffective for failing to investigate an alternative suspect, Butler. It also alleged actual innocence, citing an affidavit from a new eyewitness, who saw Butler commit the offense, and another affidavit from a witness who learned that the State's witnesses falsely accused defendant. The circuit court denied leave to file.

In its initial opinion, the appellate court reversed. It found a colorable claim of actual innocence and remanded the entire petition to the second stage without reviewing the ineffectiveness claim. The State appealed, and the supreme court affirmed the appellate court as to the actual innocence claim, but it reversed and remanded in part for consideration of whether defendant's ineffectiveness claim could satisfy the cause-and-prejudice test. The appellate court held that it could not, and affirmed the denial of leave to file that claim.

Defendant established cause for his failure to raise counsel's ineffectiveness in his initial petition, because the information upon which the claims rested was not previously available. But he could not show prejudice, because he did not establish that counsel's performance was deficient. Defendant's petition did not provide sufficient information concerning what counsel knew of Butler to warrant an investigation. Defendant merely stated that he told his attorney that people in jail were stating that Butler was the shooter. Defendant offered no details as to how reliable those tips were, whether Butler could be found, or what Butler would say even if counsel was able to speak with him. Any suggestion that a discussion with Butler would have led to the discovery of additional witnesses was entirely speculative. Without some detail as to how an investigation of Butler would have led to exculpatory evidence, defendant could not meet the prejudice prong of the cause-and-prejudice test.

**People v. Elliot**, 2022 IL App (1st) 192294 Defendant could not establish that his attorney was ineffective for failing to call an expert on eyewitness identification at his murder trial. Regarding the first **Strickland** prong, defendant could not show counsel's performance was deficient. Although defendant argued that the decision to not call an expert was not sound trial strategy if counsel failed to investigate potential expert witnesses, the appellate court found the record silent on this matter and would not presume that counsel did not investigate.

Even if counsel wanted to call an expert, the appellate court was not convinced the testimony would have been admitted. Unlike **People v. Lerma**, 2016 IL 118496, the case did not hinge entirely on eyewitness identifications, as defendant's text messages and

internet searches provided circumstantial evidence of his guilt. And the identifications here occurred in daylight, by at least one witness who was familiar with defendant, making the need for expertise in this area less compelling.

Finally, defendant could not show prejudice. Defendant argued that an expert would be able to discredit the eyewitness by testifying about such phenomena as the witness-confidence fallacy and weapon focus, but the appellate court held that without a proffer, this argument was too speculative to show prejudice.

**People v. Coe, 2021 IL App (4th) 200233** Defendant's post-conviction petition was properly denied after an evidentiary hearing. Defendant alleged that his trial attorney provided ineffective assistance of counsel where he failed to interview and call multiple alibi witnesses. Several of defendant's family members and friends testified at the hearing that they had been prepared to testify at defendant's trial that he was with them in Chicago on the date of the offense. Defendant testified that he had provided the names of all of these witnesses to trial counsel. While trial counsel could not remember every name defendant had given, counsel did recall reaching out to at least two of the proposed witnesses, but they were not helpful. Counsel also testified that his practice would have been to attempt to contact anyone defendant disclosed as a witness.

The circuit court found defendant's trial counsel more credible than defendant and his proposed alibi witnesses. Although trial counsel did not recall many details about his representation of defendant, it was not speculative to conclude that defendant did not provide the names of additional alibi witnesses to counsel at the time of trial. Counsel's actions in contacting two witnesses defendant had named at the time corroborated counsel's claim that he would have attempted to contact any potential witnesses suggested by defendant.

#### **§14-4(b)(1)(c)** **Counsel Ineffective**

#### **United States Supreme Court**

**Porter v. McCollum, 557 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009)** 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.

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, 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.

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."

There was a reasonable probability that had defendant been represented by competent counsel, the result of the death hearing would have been different. An adequate investigation would have disclosed ample mitigating evidence, and such evidence would have created a reasonable probability that a non-death sentence would have been imposed.

**Rompilla v. Beard**, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) 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.

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.

### **Other Federal Courts**

**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).

**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.

### **Illinois Supreme Court**

**People v. Domagala**, 2013 IL 113688 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.



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. On those facts, 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.

Prejudice resulted from counsel's deficient performance. The testimony of the petitioner's post-conviction expert would not have been cumulative to expert testimony which was admitted at trial; 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.

**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. 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. Morgan**, 187 Ill.2d 500, 719 N.E.2d 681 (1999) 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."

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. 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. Howery](#), 178 Ill.2d 1, 687 N.E.2d 836 (1997) 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."

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. Steidl](#), 177 Ill.2d 239, 685 N.E.2d 1335 (1997) 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.

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).

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. 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.

### **Illinois Appellate Court**

**People v. Landa**, 2020 IL App (1st) 170851 Post-conviction counsel's certificate stating that he had "communicated" with defendant, "examined the record and transcripts," and "presented the petitioner's claims" substantially complied with Rule 651(c), leading to the presumption that counsel provided reasonable assistance. To overcome that presumption, a defendant must show both the manner in which counsel's performance was deficient and also the prejudice resulting from that deficiency. The court distinguished this situation from that where counsel fails to file any certificate at all (**People v. Suarez**, 224 Ill. 2d 37 (2007)), which requires remand regardless of whether the petition had merit.

Here, defendant established unreasonable performance where, during the several years that defendant's petition was pending, post-conviction counsel failed even to have defendant's supporting affidavit notarized and failed to file a response to the State's motion to dismiss, despite repeatedly stating he would do so. Counsel also stood silent at the hearing on the motion to dismiss, advancing no argument on defendant's behalf. Defendant demonstrated prejudice where he advanced a viable claim of ineffective assistance of trial counsel for failing to investigate and present his alibi defense in his petition. Counsel should

have argued that the court was required to accept defendant's petition and supporting affidavits as true where they were unrebutted by the record, a requirement which the court did not seem to understand given its comments in dismissing the petition. The evidence at defendant's trial was closely balanced, and post-conviction counsel's failure to support the petition with argument and defendant's affidavit was unreasonable and prejudiced defendant.

**People v. Myles, 2020 IL App (1st) 171964** Defendant's post-conviction petition made a substantial showing of trial counsel's ineffectiveness for failure to investigate the criminal history of the complainant, and use her pending criminal charges as impeachment evidence.

The complainant had testified that defendant robbed her, while defendant testified that the encounter was a misunderstanding. After conviction, defendant learned that the complainant had federal fraud and bribery charges pending at the time of her testimony. The charges would have been admissible as impeachment evidence. Trial counsel included an affidavit stating that he would have used this evidence had he known of it.

Defendant met the second-stage showing for ineffectiveness where counsel's failure to investigate constituted deficient performance, and prejudice resulted. Credibility was critical to the State's case, and evidence regarding the complainant's pending fraud and bribery charges is the kind of evidence that would tend to show that her testimony might be influenced by interest, bias or a motive to testify falsely. A witness facing pending charges may have an interest or motive to curry sympathy or favor as a crime victim in her case. It did not matter whether the government intended to reduce or dismiss charges, only that the witness had an expectation they might. And cooperation in defendant's criminal case would have been a factor in mitigation according to federal sentencing guidelines.

**People v. Simmons, 2020 IL App (1st) 170650** Defendant made a substantial showing of ineffective assistance of counsel where his post-conviction petition included an affidavit from an exculpatory witness who was never contacted by trial counsel.

The witness' affidavit stated that he observed someone other than defendant committing the murder, and that he told the police and co-defendant's attorney that defendant did not commit the crime. He was listed as a witness in police reports, yet defendant's attorney never contacted him. This deficient performance was prejudicial under the second-stage standard, where the other eyewitnesses had motives to lie, and defendant confessed only after 10 hours of interrogation. The court concluded that if the witness had testified in a manner consistent with his affidavit, a verdict of not guilty would at least be reasonable.

**People v. Johnson, 2019 IL App (1st) 153204** Defendant filed a successive post-conviction petition with an attached exculpatory affidavit from an eyewitness to the shooting. He alleged ineffective assistance of counsel for failing to investigate the witness. The circuit court granted the State's motion to dismiss.

Even though the petition had advanced to the second stage, the State had a right to raise a cause-and-prejudice challenge on appeal, because the trial court never applied the test. A majority of the Appellate Court found that defendant established cause and prejudice. The new exculpatory affidavit became available to defendant only after his direct appeal and first petition. Although defendant knew the affiant was at the scene of the crime, defendant included an affidavit stating that he asked his attorney to investigate witnesses at the scene but that counsel did not do so. Defendant also established prejudice where the affiant stated that he witnessed the shooting and defendant was not one of the shooters. His testimony

would contradict the two eyewitnesses at trial and support defendant's theory that their accounts were unreliable.

The court then found that defendant made a substantial showing of ineffective assistance of counsel. Counsel cannot make a sound strategic decision about which witnesses to call if counsel hasn't investigated the witnesses in the first place.

**People v. Upshaw, 2017 IL App (1st) 151405** Although whether to present a witness is a matter of strategy, valid strategic decisions may be made only after there has been a thorough investigation of law and facts relevant to the options. It may be ineffectiveness to fail to present exculpatory evidence of which counsel is aware, including failing to call witnesses whose testimony would support an otherwise uncorroborated defense.

Here, defendant made a substantial showing that trial counsel was deficient for failing to contact a known alibi witness who alleged in his affidavit that he was with defendant in defendant's home at the time the offense occurred on the street. The affidavit indicated that defendant provided trial counsel with the witness's address and telephone number and said that the witness would be willing to testify to defendant's alibi. The record suggests no strategic reason that counsel would have decided not to investigate the alibi or interview the witness.

In addition, the prejudice component of **Strickland** was satisfied where the case against defendant rested on an inculpatory statement which he gave after 28½ hours in police custody. That statement was inconsistent with the events as related by a police officer's testimony, and defendant did not fit the description of the shooter. In addition, a jury note during deliberations indicated an impasse concerning the credibility of defendant's statement. Under these circumstances, defendant made a substantial allegation that had trial counsel interviewed and presented the alibi witness, there was a reasonable probability that the result of the trial would have been different.

**People v. Coleman, 2015 IL App (4th) 131045** 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."

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. 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. 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.

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.



**People v. Clark**, 2011 IL App (2d) 100188 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.

**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. 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. 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.

**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. 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.

#### **§14-4(b)(2)**

#### **Plea Bargaining & Guilty Pleas**

#### **United States Supreme Court**

**Jae Lee v. United States**, 582 U. S. \_\_\_, 137 S.Ct. 1958, 198 L.Ed.2d 476 (2017) The Sixth Amendment guarantees a defendant the effective assistance of counsel at critical stages of a criminal proceeding including when he enters a guilty plea. To demonstrate the counsel was ineffective, a defendant must show that counsel's performance was deficient and that defendant was prejudiced as a result.

Defendant was charged with possessing ecstasy with intent to distribute. Defendant was not a United States citizen and he feared that a criminal conviction would affect his status as a lawful permanent resident. His counsel assured him that the government would not deport him if he pleaded guilty. So defendant, who had no defense to the charge, accepted a guilty plea that carried a lesser sentence than he would have faced at trial.

Unfortunately, counsel was wrong, and the conviction meant that defendant was subject to mandatory deportation. When defendant learned this he filed a motion to vacate his conviction arguing ineffective assistance of counsel.

The Supreme Court held that counsel provided ineffective assistance. The prosecution conceded that counsel's performance was deficient when he incorrectly advised defendant that he would not be deported. The only question was whether defendant could show prejudice. Here the record shows that defendant would have rejected the plea had he known that it would lead to his deportation even though he had virtually no chance of prevailing at trial. Since deportation was the determinative factor for defendant, he demonstrated that he would have rejected any plea leading to deportation in favor of taking a long shot at trial.

The case was remanded to allow defendant to withdraw his plea.

**Lafler v. Cooper**, 566 U.S. 156, 132 S. Ct. 1376, 182 L.Ed.2d 398 (2012) The Sixth Amendment right to counsel extends to the plea-bargaining process. When 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 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, would have been less severe than under the judgment and sentence that were imposed.

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. 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.

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. 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." 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, "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."

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. But for counsel's deficient performance there is a reasonable probability defendant would have accepted the State's plea offer to dismiss two charges and recommend a 51-to-81 month sentence. Instead, he received a minimum sentence  $3\frac{1}{2}$  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**, 566 U.S. 134, 132 S. Ct. 1399, 182 L.Ed.2d 379 (2012) 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, the Sixth Amendment guarantees the right to effective assistance of counsel during plea bargaining.

It was unnecessary to resolve the scope of counsel's duties regarding plea bargaining here, 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 **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.

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**, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) 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 **Strickland**. The cause was remanded for the State court to consider the second prong of **Strickland** - whether defendant was prejudiced by counsel's unreasonable actions.

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."

The court also 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.

### **Illinois Supreme Court**

**People v. Williams**, 2025 IL 129718 Defendant filed a post-conviction petition alleging, among other things, that he had received ineffective assistance from trial counsel when counsel allowed the trial court judge's son to participate in privileged attorney-client meeting prior to his guilty plea. The circuit court dismissed defendant's petition on the State's motion.

The appellate court reversed, holding that retained post-conviction counsel provided unreasonable assistance by not supporting the prejudice prong of the ineffective assistance claim.

The Supreme Court disagreed, reversed the appellate court, and affirmed the trial court. Proceedings under the Post-Conviction Hearing Act require counsel, whether appointed or retained, to provide a reasonable level of assistance. Whether counsel satisfied that requirement depends on the unique facts of each case. Here, the prejudice alleged in the petition was that there was a “substantial likelihood” that the result of the plea hearing and sentencing would have been different had the judge’s son not been present at the pre-plea meeting. The petition did not include either an assertion of innocence or an articulation of a plausible defense that could have been raised at trial, a necessary component of demonstrating prejudice where the defendant has pled guilty.

The appellate court incorrectly assumed there were additional facts or allegations counsel could have included in the petition despite the absence of anything in the record to suggest that defendant had a viable defense. Defendant had stated on the record that he accepted the plea because he was facing a substantially longer term of imprisonment if convicted. He had also acknowledged that his likelihood of success at trial was low. In the face of this record, post-conviction counsel made the only arguments he could and would not be found to have provided unreasonable assistance. “[W]here, as here, the record shows that under the circumstances the arguments that postconviction counsel raised were the best options available, counsel cannot be said to have rendered an unreasonable level of assistance even if the arguments lacked legal merit, were not particularly compelling, and were ultimately unsuccessful.”

**People v. Marcus, 2023 IL App (2d) 220096** Defendant pled guilty but mentally ill to one count of first-degree murder in exchange for the dismissal of other charges and a sentence of 45 years of imprisonment. Subsequently, defendant filed a post-conviction petition alleging ineffective assistance of counsel for pressuring defendant to forego an insanity defense and failing to inform him that two mental health experts opined that an insanity defense was supported. Defendant alleged that he would not have pled guilty and would have insisted on going to trial had he known about the expert opinions. Following an evidentiary hearing, the trial court denied defendant’s petition.

In the guilty plea context, counsel renders deficient performance where he fails to ensure that defendant’s plea is knowing and voluntary. To establish prejudice, defendant must show that there was a reasonable probability that, absent counsel’s deficient performance, he would not have pled guilty and instead would have chosen to proceed to trial.

The trial court’s denial of defendant’s petition was not manifestly erroneous. Defendant’s claim that defense counsel failed to disclose expert opinion on the issue of insanity was contradicted by defense counsel’s testimony as well as defendant’s own statements, during the plea hearing, that he had reviewed one expert’s report, had discussed with counsel his ability to raise an insanity defense, and had chosen not to pursue that defense. Defendant repeatedly confirmed that he understood the court’s questions at the plea hearing and did not have any questions of his own. Further, it was not deficient performance for counsel to advise defendant that obtaining an insanity acquittal would be a difficult task. Counsel’s advice in that regard was reasonably competent and was not legally erroneous.

Even assuming deficient performance by counsel, defendant failed to establish prejudice. The record overwhelmingly supported the conclusion that defendant did not want to take his case to trial. Counsel discussed the possibility of an insanity defense and had defendant evaluated by two separate experts. But, defendant pushed to have his case



resolved in a timely fashion and told the experts that he did not want to go to trial because he wanted to spare his daughter from that process. And, at the plea hearing, the court confirmed that defendant did not wish to raise an insanity defense. Accordingly, the appellate court affirmed the trial court's denial of defendant's petition.

**People v. Hatter, 2021 IL 125981** Defendant was charged with nine counts of criminal sexual assault based on three acts, and pled guilty to two of the counts, both of which included as an element the victim's status as a "family member." In a post-conviction petition, he alleged ineffective assistance of counsel, arguing that defense counsel should have informed the court that defendant lived in the residence for only two months, while the "family member" element of the charges requires continuous residence for at least six months.

The Supreme Court affirmed the dismissal of his petition. In order to show the prejudice prong of an ineffectiveness claim in a guilty plea proceeding, a petitioner must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Therefore, the defendant must show that he would have been better off going to trial because he would have been acquitted or had a viable defense. Here, while the residence issue offered a viable defense to three of the criminal sexual assault charges, including the two charges to which he pled guilty, defendant offered no defense to the remaining six charges. Because all nine charges involved the same class of felony with the same sentencing ranges, defendant could not show prejudice by establishing a plausible defense to only three of the charges.

**People v. Brown, 2017 IL 121681** A claim that a guilty plea defendant was denied the effective assistance of counsel is governed by the **Strickland** test, which requires the defendant to establish that counsel's performance fell below an objective standard of reasonableness and caused prejudice.

To satisfy the prejudice requirement of **Strickland**, a guilty plea defendant must show a reasonable probability that, but for counsel's errors, he would have pleaded not guilty and insisted on going to trial. Where an ineffective assistance claim involves a matter of strategy related to the chances for acquittal, defendant is required to show that he would have been acquitted or would have had a viable defense at trial. Where the claim is related to defendant's understanding of the consequences of pleading guilty, however, the prejudice prong is satisfied where defendant shows that had counsel informed him of the consequences of a guilty plea, it would have been a rational decision to reject the plea bargain and go to trial.

Here, defendant could not show that it would have been rational for him to reject the plea bargain and go to trial. Defendant pleaded guilty to the Class X felony of being an armed habitual criminal, in return for an 18-year sentence and dismissal of a home invasion charge which would have carried a mandatory 15-year enhancement. Given defendant's significant criminal history, if he had been convicted after a trial his sentences for both armed habitual criminal and home invasion would have been toward the higher end. Under these circumstances, it would not have been rational to reject the plea bargain providing a lower sentence even had his trial counsel correctly informed him that his armed habitual criminal conviction was subject to an 85% good time requirement (rather than 50%, as counsel believed).

**People v. Valdez, 2016 IL 119860** 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. Here, defense counsel failed

to inform a guilty plea defendant that the plea might carry any consequences on his immigration status. But, the effect of the conviction on defendant's immigration status was unclear; 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.

Defense counsel's failure to provide any advice about defendant's immigration status was objectively unreasonable and satisfied the first component of Strickland. But, 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."

**People v. Hall**, 217 Ill.2d 324, 841 N.E.2d 913 (2005) 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.

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.

The attorney's erroneous advice was not 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. The critical factor is whether the court's admonitions were sufficiently related to the erroneous advice to cure any prejudice. Here, the trial court merely read the charge and asked if the defendant understood it. The court did not determine whether defendant realized that knowledge was an element of the offense.

**People v. Hale**, 2013 IL 113140 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**; a 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.

In order to show prejudice 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.

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's finding that the latter statement was incredible was not contrary to the manifest weight of the evidence.

Further, 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 maintained his innocence throughout, and defense counsel testified that defendant was not interested in accepting the plea. Although there was a substantial difference between the plea offer and the sentences imposed after trial, there was also a possibility that defendant could have received a lower sentence after trial.

**People v. Hughes, 2012 IL 112817** In order to render effective assistance, 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.

Consistent with Padilla, counsel must advise defendants that their guilty pleas will subject them to evaluation as SVP because it is "enmeshed" in the criminal process and carries severe consequences for the defendant in that he or she may face involuntary civil commitment. 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.

The court concluded, however, that defendant failed to establish that defense counsel was ineffective because the record did not show that defense counsel failed to advise defendant of the possibility that an SVP petition could be filed, and defendant testified that he and counsel did discuss the possibility of such a petition. And, even if counsel's performance was deficient, defendant failed to show prejudice. A bare allegation that the defendant would not have pleaded guilty had counsel acted competently is insufficient.

**People v. Manning, 227 Ill.2d 403, 883 N.E.2d 492 (2008)** 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.

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.

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. 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. Curry**, 178 Ill.2d 509, 687 N.E.2d 877 (1997) 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.

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.

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.

Defendant was not 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. Palmer**, 162 Ill.2d 465, 643 N.E.2d 797 (1994) 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.

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. 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).

### **Illinois Appellate Court**

**People v. Gallardo**, 2024 IL App (2d) 230289 The denial of defendant's post-conviction petition after an evidentiary hearing was affirmed. Defendant alleged ineffective assistance of counsel during plea negotiations, asserting that counsel failed to properly inform him of the applicable minimum and maximum sentences, leading him to reject a favorable plea offer. In denying that claim, the circuit court noted trial counsel's testimony that, while she had no specific recollection of her discussions with defendant, it was her common practice to communicate the range of sentences a defendant faced when offered a plea.

The circuit court did not err in crediting defense counsel's testimony even though she could not recall her specific conversation with defendant in this matter. Counsel had more than 20 years of experience as a public defender, and her common practice was to convey plea offers to her clients and discuss the charges and possible sentences so that her clients could make informed decisions whether to accept those offers. The record here showed that defendant chose to reject the plea offer when it was confirmed that he would have to serve 85% of the ultimate sentence rather than 50%. It was not error for the court to conclude that counsel followed her usual practice and had provided defendant with the necessary information.

The appellate court also found that defendant's ineffective assistance claim would have failed on prejudice even if he had demonstrated deficient performance. The record supported the conclusion that defendant's rejection of the plea offer was also predicated on his belief that the victim was not cooperating, that he had a viable alibi defense, and that a State witness was not credible because he had made a deal for his testimony. In light of these facts, the record indicated defendant rejected the plea because he thought he would be acquitted, and thus he failed to demonstrate a reasonable probability that, but for trial counsel's alleged deficient performance, he would have accepted the offer.

**People v. Jones**, 2024 IL App (1st) 221506 Following defendant's negotiated guilty plea, plea counsel filed a motion to withdraw but failed to file a Rule 604(d) certificate. The parties agreed that failure required remand for new post-plea proceedings.

Additionally, at the hearing on defendant's motion to withdraw plea, defendant had been permitted to present his own argument in support of withdrawal of his plea. Defendant stated that nobody, including plea counsel, had advised him that he would have to serve his four-year term of mandatory supervised release on electronic monitoring, which he likened



to “house arrest.” On appeal, the parties argued that the court failed to conduct a preliminary **Krankel** inquiry based on this allegation. The appellate court held that remand under **Krankel** was not required, however, because the circuit court had gone ahead and construed defendant’s claim as an argument for withdrawing his plea. Instead, remand for a new hearing was the proper remedy because the record was insufficiently developed to decide that claim in the instant appeal. In reaching this conclusion, the court rejected the State’s argument that the claim was forfeited because it was not in the written post-plea motion filed by counsel. The trial court expressly incorporated this issue into the motion to withdraw plea when it told defendant at the hearing, “it’s your motion, go ahead and say what you want to say.”

Reversed and remanded for the appointment of new post-plea counsel and new post-plea proceedings, including a hearing on whether plea counsel provided ineffective assistance by failing to advise defendant about the requirement of serving his mandatory supervised release on electronic monitoring.

**People v. Shaw, 2023 IL App (1st) 221358** Defendant made a substantial showing of an involuntary guilty plea, where his post-conviction petition alleged that both the trial court and defense counsel misled him about MSR. Specifically, he was told MSR could not affect his release date from prison, yet he was ultimately “violated at the door” and served over four years in prison beyond the term agreed to in the plea.

Defendant pled to criminal sexual assault in exchange for a five-year prison term. The MSR term was 3 years to life along with registration as a sex offender. At the guilty plea hearing, defendant specifically asked if the MSR term affects his release date. The judge said, “No, it does not,” and defendant agreed to plead guilty. On his release date, IDOC informed defendant he would not be released because he could not find an approved host site that complied with the restrictions placed on sex offenders.

Defendant’s post-conviction petition alleged that his plea was not voluntary because the trial court, and his attorney, misled him about the nature of MSR. If he had known about the living restrictions, and that an inability to comply would lead to a “violation at the door,” he would not have pled guilty. He alleged that he would have gone to trial and presented a defense of consent. The circuit court granted the State’s motion to dismiss.

The appellate court reversed. Although the trial court had no obligation to inform defendant of the collateral consequences of the plea, including the need to find an approved host site in order to be released from prison, it did have an obligation to provide accurate information once defendant asked about those details. Here, the court’s statement was false – MSR could, and did, affect defendant’s release date. Where these false statements induced the plea, defendant made a substantial showing of an involuntary plea.

Defendant also made a substantial showing of plea counsel’s ineffectiveness by alleging that counsel assured him the MSR restrictions were not onerous and would not affect his release date. Defense counsel is not obligated to inform a defendant of all collateral consequences of the plea, but courts have recognized exceptions to this rule. “Where consequences are severe, certain to occur, ‘enmeshed’ in the criminal process, and are of predictable importance to a defendant’s calculus, they are not categorically excluded from **Strickland**’s purview despite being traditionally categorized as collateral.” **People v. Hughes, 2012 IL 112817, ¶49**, citing **Padilla v. Kentucky, 559 U.S. 356 (2010)**. The appellate court agreed with defendant that the risk of being “violated at the door” and held indefinitely is one such consequence, meaning that defendant’s allegations, taken as true, made a showing of unreasonable assistance. The petition further made a showing of prejudice

by detailing the consent defense he would have presented at trial. The court remanded for a third-stage evidentiary hearing.

**People v. Hill**, 2023 IL App (1st) 221062 Defendant was found guilty of two attempted murders and received an aggregate sentence of 75 years. He filed a post-conviction petition alleging his trial attorney misadvised him of the sentencing range, causing him to reject a 20-year plea offer. The circuit court granted the petition, though it rejected the requested remedy of a new trial and instead held a resentencing hearing. The court imposed a new sentence of 37 years.

Defendant first argued on appeal that the circuit court erred when it denied his requested remedy of a new trial. The appellate court rejected the claim, finding that the circuit court has wide discretion in fashioning a remedy for a constitutional violation raised in a post-conviction petition. The trial court must “neutralize the taint” of the violation “while at the same time not grant a windfall to defendant.” **Lafler v. Cooper**, 566 U.S. 156, 170 (2012). Typically the remedy in a case such as this is either specific performance or resentencing, and the circuit court has discretion to choose which remedy is appropriate. Notably, defendant did not ask for specific performance. Also, the specific performance remedy – a 20-year sentence – was not necessarily precluded by the chosen remedy of a new sentencing hearing.

The appellate court agreed with defendant that his new sentence violated due process. In his post-conviction petition, defendant alleged, and the circuit court found, that he would have accepted the 20-year offer had he been correctly advised of the proper sentencing range. Instead, he was informed that he faced a maximum sentence of 30 years. Under these circumstances, the right to due process prohibits the court from resentencing a defendant to a term that exceeds what he believed to be the maximum sentence he faced when he rejected the court’s 20-year offer and elected to proceed to trial. Resentencing him to a term greater than 30 years would be “inconsistent with constitutional concerns of fundamental fairness.” **People v. Whitfield**, 217 Ill. 2d 177 (2005). The case was remanded for resentencing to a term not to exceed 30 years.

**People v. Bass**, 2022 IL App (1st) 210249 The circuit court erred in dismissing defendant’s post-conviction petition at the second stage where he made a substantial showing of ineffective assistance of counsel. Specifically, defendant alleged that his counsel failed to consult with him in private at any time prior to trial. Instead, all of their conversations occurred in a holding cell behind the courtroom while other detainees were present. Defendant alleged that this led him to be misinformed regarding critical evidence, which ultimately led him to reject a favorable plea offer.

It is crucial to the attorney-client relationship that a client and his lawyer be able to engage in full and open communication. Indeed, the attorney-client privilege is meant to foster such communication and requires that conversations occur in private. Here, defendant was facing a murder charge, and evidence provided in discovery consisted of surveillance video, phone calls, and text messages, among other things. The presence of other detainees made it impossible for counsel to engage in a meaningful review of the State’s evidence with defendant. Thus, counsel’s performance in failing to meet privately with defendant was deficient. In reaching this conclusion, the court was careful to note that it was not setting out a categorical rule requiring private consultation in every case.

The court went on to find that defendant also made a substantial showing of prejudice where he alleged that he would have accepted a 20-year plea offer had he not been misadvised of the significance of certain evidence against him. Instead, defendant proceeded to trial and

received a 55-year sentence after conviction. While the State argued that the significance of the evidence in question was not material to the plea decision, the appellate court found that such an analysis should be made at an evidentiary hearing rather than at the second stage.

**People v. Roman**, 2022 IL App (1st) 201173 Defendant was convicted of murder and received a 32-year prison sentence. The appellate court reversed and remanded due to an evidentiary error. On remand, defendant pled guilty and received a 24-year term, after being admonished that he faced a 20 to 60-year sentencing range. Defendant filed a post-conviction petition alleging the trial court and counsel misled him as to the potential maximum sentence, rendering his plea involuntary. He pointed out that the trial court could not impose a sentence greater than 32 years on remand unless it was based on post-sentencing conduct. 730 ILCS 5/5-5-4(a). The circuit court summarily dismissed.

The Appellate Court reversed. Defendant made an arguable claim of ineffective assistance of counsel. Attorneys have a duty to provide their clients with accurate information about potential sentences. Here, defendant alleged counsel erroneously stated that he faced a sentence 28 years longer than the actual maximum. The claim was to be taken as true, and was not rebutted by the record. In fact, the record showed the trial court stated the maximum was 60 years and counsel did not object. Thus, defendant made an arguable claim of deficient performance.

Defendant also made an arguable claim of prejudice. Defendant alleged that had he known of the actual sentencing range, he would have gone to trial. Under **People v. Hall**, 217 Ill. 2d 324, 335 (2005), defendant must also claim actual innocence or a plausible defense. A defendant can show prejudice in the plea context using the relative weakness of the State's case based on facts already in the record. Here, the Appellate Court rejected the State's claim that its evidence at trial was overwhelming. Its prior holding said otherwise, as it found the prejudicial gang evidence warranted a new trial. The State's eyewitness testimony was susceptible to attack based on opportunity to observe and lighting conditions. As such, defendant made an arguable claim of prejudice.

Finally, the Appellate Court stressed the low threshold applicable to *pro se* petitions and expressed dismay with the State's "lip service" to this standard, which it recited and proceeded to "rebuff" by making repeated, improper challenges to the credibility of defendant's claims.

**People v. Jones**, 2021 IL App (1st) 182392 Defendant's post-conviction petition failed to make a substantial showing of prejudice stemming from plea counsel's erroneous advice about sentencing credit. Defendant pled guilty in exchange for a minimum sentence of two years. He claimed in a post-conviction petition that his attorney assured him he would receive 283 days of credit, but that he later learned the credit had been applied to a prior sentence and would not be applied to the instant case.

The Appellate Court rejected the State's untimeliness argument, noting the record did not contradict defendant's claim that he did not learn his attorney's advice was erroneous until he began serving this sentence, long after the three-year deadline for filing the petition. But it affirmed the second-stage dismissal on the merits. Under **People v. Brown**, 2017 IL 121681, defendant had to show that absent counsel's erroneous advice, there was a reasonable probability he would have rejected the plea and gone to trial. Defendant did not make that showing here because he did not outline any potential defenses or weaknesses in the State's case that would have made it rational for him to go to trial instead of accepting a minimum sentence.

**People v. Nicholson, 2021 IL App (3d) 180010** In post-conviction proceedings, defendant established that he received ineffective assistance of counsel during plea negotiations where counsel failed to inform defendant that he was eligible for Class X sentencing for a charge of aggravated domestic battery, based on defendant's criminal history. While defendant was advised of the possibility of Class X sentencing on another charge, attempt murder, defendant alleged that counsel advised him the State could not prove the attempt murder charge, and he would face only a 14-year maximum for the aggravated domestic battery. On this advice, defendant rejected a six-year offer from the State. Defendant ultimately was acquitted of the attempt murder but was sentenced to 25 years of imprisonment on the aggravated domestic battery.

At the hearing on his post-conviction petition, defendant testified that if he had known he was Class X eligible for the domestic battery, he would have accepted the six-year offer. And, while counsel could not recall the precise advice he gave defendant, he admitted not knowing that defendant would be subject to Class X sentencing on the lesser charge and testified that he would have given an assessment of the strength or weakness of the State's evidence on all of the charges, essentially corroborating defendant's claim that counsel advised he could not be convicted of the attempt murder. The Appellate Court reversed the denial of defendant's post-conviction petition and remanded the matter to the trial court for resentencing.

**People v. Vatamaniuc, 2021 IL App (2d) 180379** Defendant failed to establish ineffective assistance of counsel during plea negotiations. Defendant claimed that counsel failed to properly convey the details of the State's written plea offer, and that there was a reasonable probability defendant would have accepted the offer if he had. The Appellate Court concluded that defendant could not show prejudice, even if counsel had performed deficiently, where the record failed to corroborate defendant's self-serving statement that he would have accepted the offer. Defendant's attempt to accept the offer six months after it expired could not serve as corroboration because the record also showed that defendant had been timely informed of the details of the offer, including its limited availability.

**People v. Pagsisihan, 2020 IL App (1st) 181017** The trial court erred in entering a second-stage dismissal of defendant's post-conviction petition which alleged that plea counsel failed to advise him of the immigration consequences of his guilty plea to murder. While the record showed that defendant had been subject to deportation proceedings previously, he was never removed from the United States following those proceedings, he subsequently obtained a marriage license in the United States, and he was granted work authorization through INS. Defendant alleged that he informed plea counsel about his prior dealings with immigration, and counsel never told him that a murder conviction would render him subject to deportation. Defendant also alleged that he would not have pled guilty had he known of the immigration consequences because he has lived in the United States nearly his entire life, has children and family here, and has no connection to the Philippines where he was born.

The Appellate Court agreed that defendant made a substantial showing that counsel's performance was deficient for failing to advise defendant of the certain immigration consequences of his plea to murder, even though defendant knew from prior immigration proceedings that his removal was already possible. And, the court concluded that defendant made a substantial showing of prejudice because under the circumstances here, it would have been rational to reject the plea and proceed to trial had defendant known that deportation was a statutory certainty and not merely a possibility.

While a conviction after trial may have resulted in a longer term of imprisonment than that imposed as part of the negotiated plea, that is not the only consideration when considering whether a noncitizen defendant's decision to insist on trial would have been rational. The Appellate Court noted that defendant had no memory of the Philippines, knows nobody there, and has significant family ties to the United States. While not everyone in defendant's position would choose to reject the plea here, the court could not say it would be irrational to do so. The Appellate Court reversed and remanded for an evidentiary hearing.

**People v. Ryburn**, 2019 IL App (4th) 170779 The circuit court erred when it found defendant's successive post-conviction petition failed to satisfy the cause-and-prejudice test. Defendant had pleaded guilty to three counts of aggravated criminal sexual assault and received three consecutive 20-year sentences. Years later, after filing an ARDC complaint and a FOIA request, he learned that the State initially offered a 24-year total sentence to his attorney, but that his attorney never communicated the offer to him. Defendant's inability to learn about the offer until investigating his own case constituted "cause." He further made a substantial showing of prejudice by meeting the **Frye** test: he alleged that if he had known of the offer he would have accepted it; he provided evidence that the State would not have revoked the offer, because it made clear that the offer stood until the next hearing date; the judge would have accepted the offer as it would have saved time and would save the teenage victim the trouble of testifying; and the end result of the criminal process would have been more favorable.

**People v. Boyd**, 2018 IL App (5th) 140556 Defendant should have been permitted to withdraw his guilty plea to armed robbery because he established ineffective assistance of plea counsel. At the hearing on the motion to withdraw, plea counsel confirmed that he informed defendant he would receive 50% credit, which constituted deficient performance because defendant must serve 85% of his sentence. As for prejudice, counsel and defendant both testified that they discussed the amount of credit defendant would receive in the lead-up to the plea. The Appellate Court interpreted this testimony as establishing more than a bare allegation that defendant would not have pled guilty absent the misinformation, as it showed the amount of credit to be a factor in his decision. Thus, defendant established both prongs of **Strickland** and should have been allowed to withdraw his plea.

**People v. Hoare**, 2018 IL App (2d) 160727 A plea to "410 probation" (first-offender probation) for a drug offense is a "conviction" for purposes of the Immigration and Nationality Act even though successful completion of the term of probation does not result in conviction under Illinois law. Under the Immigration Act, a "conviction" of a drug offense, other than minor possession of cannabis, requires deportation. The Immigration Act's definition of "conviction" includes entry of a guilty plea with imposition of "some form of punishment, penalty, or restraint" on liberty. In **Gill v. Ashcroft**, 335 F. 3d 574 (7th Cir. 2003), the Seventh Circuit specifically held that the Immigration Act's definition of "conviction" includes a plea to 410 probation.

Defendant, a citizen of Belize but not the US, pled guilty to possession of a small amount of cocaine. At the plea, counsel represented that he had looked into the immigration consequences of the plea and believed 410 probation to be "an appropriate disposition taking that into account." The court gave only general admonishments about potential deportation consequences. After defendant was ordered deported because of the plea, he filed a post-



conviction petition claiming plea counsel was ineffective for failing to advise him that his plea would result in deportation.

Defendant's petition stated the gist of a claim of deficient performance. It should have been clear to plea counsel that 410 probation was equivalent to a conviction under the Immigration Act, especially given the decision in [Gill](#). Because the deportation consequence was "truly clear," counsel was required to tell defendant that his plea would strip him of any defense to deportation.

Defendant also stated the gist of a claim of prejudice even though he did not assert that he had a defense or was actually innocent. Under [Lee v. United States](#), 583 U.S. \_\_\_\_, 137 S. Ct. 1958 (2017), a defendant can show prejudice where, despite only a remote chance of acquittal, he might still have elected trial over the certainty of deportation. Here, defendant had been married to a US citizen for 6 years, he had two young children who were US citizens, and he and his wife both worked in the US and had no desire to move elsewhere. On these facts, it would not have been irrational for defendant to reject the plea and proceed to trial had he been properly advised regarding deportation.

[People v. Walker](#), 2018 IL App (1st) 160509 Defendant failed to establish prejudice under **Frye** and **Lafler** in arguing that his counsel was ineffective during plea negotiations. Defendant was charged with first-degree murder with a firearm, convicted after a jury trial, and sentenced to 53 years in prison (28 plus a 25-year enhancement). In a post-conviction petition, he claimed counsel failed to advise him of the firearm enhancements before he rejected a 27-year plea offer.

Defendant failed to show a reasonable probability that he would have accepted the plea had counsel advised him of the correct maximum. The court reasoned that defendant was willing to try for an acquittal rather than accept a 27-year term, while believing he faced a 60-year maximum. There was no evidence this calculus would have changed had he known he faced the firearm enhancements. Defendant had a lengthy criminal history, and therefore knew he'd receive a sentence far above the minimum if convicted. The record therefore established defendant's determination to risk a lengthy sentence in hopes of an acquittal. Defendant's own self-serving statement in his petition that he would have accepted the plea is insufficient, even at the first stage.

[People v. Hudson](#), 2017 IL App (3d) 160225 Defendant was charged with offenses that in combination with his prior convictions would have made him subject to mandatory life imprisonment. Trial counsel erroneously told defendant that he was only subject to a maximum term of 60 years imprisonment and that he would most likely get a sentence of 44 years if convicted. Prior to trial, the State offered a plea deal of 20 years imprisonment. While the jury was deliberating, the State offered defendant 16 years. Defendant rejected both offers. The jury convicted defendant and the court sentenced him to life imprisonment.

The federal district court eventually granted defendant's habeas petition finding that his trial counsel had been ineffective for failing to advise defendant of the mandatory life sentence. The court ordered the State to re-offer defendant a 20-year plea deal. If defendant accepted the deal, the trial court could exercise its discretion to decide whether to resentence defendant according to the plea agreement.

In State court, the prosecutor re-offered the 20-year plea deal and defendant accepted the offer. The trial court rejected the deal stating that it would not have accepted it at the time defendant was initially tried. The court reimposed a life sentence.

The trial court abused its discretion in rejecting the plea agreement. The appropriate remedy in situations like this must be to neutralize the taint of the constitutional violation.

The first plea offer of 20 years best placed the parties in the same situation they were in at the beginning of the plea process. Although the trial court had discretion to reject the details of the plea, such discretion was limited by the need to neutralize the taint of the constitutional violation, making the reimposition of a life sentence impermissible.

The case was remanded to the trial court to accept the plea agreement.

**People v. Thomas, 2017 IL App (4th) 150815** During plea negotiations, both the prosecutor and defense counsel mistakenly believed that defendant would have to serve 85% of any sentence imposed. Defendant rejected several offers, the lowest being for 21 years. Following trial, the court clarified that defendant would serve 50%, and defendant was sentenced to 26 years. Defendant then wrote to the court seeking reduction or appeal of his sentence, stating that if he had known his sentence would be served at 50%, he “might have” accepted the 21-year offer.

Defendant could not show prejudice. He did not claim he “would have” accepted the 21-year offer had he known the correct percentage. Instead, the “lackadaisical assertion” that he “might have” accepted the offer did not undermine confidence in the outcome of the proceedings. Further, the State’s 21-year offer was based on its belief that defendant would serve nearly 18 years in prison, and nothing in the record suggested that the State would not have withdrawn the 21-year offer had it realized that error.

**People v. Armstrong, 2016 IL App (2d) 140358** 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 offense on which his status as a sex offender depended was not actually a sex offense. The Appellate Court agreed.

Defendant’s prior offense would have been (at the time he pled guilty) a sex offense requiring registration only if the victim had been under 18 years old. The charge did not make 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. Counsel rendered deficient assistance where he did not ascertain that defendant had not been convicted of a sex offense. It was reasonably probable that defendant would not have pled guilty had he received accurate advice since he could not have been properly convicted of failing to register.

**People v. Williams, 2016 IL App (4th) 140502** 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 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.

**People v. Deltoro, 2015 IL App (3d) 130381** 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 United States and thus it was unclear whether counsel knew about defendant's immigration status. 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.

[People v. Carranza-Lamas](#), 2015 IL App (2d) 140862 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. Lopez](#), 2015 IL App (1st) 142260 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.

Where the basis for the claim of ineffective assistance is that counsel failed to advise defendant of the immigration consequences of a guilty plea, however, 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**.

[People v. Dodds](#), 2014 IL App (1st) 122268 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. Under the rationale of [Padilla v. Kentucky](#), 559 U.S. 356 (2010), 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. 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. 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.

**People v. Greco**, 2014 IL App (1st) 112582 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**, 568 U.S. 342, 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. Illinois courts use **Teague's** retroactivity analysis and thus would follow "the well-reasoned decision" in **Chaidez**. Accordingly, defendant's post-conviction claim relying on **Padilla** was properly dismissed.

**People v. Guzman**, 2014 IL App (3d) 090464 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.

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.

**People v. Guzman-Ruiz**, 2014 IL App (3d) 120150 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."

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

**People v. Barghout**, 2013 IL App (1st) 112373 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.

**People v. Miller**, 2013 IL App (1st) 111147 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.

**People v. Robinson**, 2012 IL App (4th) 101048 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.

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.

**People v. Trujillo**, 2012 IL App (1st) 103212 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.

**People v. Guerrero**, 2011 IL App (2d) 090972 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.

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. Edmonson**, 408 Ill.App.3d 880, 946 N.E.2d 997 (2d Dist. 2011) 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.

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

**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.

**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).

#### **§14-4(b)(3)**

#### **Errors in Presenting Evidence**

#### **United States Supreme Court**

**Harrington v. Richter**, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) 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.

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.

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, the prosecution’s case did not stress blood evidence. And, 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.

Also, 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. Defense counsel conducted a skillful cross-examination, elicited concessions from the State’s experts, and drew attention to weaknesses in their conclusions.

### Illinois Supreme Court

**People v. Roland**, 2023 IL 128366 Defendant was convicted of attempted murder based on evidence that while running from the police, he turned and fired a gun in the officer’s direction before continuing to flee. At trial, defendant testified that he fired the shot in the air in an attempted “suicide by police.” He testified that the death of his mother and the mother of his child made him suicidal, and that he tried committing suicide shortly before the date of the incident as well as two days after the incident. He testified that he received treatment at hospitals after both attempts. In finding defendant guilty, the trial court found defendant’s explanation for the shooting unconvincing. The trial court pointed out that defendant fled and hid after firing the gun, undermining his claim that he wanted the officer to shoot him.

Defendant filed a post-conviction petition alleging that he received ineffective assistance of counsel when his trial counsel failed to present corroborating evidence of his mental health history – specifically, documentation of his prior suicide attempts. After second stage dismissal, the appellate court reversed and remanded for an evidentiary hearing. The supreme court reversed the appellate court’s decision and affirmed the dismissal of the petition.

The supreme court held that defendant could not establish prejudice. Although the documents appended to his petition would have corroborated his uncontested testimony regarding his mental health around the time of the shooting, it does not necessarily follow that the evidence was reasonably likely to have changed the outcome at trial. The trial court was made aware of defendant’s suicide attempts, but its decision did not seem to hinge on whether it found those accounts credible. It instead focused on defendant’s actions after the

shooting. The supreme court emphasized the trial court's finding that a suicide-by-police defense did not square with defendant's decision to run and hide after firing the shot. In light of this finding, it's unlikely corroborating evidence would have changed the trial court's decision.

**People v. Lewis, 2022 IL 126705** The Supreme Court agreed with the appellate court's decision to reverse defendant's conviction and remand for a new trial.

Defendant was convicted of involuntary sexual servitude of a minor, traveling to meet a minor, and grooming. A 4-3 majority agreed with defendant's allegation that his attorney was ineffective for failing to effectively pursue an entrapment defense.

Defendant's convictions stemmed from a Department of Homeland Security anti-trafficking sting operation which used an adult services website to lure people searching for prostitutes. Defendant responded to an ad for an 18 year-old prostitute. Agents responded to the defendant's text by offering the defendant "her" two daughters. When the officers told defendant the girls were 14 and 15, defendant stated he was not interested. He informed the officers he was interested in women 18 and older. He tried again to solicit the "mother." After more back and forth, defendant admitted he thought 14 and 15 year-old girls are "old enough" despite what the law says, then asked for pictures. He again asked how much for the "mother" but was turned down, and eventually agreed to meet at a hotel and pay for both daughters. He was arrested at the hotel. A search of his cell phone found no evidence of any interest in sex with underage girls prior to the text exchange with the officers.

At trial, defendant testified he never had a desire to have sex with a minor and that the agents put the idea into his head and made him comfortable with the idea. He also presented four character witnesses who attested that he had never been interested in sex with minors.

The jury received the entrapment instruction, IPI No. 24-25.04, which states in relevant part that defendant is entrapped if "incited or induced by a public officer," but not if defendant "was predisposed to commit the offense and a public officer merely afforded to the defendant the opportunity." In closing argument, the prosecutor told the jury that, "[i]f you find that the police did incite or induce him, then you can look at the next step," which was predisposition. The jury requested a definition of "incited and induced and predisposed." The parties agreed with the court to not define the terms and instead refer the jury back to the instructions. The jury asked for a definition of "predisposition." Again the parties agreed with the court to not provide a definition. The jury convicted defendant of all counts.

On appeal, defendant claimed counsel was ineffective for failing to answer the jury's request for definitions, failing to object to the State's closing argument, and failing to admit into evidence defendant's lack of a criminal history.

The Supreme Court found counsel ineffective. Regarding the definitions, a court should generally answer questions of law, and a request for a definition of a word in a jury instruction is a question of law, even if the word does not have a distinct legal definition. Here, the jury showed confusion and asked legal questions indicating difficulty interpreting the instruction. Additionally, "predisposition" does have a legal definition as found in **People v. Bonner, 385 Ill. App. 3d 141 (2008)** (defining

“predisposition” as willing to commit the crime without persuasion and before exposure to government agents). Thus, counsel should have offered a definition, and the court’s failure to give one was an abuse of discretion. The error was prejudicial because the definition of “predisposition” would have focused the jury’s attention on the time period before defendant’s encounter with the agents, and the defense offered ample evidence that defendant had no inclination to engage in sex with minors at that time.

Counsel was also ineffective for failing to object to the prosecutor’s statement that “if you find that the police did incite or induce [defendant], then you can look at the next step,” indicating predisposition. Inducement and predisposition are not separate elements, they are related. The State was required to rebut defendant’s entrapment defense by presenting evidence that (1) defendant was predisposed to commit the offenses and (2) the government agents merely afforded to him the opportunity or facility for committing the offenses. The type of inducement is relevant to the question of whether defendant was predisposed, and to whether agents merely afforded defendant an opportunity. So the State misstated the law when it told the jury a defendant is not entrapped if predisposed, even if the police incited or induced him to commit the crime. Counsel’s failure to object to this critical misstatement prejudiced defendant.

Finally, counsel’s error in failing to present evidence that defendant lacked a criminal record, which was highly relevant to the question of predisposition, was objectively unreasonable. Counsel’s failure was prejudicial where it prevented the jury from considering evidence that he was not predisposed to have sex with minors.

The State argued that none of these errors were prejudicial because the evidence established that defendant was not induced, given the short time between the initial solicitation and the defendant’s decision to go to the hotel. The majority found this fact outweighed by the government’s “use of subterfuge, deceitful representation, and coercive tactics shown by the numerous texts and interactions between law enforcement agents and defendant.” Similarly, on the question of predisposition, defendant’s ultimate request to engage in sex with minors was outweighed by his lack of criminal history, and the lack of child pornography or other indication of interest in minors on his phone. Thus, the ultimate question of whether there was inducement and predisposition remains for a properly instructed jury, and it could not be said that the errors were not prejudicial.

The dissent would have found a lack of prejudice because it believed defendant bore the burden of showing both inducement and a lack of predisposition, meaning the State could rebut the defense by showing *either* a lack of inducement *or* predisposition. Thus, the dissent saw nothing wrong with the closing argument. As for the failure to respond to the jury questions, the dissent saw no chance of prejudice because the words in question have commonly understood meanings which do not depart substantially from their legal definitions. And while it’s important that the jury understand the temporal context of “predisposition,” the pattern instruction makes it clear that it refers to the time prior to meeting the government agents. Finally, the dissent would have found no prejudice because the government agents



did not induce defendant, they simply afforded defendant the opportunity to commit the crime. The dissent noted that, despite defendant's protestations, he agreed to the crime within minutes, and once at the hotel, the agent did not offer any encouragement before defendant paid.

**People v. Patterson**, 2014 IL 115102 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.

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. And, the physical evidence overwhelmingly corroborated complainant's version of events. Given this evidence, the jury would not have acquitted defendant even if his confession had been excluded. Defendant thus failed to establish the second prong of Strickland.

**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. 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 did not stipulate 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.

Defendant's subsequent 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 its terms it contested the correctness of the court's ruling on the motion to suppress.

**People v. Campbell**, 208 Ill.2d 203, 802 N.E.2d 1205 (2003) 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.

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.

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).

### **Illinois Appellate Court**

[\*\*People v. Gilker\*\*, 2023 IL App \(4th\) 220914](#) During defendant's jury trial for predatory criminal sexual assault, the State called a sheriff's investigator, who testified that she viewed the complainant's interview with the Children's Advocacy Center. The investigator did not recall telling the complainant, after the interview, that defendant would be arrested and go to prison. The defense re-called the investigator and impeached her with her recorded statement in which she told the complainant she would arrest defendant. When confronted with this recording, the investigator admitted to making the statement, adding that she did so because she found the complainant's interview "very compelling and credible." Defense counsel did not move to strike, instead eliciting that the investigator made this statement before she had a chance to review any of the evidence. The State argued in its closing that the investigator was "correct" when she called the interview "compelling." Defendant was found guilty.

Defendant argued on appeal that the investigator improperly vouched for the credibility of the complainant. He argued that his attorney was ineffective for failing to move to strike this testimony, and the prosecutor engaged in misconduct when it repeated the testimony in closing.

Regarding the ineffectiveness claim, the appellate court found counsel's response to the testimony a matter of trial strategy. Counsel's decision to elicit testimony indicating the investigator's conclusion was premature may have done more to reduce the prejudice than a motion to strike, which may have highlighted the testimony for the jury. Therefore, the defendant could not overcome the presumption of sound trial strategy.

The appellate court also rejected the prosecutorial misconduct argument because a prosecutor improperly vouches for a witness only by "explicitly" stating that he or she

personally believes the witness is credible. Calling a witness “credible,” and making the jury infer that the prosecutor personally believes the witness to be credible, is a proper comment on the evidence.

**People v. Rouse**, 2022 IL App (1st) 210761 Defendant’s post-conviction petition made a substantial showing of ineffective assistance of trial counsel by alleging that counsel interfered with his right to a jury trial and right to testify, and failed to call an exculpatory witness.

Defendant’s petition contained his own notarized affidavit stating that he asked to testify at his robbery trial, but that his attorney warned him that doing so would “make her look bad” because they hadn’t discussed his testimony. Counsel told him he had to “go along with her on this.” Defendant also alleged that his attorney threatened to withdraw if he chose a jury trial. Finally, defendant alleged that his attorney failed to call to the stand his sister, who would have explained why he had a large amount of cash on him at the time of arrest.

The majority first held that the State forfeited two arguments raised for the first time during oral argument: (1) that defendant could not show **Strickland** deficiency and prejudice on the right-to-testify and right-to-jury-trial claims; and (2) that the record rebutted the right-to-testify claim. Neither argument was contained in the State’s brief, and although the defendant has the burden of making a substantial showing at the second stage, defendant’s opening briefs argued he had under the **Strickland** standard. At that point, the State had to rebut the argument, but instead, the State simply failed to respond. As such, any counter-arguments to these points were forfeited.

Regarding the right to a jury trial, the State argued that the record rebuts defendant’s claim because he was admonished and he executed a valid jury waiver. The majority disagreed. The admonishments did not inform him that the right to a jury trial was his alone to make. Thus, the admonishments did not specifically rebut the claim.

As to defendant’s right to testify, defendant adequately alleged that his attorney’s statements urging him not to testify interfered with his right. And the record supported the claim – after receiving admonishments about his right to testify, defendant informed the court that he would testify, but after an off-the-record discussion with his attorney, defendant stated that he would not be testifying. Taken as true, and in light of the State’s failure to raise a counter-argument to the **Strickland** prongs, defendant made a substantial showing.

Finally, defendant made a substantial showing of ineffectiveness for failing to call his sister. Even though defendant did not allege that his sister would testify, this is not an essential allegation if it can be inferred that she would. Although the dissent would have found no prejudice in light of the fact that defendant was identified in a show-up shortly after robbing two people, and had the proceeds of the robbery, and was seen throwing a gun, which was recovered, while being chased by police, defendant challenged all of this evidence at trial and therefore the value of his sister’s testimony is a question of fact to be resolved at an evidentiary hearing.

**People v. Logan**, 2022 IL App (4th) 210492 Defense counsel did not perform deficiently by failing to object to an officer’s testimony as improper lay opinion in violation of [Illinois Rule of Evidence 701](#). The officer testified that when he was at defendant’s residence in response to her 911 call about her young son’s death, defendant “appeared upset” but “it seemed...forced.” The officer also stated that defendant seemed to be mimicking the sound of crying.

Relying on **People v. Martin**, 2017 IL App (4th) 150021, the appellate court concluded that this was not improper opinion testimony because it was the officer’s past

opinion of what he observed while he was at the scene. It was not offered as a present opinion and thus was not improper lay opinion testimony. And, even if it was improper opinion testimony, there was no prejudice where the court found the evidence against defendant overwhelming such that there was no reasonable probability the outcome would have been different had counsel successfully sought to bar the officer's testimony.

**People v. Hayes, 2021 IL App (1st) 190881-B** Defendant was convicted of first-degree murder on the basis of six eyewitness identifications. On direct appeal, defendant alleged the evidence was insufficient, relying on studies showing the effects of weapon focus and witness certitude. The Appellate Court rejected the claim because his attorney did not call an expert at trial.

Defendant filed a post-conviction petition alleging ineffective assistance of trial counsel for failing to call an expert on eyewitness identification. After summary dismissal, the Appellate Court reversed, finding the claim arguable. Defendant's petition was supported by citations of cases and secondary authority discussing weapon focus and the weak correlation between witness certainty and accuracy. These sources made an arguable claim that, even if the identifications were sufficient to support a conviction under a deferential standard of review, the outcome may have been different had they been attacked by an expert witness. Each eyewitness only partially viewed defendant, at night, for a brief amount of time, with particular focus on the gun. Their descriptions varied. No physical evidence or confession linked defendant to the murder. Defendant presented an alibi and his own witnesses. Thus, it was arguable that an expert on eyewitness identifications could have undermined the credibility of the eyewitnesses to the extent that a reasonable probability exists for a different outcome.

In its original decision, the Appellate Court remanded the case to a different judge after finding the circuit court considered matters that should have been reserved for the second stage, namely, whether counsel's decisions stemmed from trial strategy. Pursuant to a supervisory order upon denial of the State's leave to appeal, the Illinois Supreme Court ordered the court to vacate that portion of the opinion.

**People v. Suggs, 2022 IL App (2d) 200713** Defense counsel was not ineffective for commenting in opening statements that the jury would hear testimony from police officers that defendant denied committing the charged act but then failing to present that testimony. While defense counsel's failure to present promised testimony generally is "highly suspect," here it was the result of unforeseen circumstances.

The officers were on the State's witness list and were present in court on the day of trial. The State did not call either of the officers as witnesses, however, so counsel was not able to cross-examine them and elicit testimony about defendant's denial. This did not obligate defense counsel to call the officers as defense witnesses, though. Counsel could not have called them solely to elicit defendant's own self-serving denial. And, calling the officers could have elicited harmful testimony. Further, the jury was given the typical admonishments that opening statements are not evidence, which is a factor to consider in deciding whether a defendant was prejudiced by a failure to present promised evidence. And, while defendant's denial to the police was consistent with his defense that he had not committed the offense, it was not the primary basis for the defense theory.

Further, the State's comments in rebuttal closing argument, that defendant could have called an eyewitness to the incident – his mother – if he really had not committed the offense and that defendant failed to provide evidence rebutting the complaining witnesses' claim that he sought medical treatment for his injuries, did not constitute improper burden

shifting. These comments were invited by defense counsel's closing argument statement that the State had failed to call the eyewitness or to produce corroborating medical evidence. Where defendant argues in closing that the State failed to produce evidence to which the defense had equal access, the State may respond by commenting on the defendant's own failure to produce that evidence. Because the State's arguments were not error, defense counsel did not render deficient performance by failing to object to those arguments.

**People v. Taylor**, 2022 IL App (5th) 180192 Defendant alleged ineffective assistance of counsel where, in his trial for armed habitual criminal, counsel did not offer to stipulate to defendant's felon status, as required by **People v. Moore**, 2020 IL 124538. The State argued that, unlike **Moore**, which involved a charge that required only proof of any prior felony conviction, the armed habitual criminal statute requires the State to prove defendant had two or more prior convictions of the specific type enumerated as qualifying offenses in the statute. Thus, the type of conviction had probative value.

The Appellate Court agreed with defendant, because even under the more exacting requirements of the armed habitual criminal statute, the parties could stipulate that defendant had two prior felony convictions which met the qualifications of the statute, without divulging the type of convictions. If defendant is willing to stipulate that his prior convictions satisfy the armed habitual criminal statute, the admission of those felonies into evidence would serve no evidentiary purpose other than to expose defendant to the risk of unfair prejudice.

Here, counsel performed unreasonably where he never objected when the prior convictions were detailed in the charging instrument, opening statements, closing argument, jury instructions, and the certified copies of conviction, which were entered into evidence. These repeated references, along with the prejudicial nature of the prior offenses – aggravated battery resulting in great bodily harm and unlawful delivery of a controlled substance – and the circumstantial nature of the State's case, rendered counsel's performance prejudicial.

**People v. Hampton**, 2021 IL App (5th) 170341 Trial counsel's performance was deficient, but defendant could not show prejudice due to overwhelming evidence. Defendant was convicted of murder after the State alleged he and two accomplices waited outside a nightclub before shooting the victim as he exited the club. Counsel first erred in eliciting evidence of defendant's other crimes. Despite prevailing on a pre-trial motion to bar defendant's criminal history, counsel asked defendant to detail his record on direct-examination. Counsel's decision to elicit testimony about defendant's other charges did not constitute sound trial strategy.

Counsel also erred in failing to object to an officer's testimony describing a surveillance video viewed by the jury. The officer opined that an object removed from the victim's body after the shooting was not a gun. The testimony was inadmissible because the officer had no firsthand knowledge of the events, and was in no better position to understand the contents of the video than a typical juror, such that the testimony invaded the province of the jury.

The defendant could not show prejudice, however, because, despite the defense theory of self-defense, there was no evidence supporting the notion that the victim was armed. The victim was shot immediately after leaving a club that had metal detectors at the entrance, defendant admitted he did not see a firearm, and the shell casings at the scene all came from the same firearm.



**People v. Bell, 2021 IL App (1st) 190366** The trial court did not err in admitting four Twitter posts into evidence for the limited purpose of identification. The complainant testified that she used the tweets, two of which referenced her shooting and two of which showed photographs of codefendant and defendant with weapons, to identify her assailants. Her explanation of how she observed the tweets on her phone before taking a screen shot adequately laid a foundation. While defendant alleged a failure to prove the identity of the poster, neither the witness nor the State used either the written or photographic tweets to establish any admission or evidence other than explaining how the complainant arrived at her identification.

Nor was counsel ineffective for failing to move for a severance based on the tweets. Although defendant alleged the tweets apparently came from the co-defendant's account and implicated defendant in the offense in violation of **Bruton**, the tweets were not admitted as prior statements of the codefendant. They were admitted for the limited purpose of identification, and would have been admissible against defendant even if the cases were severed.

Finally, the court rejected several additional claims of ineffectiveness, finding no unreasonable performance. These included: failure to object to codefendant's opening statement which revealed defendant would testify (sound strategy where trial counsel testified at a post-trial hearing that the attorneys collaborated on the defense and had no problem with the statement); failing to impeach the complainant with prior inconsistent statements casting doubt on her ability to observe (sound strategy where trial counsel explained he did not want to "beat up" on a sympathetic victim who made the statements in question after suffering a traumatic event); failure to object to the complainant's references to her subsequent miscarriages (sound strategy where trial counsel stated the defense theory was not that the complainant was not sympathetic, only that she was mistaken); and admitting evidence that defendant and co-defendant had been arrested with a gun similar to the one used in the crime (trial counsel explained the ballistics did not match and it therefore undermined the witness' testimony and photographic tweets, a sound strategy).

**People v. Gavin, 2021 IL App (1st) 182085** Counsel was not ineffective for failing to elicit the fact that a witness did not make an identification of the defendant as the shooter, or cross-examine an officer about the witness's failure to identify defendant in a show up. Trial counsel testified at a post-trial hearing that she feared the witness would identify defendant for the first time from the stand, and that the officer might suddenly hedge on the non-identification at the show-up. Thus, strategic reasons existed for counsel's omissions. Additionally, where the witness had testified he did not get a good look at the shooter and had not identified defendant at any point in State's case, and other, more persuasive evidence implicated defendant in the crime, defendant could not show prejudice.

**People v. Lewis, 2020 IL App (2d) 170900** Defendant was convicted of involuntary sexual servitude of a minor and traveling to meet a minor after responding to an ad on Backpage.com and traveling to a hotel to meet up with two underage girls to engage in sexual activity. It turned out that no minors were involved; defendant was actually communicating with an undercover officer in response to the internet advertisement, and he was arrested after he arrived at the hotel and produced cash in exchange for the anticipated sexual activity. Defendant presented an entrapment defense at trial.

Defense counsel rendered deficient performance by failing to submit a definition of “predisposed” in response to a jury question as to the meaning of the term. The jury received instructions on the defense of entrapment, but those instructions did not include such a definition, and there is no pattern instruction defining the term. The generally understood definition of “predisposed” is broader than how that term is defined for purposes of entrapment, where the focus is on whether defendant was ready and willing to commit the charged offense “before his or her initial exposure to government agents.” **People v. Bonner**, 385 Ill. App. 3d 141 (2008). Given the difference between the common understanding and the narrower meaning relating to the entrapment defense, and the jury’s express confusion over the meaning of the term, counsel erred in agreeing to the court’s response declining to provide a definition of “predisposed.”

Counsel also provided deficient representation by failing to present evidence that defendant had no prior criminal history. The absence of any criminal history was strong evidence of defendant’s lack of predisposition. Counsel failed to function as guaranteed by the sixth amendment by not presenting that evidence.

And, counsel erred by not objecting to the State’s closing argument which suggested to the jury that it had to first find that defendant was induced by government agents to commit the offense before considering whether he was predisposed to do so. Once the court decides there is sufficient evidence to instruct the jury on entrapment, it is the State’s burden to either disprove inducement or prove predisposition, beyond a reasonable doubt. The State’s argument misrepresented its burden.

These errors were prejudicial. The failure to offer a definition of “predisposed” created a serious danger that the jury convicted defendant without considering whether he was inclined to commit the offense *before* his contact with the officer. And, the State’s closing argument “muddled the waters” with regard to the entrapment defense. The cumulative effect of counsel’s errors rendered defendant’s trial unreliable under **Strickland**. The Appellate Court reversed and remanded for a new trial.

**People v. Ortega**, 2020 IL App (1st) 162516 A truck driver transporting a vehicle to a third party contacted the police when he opened the trunk of that vehicle and discovered bundles wrapped in duct tape. Those packages were ultimately found to contain cannabis, and defendant was arrested after the vehicle was delivered and he was observed removing the packages.

Trial counsel filed a motion to suppress, as well as a **Franks** motion, but did not present evidence on either motion at a hearing. The motion to suppress challenged both the initial search of the vehicle as well as the subsequent search of the packages found in the trunk. The trial court denied the motion to suppress on the basis that the truck driver was a bailee who had possession of the vehicle and could therefore allow it to be searched. The trial court held that a **Franks** hearing was not necessary.

The agreed upon facts did not resolve the questions of whether the police had probable cause to open the packages, whether the police opened those packages prior to obtaining a warrant, or whether there were misrepresentations in the facts contained in the complaint for search warrant. Counsel rendered deficient performance by not requesting an evidentiary hearing, and had counsel requested an evidentiary hearing, there was a reasonable probability of a different outcome. Thus, defendant received ineffective assistance of counsel. The Appellate Court reversed and remanded for a *Franks* hearing, and retained jurisdiction over the ultimate question of whether defendant’s motion to suppress was properly denied because that issue could become moot depending on the outcome on remand.

**People v. Hamilton, 2019 IL App (1st) 170019** Trial counsel was ineffective for failing to assert the proper ground for the admission of evidence. The defense theory at defendant's murder trial was that defendant saw the victim reach into his waistband before he shot him. Both the victim's girlfriend and defendant attempted to testify that they had known the victim to carry a gun in the past. The trial court barred the testimony, finding it "conjecture" and not admissible as **Lynch** evidence because it did not go to the victim's propensity for violence.

The Appellate Court majority held that counsel was ineffective for failing to argue that the evidence goes to state of mind, for which the evidence was clearly relevant and admissible. The trial court was correct that this evidence is not covered by **Lynch**, but it was incumbent upon counsel to identify and argue the correct basis for the admission of the evidence. "The defendant had a right to expect defense counsel to understand, explain, and apply the rules of evidence to the facts of his case in support of his theory of defense, no matter how nuanced that interpretation may be." Despite the fact that no gun was actually found on the victim, there was sufficient evidence of defendant's belief in the need to act in self-defense such that exclusion of state-of-mind evidence denied defendant a fair trial.

**People v. Miramontes, 2018 IL App (1st) 160410** Counsel's stipulation to the quantity of methamphetamine constituted ineffective assistance where three separate bags of a whitish substance had been recovered by the police but were combined before any of the bags could be tested independently. Relying on **People v. Coleman, 2015 IL App (4th) 131045**, the Court concluded that it could only speculate about whether all three of the bags contained methamphetamine prior to combining them. Because defendant may have been convicted of possession of a lesser quantity had counsel not stipulated to the combined quantity, defendant was prejudiced, and the matter was reversed and remanded for a new trial.

**People v. Jackson, 2018 IL App (1st) 150487** In joint, separate trials for attempt murder of a peace officer, co-defendant's counsel elicited facts tending to show that the shooters would not know their target was an officer. Defendant's counsel, who argued that defendant did not fire a gun at all, and that co-defendant, acting alone, fired all of the shots, did not elicit the same facts. Defendant was convicted of attempt murder of a peace officer, while co-defendant was convicted only of attempt murder. The Appellate Court rejected defendant's ineffectiveness claim, finding counsel's all-or-nothing strategy sound. Given the fact that officers saw only co-defendant firing, counsel could forego arguing that defendant would not have known the target was a police officer, as such an argument may have confused or distracted the jury, even though defendant's jury did receive a lesser-included offense instruction.

While counsel performed deficiently in failing to object to the officers' testimony detailing their awards and commendations, defendant could not show prejudice in light of his presence at the scene and positive GSR tests on his sleeve.

**People v. Stevens, 2018 IL App (4th) 150871** Counsel's failure to object to admission of certified report stating that defendant did not have a concealed carry license was invited error. Counsel could have objected at the pretrial hearing where the State indicated it would seek to admit the report or at trial when the exhibit was introduced. If counsel had objected, the State could have cured any error by calling a witness to admit the report. Even if counsel's performance was deficient, there was no prejudice because the record does not show that such witness was not available.

**People v. Tucker, 2017 IL App (5th) 130576** Defendant made a substantial showing in his second-stage post-conviction petition that trial counsel provided ineffective assistance in several ways.

(1) During opening statements, counsel disclosed to the jury inadmissible details of defendant's prior convictions.

(2) Counsel failed to lay a proper foundation to impeach a critical State witness.

(3) Counsel unsuccessfully tried to introduce a diagram to show that a State's witness could not have seen what he claimed to see. But since the diagram was not to scale, it could not accurately show what counsel intended and the trial court properly excluded it.

(4) Counsel made an unprofessional and bizarre closing argument where he, among other things, admitted his incompetence as a trial attorney and promised to retire from conducting trials.

**People v. Baldwin, 2014 IL App (1st) 121725** 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 under **725 ILCS 5/115-7.3**. 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. Defense counsel acted unreasonably by failing to introduce 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.

Defendant could not show prejudice from counsel's failure, however, where the record clearly showed that the trial judge would have convicted defendant even in the absence of the other crimes evidence.

**People v. Dupree, 2014 IL App (1st) 111872** 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.

Where there is a charge or inference of recent fabrication, however, 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.

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 State introduced the witness's second statement, which was consistent with his trial testimony.

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.

Defendant was prejudiced 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. The evidence against defendant was far from compelling, as there was no physical evidence linking him to the offense. And, the prior inconsistent statement related to defendant's guilt or innocence, making it especially prejudicial.

**People v. Coleman**, 2012 IL App (4th) 110463 Defendant filed a post-conviction petition claiming that defense counsel was ineffective for stipulating that large bag contained 926 grams of cocaine where police officer tested contents of only one of 15 bags that were recovered before commingling all 15 into one and sending to the lab. Petition showed an arguable case of ineffective assistance concerning counsel's stipulation that the entire large bag contained cocaine.

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.

**People v. Fillyaw**, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011) 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 in this closely balanced case. 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 the 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.



**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. 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.

**People v. Bryant**, 391 Ill.App.3d 228, 907 N.E.2d 862 (5<sup>th</sup> Dist. 2009) Deciding not to present a particular witness is generally a matter of trial strategy. Presumption of sound trial strategy is rebutted where counsel's decision is so irrational and unreasonable that no reasonably effective defense attorney would have pursued it 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.

Here, counsel's decision not to call any witnesses in support of the defense was clearly a matter of trial strategy, but the strategy was unsound and caused prejudice. 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. Even if the cross-examination of State witnesses 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 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.

**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).

**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. 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. 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. 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."

#### **§14-4(b)(4)**

#### **Failure to Assert Issue Or Seek Instruction**

#### **United States Supreme Court**

**Berghuis v. Thompkins**, 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010) 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.

#### **Illinois Supreme Court**

**People v. Jones**, 2023 IL 127810 Defendant was convicted of unlawful possession of ammunition by a felon after police found two bullets in her glove box during a traffic stop. When police confronted defendant with the bullets, she stated that they belonged to her husband. At trial, defendant's husband claimed ownership of the bullets, describing how he often used defendant's car to transport his gun, for which he possessed a FOID card.

During deliberations, the jury asked for a definition of "knowingly." The defense agreed with the State that no additional instruction was required. Defense counsel reasoned that the definition would inform the jury that "knowing" could mean awareness of a "substantial probability" that something exists.

Defendant was convicted and sentenced to two years in prison. On appeal, the appellate court rejected a reasonable doubt challenge, and a due process and ineffectiveness claim for the lack of a jury instruction defining knowledge.

The Supreme Court affirmed. It first held that a rational trier of fact could have found knowing, constructive possession of the bullets. Defendant was driving the car alone and was its only registered owner. She therefore exercised exclusive control over the glove box where the ammunition was found, meaning she had constructive possession. And where possession is established, an inference of culpable knowledge can be drawn from the surrounding facts and circumstances. While the defense put forth evidence that the bullets belonged to the husband, the credibility of that evidence was a determination for the trier-of-fact.

Nor did the lack of an instruction defining "knowledge" deprive defendant of her due process right to a fair trial or her right to effective assistance of counsel. A due process argument was not available, because counsel's rejection of the instruction was more than mere forfeiture, it was invited error. Thus, plain error review was not available. Furthermore, counsel's decision was sound trial strategy, as the "substantial probability" language contained in the instruction created a mental state akin to recklessness and could have reduced the chances for an acquittal.

**People v. Gayden, 2020 IL 123505** Responding to a call of a man with a gun, police approached defendant's apartment and saw him standing in the open doorway with a shotgun. Defendant tried to close the door, but the officers blocked the door, entered, arrested defendant, and recovered the gun. Defendant was convicted of unlawful use of a weapon. During the course of his appeal, he completed his prison term and his one-year term of MSR. On appeal, defendant alleged ineffective assistance of counsel for failing to file a motion to suppress the gun. Defendant argued that the police entered his home without probable cause or exigent circumstances.

The Appellate Court refused to reach the issue, finding the record did not contain sufficient facts to judge whether or not a motion to suppress would be meritorious. It suggested defendant file his claim in a post-conviction petition. In a rehearing petition, defendant informed the Appellate Court that its suggested remedy was unavailable, as defendant was no longer in custody and not eligible to file a petition under the Post-Conviction Hearing Act, and asked instead for a remand. The Appellate Court found this request forfeited. Defendant appealed to the Supreme Court, arguing that the record was sufficient to resolve his ineffectiveness claim, but if not, the cause should be remanded for a hearing because he could not file a post-conviction petition.

The Supreme Court affirmed. It held that the record did not contain sufficient information concerning the circumstances of defendant's arrest from which it could determine whether a motion to suppress would have been meritorious. The State had no reason to establish the factual basis that gave the officers probable cause to arrest defendant in the first place, as that information was not necessary to prove defendant's guilt. The arrest report reveals that officers learned about other circumstances that may have given the officers probable cause and exigent circumstances, including threats to a woman in the apartment with defendant.

The court then rejected defendant's claim that his case should be remanded for a hearing. It held that contrary to defendant's argument, there is not a "hole" in Illinois' appellate procedures, nor does the Post-Conviction Hearing Act's restrictions on who can file a petition create a class of defendants who, because they complete their sentence during the course of their direct appeal, never get a decision on the merits of their undeveloped claims of ineffective assistance of counsel. Rather, the remedy for a defendant in this position is to file a post-conviction petition before his sentence is discharged – even if his direct appeal was pending – in order to preserve his post-conviction claim. Although the court has used its supervisory authority to allow for the filing of a post-conviction in a misdemeanor case, that defendant had no other recourse because the Act does not allow petitions in misdemeanor cases. Here, the defendant did have an available means of recourse, but he failed to take it. For the same reason, the court, with one justice dissenting, rejected defendant's proposal that in these situations, appellate courts should remand for a hearing upon a substantial showing of ineffectiveness.

**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.

But, 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. Simpson**, 2015 IL 116512 Defense counsel was ineffective where he failed to object to a prior inconsistent statement that was inadmissible under 725 ILCS 5/115–10.1.

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.

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 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.

**People v. Henderson**, 2013 IL 114040 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.

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.

**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 Angeles 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.

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

**People v. Givens**, 237 Ill.2d 311, 934 N.E.2d 470 (2010) 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.

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.

**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, 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.

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

**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."

### Illinois Appellate Court

**People v. Resor**, 2024 IL App (4th) 230208 Defense counsel rendered ineffective assistance where he failed to assert that defendant's speedy trial rights were violated with regard to later-filed charges. Defendant was initially charged with aggravated domestic battery on March 21, 2022. The State subsequently added two charges of aggravated battery on September 19, 2022, and defendant's trial began on October 11, 2022, more than 200 days after he was first arrested and charged.

Under 725 ILCS 5/103-5(a), a defendant must be tried within 120 days of being taken into custody, less any delays attributable to him. Where later-filed charges are subject to compulsory joinder with the original charge, however, any continuances attributed to defendant on the original charge cannot be attributed to him on the new charges because those charges were not before the court when the continuances were obtained. Charges are subject to compulsory joinder where they are known to the proper prosecuting officer at the time of commencing the prosecution and where they are based on the same act. 720 ILCS 5/3-3(b).

Here, the court found that the subsequent aggravated battery charges were subject to compulsory joinder. Both the police report and the arresting body camera video showed that all of the facts necessary to support the additional charges were made known to the State when the first charge was filed or immediately thereafter. And, while the initial charge alleged strangling and the subsequent charges alleged two acts of shoving or pushing the victim into a building and a nearby pole, there was but a single, continuous and uninterrupted act of battery here, thus the charges were sufficiently based on the same act as to require simultaneous prosecution under compulsory joinder principles. There was no dispute that defendant was not tried on the new charges within 120 days of his original

arrest. Accordingly, his right to speedy trial was violated as to the later-filed charges, and counsel rendered ineffective assistance by not moving to dismiss those charges on that basis. The appellate court vacated defendant's convictions and sentences on counts 2 and 3.

**People v. Reinking, 2024 IL App (4th) 230486** Defendant was charged with unlawful delivery of a firearm under section 24-3(A)(e), which prohibits giving a firearm to someone who has been treated in a mental institution within the previous five years. The State alleged defendant violated the statute by returning an AR-15 to his son after his involuntary stay in a hospital's mental health unit.

The parties stipulated to several facts, including to the nature and length of the son's stay at the hospital and the fact that defendant "gave" the weapon to his son within the prohibited time period. The issues at trial were whether defendant knew that his son received treatment for mental health while in the hospital, as required by the statutory definition of "mental institution," and whether defendant could "give" the firearm to his son if his son legally owned the firearm. The trial court found defendant guilty. It found defendant's testimony that he was ignorant of the nature of his son's hospitalization lacked credibility, given defendant was present for the commitment, and visited his son in the hospital. The court also found defendant "gave" the firearm to his son as contemplated by the statute.

On appeal, defendant argued the court erred in denying a pretrial motion to dismiss because the indictment failed to state the nature of the charge, and because the statute is unconstitutionally vague. The appellate court affirmed. Although defendant argued the charge did not specify the unlawful "giving" conduct, and "giving" can have different meanings, the indictment tracked the language of the statute and need not have specified the exact means by which the conduct was carried out. Nor is the statute unconstitutionally vague. Defendant argued that no person could understand that the "giving" of a firearm also encompassed "returning" a firearm to its lawful owner. The appellate court held that a person of ordinary intelligence could understand these acts to be one and the same. The plain language of the statute conveys its purpose – preventing the mentally ill from obtaining firearms, regardless of how or why the firearm is given.

The appellate court also held the State proved defendant's knowledge that his son had been treated in a mental institution. Defendant argued the trial court should have accepted his testimony that he was hard of hearing and therefore didn't understand why or where his son was being taken by the police. But defendant admitted that he knew his son had been claiming his phone was hacked by Taylor Swift and was acting erratically. The defendant also visited his son in the mental hospital. A rational trier of fact could have found defendant knew the nature of his son's hospitalization.

Finally, the appellate court affirmed the trial court's rejection of defendant's ineffectiveness claim after a **Krankel** hearing. Defendant argued that his attorney should not have stipulated to the fact that he "gave" his son the firearm and that he objected to this stipulation. But defense counsel testified that defendant later agreed to all of the stipulations after consultation. The appellate court would not re-weigh the credibility findings of the trial court. Defendant also argued that his attorney should have presented a defense based on a conversation defendant had with the sheriff's office before returning the firearm, in which he was told that doing so was legal under the FOID Act. Nor would the appellate court question counsel's strategic decisions. But defense counsel was examined at length during the hearing and explained why he chose to instead focus on defendant's knowledge. The appellate court would not question counsel's strategic decision to settle on an alternative valid defense.

**People v. Page, 2024 IL App (1st) 220830** Trial counsel was ineffective for failing to move to suppress a firearm. The evidence at trial consisted of a police officer's description of his review of a POD camera, along with the camera's footage. The footage showed defendant placing an object in his pocket. According to the officer, this object appeared to be a firearm magazine. Officers responded to the scene, and when defendant saw the officers, he threw something into a Kia and ran. The Kia drove off, but officers found a firearm inside a Pontiac that had been parked next to the Kia, and arrested defendant. The trial court reviewed the evidence and found that she could not identify the object defendant placed into his pocket. She also found, however, that he appeared to make a "racking" motion as if he was holding a firearm. The court found defendant guilty of armed habitual criminal.

The appellate court reversed and remanded because there was a reasonable probability that, had counsel filed a motion, it would have been successful. The trial court's review of the footage confirmed that it was unclear if the object defendant placed in his pocket was a magazine, let alone an illegally long magazine. If it was a suspected firearm, as the trial court concluded, the officers would have had to have known that defendant couldn't legally carry it in order to have probable cause to search him or the Pontiac. The State did not argue that the gun was in plain sight or that the flight provided probable cause.

Although the State argued that the claim was better-suited to a post-conviction petition because the officers did not offer their reasons for the search, the appellate court disagreed. First, time was of the essence because the post-conviction process takes so long that defendant may have completed his sentence before obtaining a ruling. Second, prior cases have found that an ineffectiveness claim for failing to file a motion to suppress is cognizable on direct appeal where no new facts are necessary to determine whether counsel's decision was reasonable. See, **People v. Little, 322 Ill. App. 3d 607, 613-14 (2001)**. Finally, the idea that the officers could have added testimony to justify the search if the claim were brought in a collateral proceedings is a "heads I win, tails you lose" proposition where "the lack of evidence on the issue of probable cause is precisely what a motion to suppress would have prevented."

**People v. Keys, 2023 IL App (4th) 210630** Counsel was not ineffective for failing to file a motion to suppress defendant's statements. Defendant argued that he had invoked his right to silence when he stated, "I said I didn't do anything, period, point blank. If that's the case, if you feel like based off your investigation, then do what you gotta do, there ain't nothin' further for us to talk about." Generally, once an individual asserts his right to remain silent, questioning must stop. Subsequent statements obtained in violation of the individuals' right must be suppressed.

Here, the court concluded that defendant had not invoked his right to remain silent by stating that there was nothing more to talk about. Instead, defendant was merely "expressing his belief the officers had made up their minds he was guilty based on their investigation." Because defendant had not unequivocally invoked his right to remain silent, there was no basis for counsel to file a motion to suppress his statements.

**People v. Lee, 2023 IL App (1st) 211080** Defendant entered a blind plea to aggravated vehicular hijacking, a Class X felony. Because he had two prior Class X convictions within the previous 20 years, he was subject to a mandatory term of natural life imprisonment pursuant to the Habitual Criminal Act (the Act). Defendant subsequently moved to withdraw his plea, alleging he received ineffective assistance of counsel because his lawyer erroneously believed that a life sentence was discretionary. The circuit court denied that motion, and defendant appealed.

The appellate court held that defense counsel's performance was deficient. At the plea hearing, defense counsel asserted that a life sentence was not mandatory even after the circuit court stated otherwise and even after counsel was provided an opportunity to review the Act. Yet, it was straightforward and readily verifiable that a life sentence was, in fact, mandatory, and thus counsel's failure to provide accurate advice to defendant was objectively unreasonable.

Further, defendant demonstrated prejudice where the record supported the conclusion that defendant's primary consideration was avoiding a natural life sentence, and he pled guilty believing that doing so would afford him the opportunity to argue for a lesser term of years. While defendant had no obvious defense to present at trial, he gained nothing by pleading guilty and thus the court could not say that a decision to go to trial would have been irrational. The court found a reasonable probability that but for counsel's erroneous advice, defendant would not have pled guilty and would have instead insisted on a trial.

The appellate court reversed the denial of defendant's motion to withdraw plea, vacated his conviction and sentence, and remanded to allow him to plead anew.

**People v. Haynes, 2023 IL App (1st) 220296** Defendant was charged with the attempt murders of White and Williams. The evidence showed that the three men and several other people were on a party bus. Defendant was carrying a gun, and began arguing and physically fighting with a woman. White charged, punched, and tackled defendant. As White was on top of defendant, he smelled gunpowder and realized he'd been shot in the chest. Williams began fighting with defendant, and as they tussled over the gun, Williams was shot.

The trial court acquitted defendant of the attempt murder of Williams, finding the gun went off during a struggle. But it convicted defendant of the attempt murder of White, and sentenced him to the minimum of 31 years.

On appeal, defendant first argued the State failed to prove he intended to kill White. He pointed out that only one of several bullets in the gun were fired, suggesting it went off by accident. The appellate court affirmed. State of mind is generally proven by circumstantial evidence, such as the use of a deadly weapon and the nature of the victim's injuries. "The very fact of firing a gun at a person supports the conclusion that the person doing so acted with the intent to kill." Defendant's intent, as gleaned from the circumstances, was a question for the court as factfinder. The fact that a gun was fired directly into White's chest, even once, was enough proof of an intent to kill.

A new sentencing hearing was required, however, because defense counsel failed to argue for the application of [720 ILCS 5/8-4\(c\)\(1\)\(E\)](#). Under this provision, sentencing for attempt murder is reduced to a Class 1 range if defendant can show by a preponderance of the evidence: (1) he acted under a sudden and intense passion resulting from serious provocation by the victim; and (2) if the victim died, his death would have been negligent or accidental.

Even though it affirmed the attempt murder conviction, and therefore necessarily found that defendant acted with an intent to kill, a majority of the appellate court nevertheless found that the provision may still apply to the instant situation. The court noted the provision is in direct tension with a finding of guilt, because a defendant cannot act negligently or accidentally if he had an intent to kill. So it interpreted the statute to mean that, "although the defendant intended to kill the victim, his acts were sufficiently at the minimum, such that if the victim had actually died, the death could still be considered negligently or accidentally caused." Here, where defendant fired one shot at the victim during a physical fight, the sentencing court may have found the provision satisfied. Therefore



counsel was ineffective for failing to raise the issue, and a new sentencing hearing was required.

A dissenting justice would have found section 8-4(c)(1)(E) could not apply here, because defendant acted intentionally when he shot White. Under these circumstances, defense counsel had no obligation to argue that White's death would have been accidental or negligent.

**In re M.G.**, 2022 IL App (4th) 210679 Counsel was not ineffective for failing to seek suppression of evidence seized incident to the minor's arrest. The police had probable cause to arrest the minor where, around 4 a.m., an officer observed a truck in the parking lot of a closed restaurant, with its hazard lights on and front-end damage. Cannabis was seen on the dashboard in plain view. A bystander gave the officer a description of the truck's driver and the direction he fled, and the officer located the minor nearby in some timber. The minor had a key to the truck around his neck. The officer took the minor into custody and searched his backpack, locating a half-full bottle of alcohol and 22 sealed packages of cannabis. On these facts, the officer had probable cause to arrest the minor for illegal possession of the cannabis in plain sight on the truck's dashboard. The subsequent search of the minor's backpack was a permissible search incident to arrest. Thus, a motion to suppress would have been meritless, and counsel was not ineffective for failing to file such a motion.

**People v. Kimmons**, 2022 IL App (2d) 180589 Defendant, who had entered a fully-negotiated guilty plea to unlawful possession with intent to deliver cocaine, subsequently filed a post-conviction petition arguing that his trial counsel was ineffective for not filing a motion to suppress. The trial court summarily dismissed the petition as untimely and without merit.

The Appellate Court noted that summary dismissal on the basis of timeliness is unquestionably improper, but affirmed the dismissal on the basis that defendant's guilty plea had waived all non-jurisdictional errors, including whether counsel had rendered deficient performance by not filing a motion to suppress. Defendant argued that an exception to the waiver rule applied, specifically that he received deficient advice from counsel, rendering his plea involuntary. The court rejected that argument, citing the absence of any argument that defendant wished to challenge the warrant but was dissuaded from doing so by erroneous legal advice from counsel.

And, the court went on to conclude that even if the waiver rule was relaxed, defendant failed to state the gist of a claim that plea counsel's decision not to challenge the warrant was deficient. Defendant's claim was based on an argument that the warrant affidavit contained material omissions, specifically with regard to the criminal background of the confidential informant. But, the informant appeared before the issuing judge during the warrant application proceedings, and the applicable law provided that such appearance under oath obviated the need for additional evidence relating to the informant's reliability. Thus, a **Franks** motion would have been denied had it been filed.

**People v. Roberts**, 2021 IL App (3d) 190445 Defendant was not denied effective assistance of counsel based on counsel's failure to file a motion to suppress statements she made to police. The statements in question were not particularly incriminating – she admitted she knew the co-defendants but maintained that she did not know they were armed and planning to commit the robbery which ultimately resulted in the victim's death. And, counsel had a strategic reason not to seek suppression of the statements. Specifically, their admission allowed the defense the opportunity to present an innocent explanation for defendant's

involvement without subjecting her to cross-examination at trial. Accordingly, defendant could not meet either the deficient performance or prejudice prong necessary to demonstrate ineffective assistance of counsel. Defendant's conviction was affirmed.

**People v. Williams**, 2021 IL App (1st) 191615 In his *pro se* post-conviction petition, defendant alleged that the State did not prove all of the essential elements necessary to sustain his armed habitual criminal conviction where one of the predicate offenses, aggravated vehicular hijacking, was committed when he was 17 years old, more than 10 years prior, and could not be used under **People v. Montgomery**, 47 Ill. 2d 510 (1971). He also alleged ineffective assistance of trial and appellate counsel for not raising that issue. The trial court summarily dismissed the petition.

On appeal, defendant argued that his petition stated the gist of a claim, not based on **Montgomery's** 10-year rule, but rather because the aggravated vehicular hijacking offense took place when he was a juvenile and therefore was not a proper predicate offense under the reasoning of **People v. Miles**, 2020 IL App (1st) 180736, and **People v. Gray**, 2021 IL App (1st) 191086. The Appellate Court rejected the State's argument that defendant had forfeited this claim, noting that the ultimate issue of whether trial and appellate counsel were ineffective for failing to challenge his vehicular hijacking as an improper predicate for AHC was raised in the petition, including the fact that he was only 17 years old at the time.

Ultimately, though, the Appellate Court affirmed the summary dismissal of the petition. While the 2014 amendment to the Juvenile Court Act would have brought defendant's vehicular hijacking offense within the jurisdiction of the juvenile court, the amendment expressly stated that it applied to offenses committed "on or after" its effective date. Nothing suggested it would have any bearing on defendant's conviction for aggravated vehicular hijacking committed several years prior. And, before **Miles** was decided, case law "squarely supported the principle that a conviction obtained when a criminal defendant was a minor could be used as a qualifying predicate offense." Thus, defendant did not state the gist of a claim of deficient performance where it would have been reasonable for both trial and appellate counsel not to challenge the use of defendant's vehicular hijacking conviction as a predicate for AHC.

**People v. Janosek**, 2021 IL App (1st) 182583 Defendant argued that his trial attorney provided deficient representation where counsel failed to file a motion to suppress evidence obtained as a result of a warrantless search of his backyard. To establish ineffective assistance based on counsel's failure to file a motion to suppress, a defendant must show both that the motion was meritorious and that there exists a reasonable probability that the outcome of the trial could have been different had the evidence been suppressed. Often, the record on direct appeal will be inadequate to evaluate such a claim because the trial was not developed for that purpose.

Here, the court concluded that the record was inadequate to determine whether the officers' presence on defendant's property was improper, and thus the court could not assess whether counsel's failure to file a motion to suppress was ineffective. The facts necessary to determine the issue were only discussed in passing at trial, and the State could have called an additional witness had a motion been filed. Accordingly, the court could not consider the claim on its merits.

**People v. McCall**, 2021 IL App (1st) 172105 After his murder conviction, the trial court held a preliminary **Krankel** inquiry on defendant's allegations of ineffective assistance of

counsel. The motion was denied without a **Krankel** hearing. A majority of the Appellate Court affirmed.

The majority first held that defendant failed to show possible neglect for failing to file a motion to suppress evidence found in defendant's home, where a triple murder took place. The police did not violate the fourth amendment because the items were found in plain view after a warrantless entry that was justified by the emergency aid exception. As in [People v. Ramsey, 2017 IL App \(1st\) 160977](#), the Appellate Court held that officers who are legally inside a home may recover items in plain view, and it does not matter whether the recovering officers, including evidence technicians, arrive after the emergency has ended. As long as the initial responding officers could have recovered the evidence because it was in plain view, the search complies with the fourth amendment.

Nor did defendant show possible neglect for failing to file a motion to suppress defendant's custodial statements. When detectives brought defendant into an interview room, they told defendant that they'd been looking for him because people in the neighborhood said that defendant had killed his family. Defendant told the detectives that he killed them in self-defense, explaining how it happened. The detectives offered defendant medical attention, left the interview room "for a short time" and then returned and advised defendant of his **Miranda** rights. Defendant provided further statements admitting to the crimes but asserting self-defense.

The failure to file a motion was sound strategy where the defense theory at trial was self-defense, and the custodial statements supported that defense. Thus, there was no reason to suppress the initial statement. Furthermore, the post-warning statement was not elicited via the deliberate "question first, warn later" technique that violates the fifth amendment. The unwarned "interrogation" in this case was a single statement by a detective that the police had been looking for defendant and then a follow-up question later referencing defendant's response. It resembled the permissible interrogation in [Oregon v. Elstad, 470 U.S. 298 \(1985\)](#), and was a far cry from the systematic, exhaustive, psychologically skillful interrogation in [Missouri v. Seibert, 542 U.S. 600 \(2004\)](#). In any event, suppression of the statements would not have affected the outcome of the case. Defendant contended that absent his statements, he could have pursued a reasonable doubt strategy at trial, but the Appellate Court found the evidence overwhelming.

The dissent would have remanded for a full **Krankel** hearing because trial counsel's explanation for failing to file a **Seibert** motion did not adequately address the issues with the statements. In fact, counsel's explanation betrayed a fundamental misunderstanding of what occurred. The video of the interrogation, which was not played at the preliminary **Krankel** inquiry, plainly showed that there was a pre-warning statement that would have been suppressed, and a post-warning statement that at least arguably could have been suppressed, but counsel's explanation showed she was unaware of these circumstances. The dissent disagreed with the majority's decision to "fill in the blanks" on behalf of trial counsel, noting that the entire purpose of **Krankel** is to provide the Appellate Court with a record on which to evaluate an ineffectiveness claim.

[People v. Bruemmer, 2021 IL App \(4th\) 190877](#) Criminal abuse or neglect of an elderly person is committed where an individual knowingly fails to perform acts which he or she knows or reasonably should know are necessary to maintain the life or health of the elderly person and that failure causes the person's life to be endangered or health to be injured. The statute also provides an exemption where the caregiver made a good faith effort to provide for the elderly person's health and personal care but failed through no fault of his or her own.

The Appellate Court first determined that defendant bears the burden of proof as to the good-faith exemption provided in the statute. Here, the charge against defendant alleged that she failed to provide adequate care for her elderly father. At trial, defense counsel presented evidence of the things defendant did to take care of her father and argued that she did the best she could under the circumstances. Ultimately, though, trial counsel provided ineffective assistance where he failed to move for a directed verdict and failed to request a jury instruction on the statutory good-faith exemption.

At the close of the State's case-in-chief, defense counsel specifically reserved the right to make a motion for directed verdict at a later time. Counsel then presented defense witnesses who described how defendant cared for her father and how he did well in her care. But, counsel never made a motion for directed verdict, despite that evidence. The Appellate Court concluded that there was no strategic reason for counsel not to make that motion on the basis of the good-faith exemption, and therefore his performance was deficient. The court went on to state that "motions for directed verdict should be standard practice," no matter how infrequently they are actually granted. But, defendant suffered no prejudice from this error because there was adequate evidence from which the jury could find defendant guilty.

Counsel's failure to request a good-faith jury instruction was also found to be deficient performance. While counsel presented evidence and argument in support of a good-faith finding, the jury instructions that were given failed to inform the jury that defendant's good-faith efforts could excuse her from criminal liability. And, defendant was prejudiced by this error because it limited the jury's understanding of the evidence, thereby calling the verdict into question. Thus, the judgment was reversed and the matter remanded for a new trial.

**People v. Petrie, 2021 IL App (2d) 190213** Defendant was found guilty of aggravated battery to a child after a bench trial. The State alleged that defendant abused an infant in her care, leaving him with severe and lasting brain injuries. The Appellate Court held that counsel was ineffective for failing to challenge the State's expert's opinion that the infant suffered abusive head trauma (formerly shaken baby syndrome "SBS") while in defendant's care.

The infant had a seizure while at defendant's home day care. At the hospital, doctors found subdural hematomas, a skull fracture, retinal hemorrhages, and a healing rib fracture. The parties did not dispute the nature of the injuries, only the cause and timing. The State's primary witness, Dr. Davis, testified that the injuries (aside from the skull fracture, which was two weeks or more old) were caused by SBS and, based on the level of swelling in the infant's brain, he must have suffered the injury immediately prior to the seizure. Davis based this opinion on the fact that victims of SBS do not experience a "lucid interval" after injury.

The doctor who operated on the infant believed the cause of the injuries to be trauma to the head that occurred hours rather than days before the seizure. Both doctors brushed aside defense questions about the lack of injury on the right side the infant's brain, the fact that his parents admitted he fell two days earlier and had vomited the night before, and the older fractures. The defense did not ask Dr. Davis why he believed no lucid interval would have occurred, and whether this opinion was supported by the literature or his own experience. The defense did call their own expert, a pediatrician who testified that, given the damage to only one side of the brain and the lack of neck injury, the infant had suffered a blow to the head, not SBS, up to 48 hours prior to the seizure.

The Appellate Court found counsel's cross-examination of Dr. Davis deficient. Although counsel ably put forth an alternative theory for the injuries – an earlier blow to the head – he failed to support the theory by exploiting weaknesses in Dr. Davis' opinions through cross-examination. First, counsel did not ask for the basis of Davis' belief that no lucid

interval could have occurred. The doctor never testified that this was a consensus belief in the field or that it was supported by any literature or even his own experience. Thus, it was potentially inadmissible for lack of foundation.

Second, since SBS is a diagnosis of exclusion – made only after every other possible explanation is ruled out – counsel was ineffective for failing to ask Davis whether he first ruled out accidental causes, such as aspiration caused by vomit. The evidence did in fact show that the infant vomited the night before and immediately before the seizure, and was sleepy when dropped off at defendant’s home. Defendant on appeal cited cases and a medical article discussing the possibility of brain swelling caused by this type of aspiration in conjunction with an earlier head trauma.

The Appellate Court agreed that by neglecting to broach these subjects, “counsel did not demonstrate the understanding of brain injuries in infants necessary to frame a cogent alternate explanation from those facts,” either through cross-examination of Davis or through direct examination of his own witness. Where the trial court’s guilty finding rested explicitly on Davis’ opinion, and in particular the lack of a lucid interval, these shortcomings were prejudicial and a new trial was required.

**People v. Navarro**, 2021 IL App (1st) 190483 Defendant’s successive post-conviction petition alleged counsel was ineffective for failing to call an expert on eyewitness identification at his murder trial. The Appellate Court affirmed the dismissal, finding defendant failed to show cause as to why he could not have raised this claim on direct appeal.

Defendant argued that his direct appeal occurred prior to **People v. Lerma**, 2016 IL 118476, where the Supreme Court found the trial court abused its discretion in refusing to admit an expert on eyewitness testimony. Defendant alleged this “massive shift” in this area of the law, where the court recognized recent research that offered greater understanding of the weaknesses of eyewitness identifications, explained why he could not raise his claim earlier. The Appellate Court disagreed. The Illinois Supreme Court has long held that eyewitness identification is a proper area for expert testimony. **People v. Enis**, 139 Ill. 2d 264 (1990). Defendant did not need to wait for **Lerma** to support an ineffectiveness claim. And if **Lerma** *did* represent a massive shift in the law, defense counsel could not have been ineffective for failing to call an expert prior to that holding.

**People v. James**, 2021 IL App (1st) 180509 Counsel was not ineffective for failing to file a motion to suppress evidence. There was no merit to defendant’s assertion that the police violated his constitutional right to privacy in his “effects” when they entered an open garage from which they had seen defendant retrieve items that they suspected to be drugs and deliver them to other individuals in exchange for cash in what are commonly known as “hand-to-hand” transactions. The record was silent as to who owned the garage, whether it was a commercial business or residential garage, whether defendant had the ability to exclude others from the garage, and whether defendant had any connection to the property or any ability to exclude others from it. Accordingly, the officer’s entry to the garage and search and seizure of a glove in which the drugs were kept did not violate any recognized fourth amendment interest.

**People v. O’Neal**, 2021 IL App (4th) 170682 On appeal from a conviction for unlawful use of a weapon by a felon and armed habitual criminal, defendant alleged counsel offered no meaningful adversarial testing and was ineffective under **Cronic**. Defendant pointed out that, because counsel failed to convince the court to provide a self-defense instruction, counsel



did little more than admit defendant's commission of the offense. Counsel also failed to seek a necessity defense instruction.

The Appellate Court refused to apply **Cronic**, noting that counsel also filed a motion *in limine*, gave an opening statement, cross-examined witnesses, made objections, gave a closing argument, and sought a self-defense instruction. Nor was counsel ineffective under **Strickland** for failing to seek a necessity instruction. Although defendant testified he grabbed the gun to stave off an attack, he had previously testified that he possessed the gun prior to this encounter. Thus, it was likely the court would have rejected the request, as it had with the self-defense instruction.

**People v. Rowell, 2021 IL App (4th) 180819** Defendant was not deprived of the effective assistance of counsel by counsel's failure to seek suppression of evidence discovered during a warrantless search of two duffle bags in defendant's trunk. The evidence at trial established that the police conducted the search because one of the officers smelled cannabis in defendant's vehicle during a traffic stop. The Appellate Court followed **People v. Hill, 2020 IL 124595**. While cannabis law is "rapidly changing," at the time of this search in 2017, the law was unequivocal that the odor of cannabis provided probable cause to search defendant's vehicle. And, probable cause to search a vehicle based on the odor of cannabis extends to any containers in the vehicle that have a reasonable likelihood of containing cannabis, including the duffle bags in defendant's trunk.

**People v. Hardy, 2020 IL App (1st) 172485** Trial counsel was not ineffective for not moving to suppress identifications made during a live lineup using only four subjects, as opposed to the usual six. Even if the lineup evidence had been suppressed, there was an adequate independent basis for the majority of the identifications such that in-court identifications would have been admissible even if the line-up identifications were not. Factors weighing in favor of finding an adequate independent basis included the eyewitnesses' opportunity to observe, a sufficient degree of attention, accurate descriptions of defendant's build and hairstyle provided by both victims, and the passage of a week, at most, between the incident and the initial lineup identifications.

In determining the independent reliability of the identifications, a dissenting justice would have considered a longer list of factors as set forth in **State v. Henderson, 27 A. 3d 872 (N.J. 2011)**, such as the level of stress surrounding the incident, whether a weapon was displayed, how long the witness had to observe, how far away the witness was and what the lighting was like, whether the witness was under the influence of any substances or of an age that would impact his or her ability to observe, whether the perpetrator was in disguise, how much time elapsed since the incident, and whether the case involved cross-racial identification. The justice would have found ineffective assistance of trial counsel for failing to move to suppress the identifications.

**People v. Guerra, 2020 IL App (1st) 171727** Defendant argued ineffective assistance of counsel based on trial counsel's failure to ask the trial court to take judicial notice of the NHTSA manual providing standards for HGN field sobriety testing. The arresting officer testified that she held her pen six inches from defendant's face during the HGN test, but the manual calls for the pen to be held 12-to-15 inches away. Defendant alleged that the arresting officer's testimony would have lost probative

value had the manual been introduced, and would have led the court to reject the officer's opinion that defendant was intoxicated.

The Appellate Court first noted that because the NHTSA manual was not introduced at trial, it was not part of the record on appeal. Accordingly, defendant's claim was based on extrajudicial material and was inappropriate for review on direct appeal. The court went on to hold that defendant could not establish prejudice, regardless, because there was ample additional evidence of intoxication, including that defendant smelled of alcohol, slurred his speech, and had urinated on himself. The trial court specifically found the State's witnesses more credible than defendant, and therefore there was no reasonable probability of a different outcome had the NHTSA manual been introduced.

**People v. Bloxton, 2020 IL App (1st) 181216** Trial counsel rendered ineffective assistance by failing to file a motion to suppress evidence on the grounds that police officers did not have probable cause to arrest defendant based solely on their observation that he possessed a firearm.

Here, defendant was standing around with a group of people when patrol officers stopped, suspecting that some of the individuals were drinking alcohol from plastic cups. Defendant did not have a cup and was not observed committing any criminal activity. An officer observed a bulge in defendant's pocket, believed it was a gun, and followed defendant as he walked away. The officer ultimately followed defendant onto a porch, observed the handle of a gun in defendant's pocket, and arrested him. The police subsequently discovered that the gun's serial number had been defaced, and defendant had a felony record precluding him from lawfully possessing a firearm.

The Appellate Court held that defendant's walking away did not create probable cause, or even reasonable suspicion, absent other circumstances indicating illegal behavior. And, defendant's possession of a gun, without more, is not enough to establish criminal activity in light of **People v. Aguilar, 2013 IL 112116**. The lawfulness of an arrest focuses on the facts known to the police at the time of the arrest. Here, the police did not know that about defendant's felony record or that the gun had been defaced until after they arrested him. Thus, the police lacked probable cause to arrest him based solely on possession of a gun, and the resulting evidence would have been suppressed had counsel brought such a motion.

The court rejected the State's argument that counsel's decision was a matter of strategy. No reasonable strategy could justify the failure to assert the strongest argument available for defendant. A successful motion to suppress would have resulted in the exclusion of the gun from evidence, preventing defendant's convictions for unlawful possession of a weapon by a felon and possession of a weapon with a defaced serial number. Accordingly, defendant's convictions were reversed outright.

**People v. Schaefer, 2020 IL App (5th) 180461** Defendant had been taken into custody on a previous charge, was convicted and sentenced. Before his incarceration, he was granted recognizance to appear at the preliminary hearing for the instant case. The court in the instant case set a bond, and defendant was released. He was then taken back into custody on the prior charge. In the instant case, he filed a speedy trial objection 120 days after he was charged. The trial court rejected the claim, finding the 160-day limit applied because defendant had bonded out in the instant case. He was tried and convicted within 160 days.

On appeal, defendant alleged ineffective assistance of counsel for not moving to revoke bond once he was taken back into custody. Defendant argued that by failing to revoke his

bond, counsel prevented the application of the 120-day speedy trial term, rather than the 160-day term. The Appellate Court refused to find prejudice. While it was true that counsel could have ensured application of the 120-day term had the bond been revoked (see **People v. Arnhold**, 115 Ill. 2d 379, 383 (1987)), the Appellate Court held that it would not assume the 120-day deadline would have passed without a trial had bond been revoked. On this record, the State and trial court appeared cognizant of the applicable speedy trial date, and the State would have had 120 days from the bond revocation to try defendant.

**People v. Shepherd**, 2020 IL App (1st) 172706 At defendant's trial for aggravated UUV, the defendant testified that the gun in her purse did not belong to her. She had given her purse to someone else to hold while she used the bathroom in a nearby business. Upon her return she received her purse back and noticed that it contained a gun. At this point, she saw the police, causing her to drop her purse, which led to the officers' discovery of the gun.

On appeal, defendant argued her possession of the gun was justified by necessity. The State argued that necessity is an affirmative defense that must be raised at trial. Defendant countered that counsel was ineffective for failing to assert a necessity defense. A majority of the Appellate Court agreed. At least some evidence satisfied the three elements of necessity: (i) defendant's testimony indicated she was "without blame in occasioning or developing the situation" leading to criminal conduct, (ii) maintaining possession "was necessary to avoid a public or private injury" as evidenced by defendant's testimony that she did not want her fingerprints on the gun, and the fact that dropping it on the sidewalk would expose it to passers-by; and (iii) these public or private injuries were "greater than the injury caused by the defendant's own conduct." The failure to advance the necessity defense was prejudicial where defense counsel's argument at trial – that defendant possessed the gun but did not own it – left the trial court no choice but to convict.

The dissent would have found that the necessity defense was presented at trial through defendant's testimony and rejected as not credible by the trial judge. Therefore, defendant was not prejudiced by trial counsel's failure to formerly assert the affirmative defense.

**People v. Lewis**, 2020 IL App (2d) 170900 Defendant was convicted of involuntary sexual servitude of a minor and traveling to meet a minor after responding to an ad on Backpage.com and traveling to a hotel to meet up with two underage girls to engage in sexual activity. It turned out that no minors were involved; defendant was actually communicating with an undercover officer in response to the internet advertisement, and he was arrested after he arrived at the hotel and produced cash in exchange for the anticipated sexual activity. Defendant presented an entrapment defense at trial.

Defense counsel rendered deficient performance by failing to submit a definition of "predisposed" in response to a jury question as to the meaning of the term. The jury received instructions on the defense of entrapment, but those instructions did not include such a definition, and there is no pattern instruction defining the term. The generally understood definition of "predisposed" is broader than how that term is defined for purposes of entrapment, where the focus is on whether defendant was ready and willing to commit the charged offense "before his or her initial exposure to government agents." **People v. Bonner**, 385 Ill. App. 3d 141 (2008). Given the difference between the common understanding and the narrower meaning relating to the entrapment defense, and the jury's express confusion over the meaning of the term, counsel erred in agreeing to the court's response declining to provide a definition of "predisposed."

Counsel also provided deficient representation by failing to present evidence that defendant had no prior criminal history. The absence of any criminal history was strong evidence of defendant's lack of predisposition. Counsel failed to function as guaranteed by the sixth amendment by not presenting that evidence.

And, counsel erred by not objecting to the State's closing argument which suggested to the jury that it had to first find that defendant was induced by government agents to commit the offense before considering whether he was predisposed to do so. Once the court decides there is sufficient evidence to instruct the jury on entrapment, it is the State's burden to either disprove inducement or prove predisposition, beyond a reasonable doubt. The State's argument misrepresented its burden.

These errors were prejudicial. The failure to offer a definition of "predisposed" created a serious danger that the jury convicted defendant without considering whether he was inclined to commit the offense *before* his contact with the officer. And, the State's closing argument "muddled the waters" with regard to the entrapment defense. The cumulative effect of counsel's errors rendered defendant's trial unreliable under **Strickland**. The Appellate Court reversed and remanded for a new trial.

**People v. Minkens, 2020 IL App (1st) 172808** Where defendant alleges ineffective assistance of counsel based on failure to seek suppression of evidence, defendant must show (1) counsel's conduct was objectively unreasonable given the state of the law at the time the suppression motion would have been filed, and (2) he was prejudiced as a result of that conduct, i.e. that the suppression motion would have been granted and there is a reasonable probability the trial outcome would have been different.

Here, defendant claimed counsel was ineffective for failing to seek suppression of cell site location information obtained without a warrant, citing **Carpenter v. United States, 138 S. Ct. 2206 (2018)**. **Carpenter** recognized a legitimate expectation of privacy in cell site location information records, rendering collection of that information by law enforcement a "search" for fourth amendment purposes. But, **Carpenter** was not decided until nearly two years after defendant's trial and sentencing. Counsel's failure to predict this development in the law was not objectively unreasonable. And, given the additional evidence presented at trial, defendant could not establish prejudice because there was no probability of a different outcome.

**People v. Sperry, 2020 IL App (2d) 180296** Defense counsel was ineffective for agreeing to the trial court's decision not to further instruct jurors with the definition of "knowingly" when the jury specifically asked a question with regard to the meaning of that term in the instructions on aggravated battery. **IPI Criminal 4th No. 5.01B** need not be given initially but should be given where the jury asks for clarification as to the mental state. Defense counsel should have insisted that the instruction be given here where the jury's question indicated it was confused over whether the State was required to prove that defendant discharged the gun on purpose or whether it was enough for the State to prove that defendant knew a gun was discharged, which was especially problematic where defendant testified that the gun went off on accident.

**People v. Isbell, 2020 IL App (3d) 180279** Where additional charges arise from the same facts as the original charges, and the State had knowledge of those facts at the commencement of prosecution, the speedy trial term for the new charges is the same as that applied to the original charges. Continuances obtained in connection with the original

charges cannot be attributed to the defense on the new charges because those new charges were not before the court at the time.

Here, defendant was originally charged with two counts of domestic battery based on insulting or provoking physical contact. Subsequently, a third count of domestic battery was added based on bodily harm. The new count also alleged different conduct than the first two counts. Because the new charge alleged both new elements and new conduct, it was a new and additional charge for purposes of the speedy trial analysis. Defendant was not brought to trial on that count until well outside of the speedy trial period where the new count was not added until more than a year after the original charges were filed. None of the continuances on the original charges could be attributed to defendant on the new charge. A motion to dismiss that charge would have been meritorious, and therefore trial counsel was ineffective for not bringing such a motion. Accordingly, defendant's conviction on the additional domestic battery charge was reversed outright.

**People v. Johnson**, 2020 IL App (3d) 160675 After trial for armed and aggravated robbery, the jury sent a note asking why no DNA tests had been conducted on a firearm and BB gun found during a search of defendant's home. The parties discussed an answer, during which the defense requested DNA testing. The State responded that it had swabbed the guns and had informed defense of the swabs. Defense counsel could have obtained a buccal swab from his client before trial and compared the result to the swabs conducted on the guns. The trial court agreed and rejected the request.

The Appellate Court found counsel ineffective. Normally, a decision to forego a request for DNA testing would be considered sound trial strategy. But in this case, defense counsel's failure to make the request was based on his ignorance of the swabs despite their inclusion in discovery. This was deficient performance.

A majority of the court also found prejudice. The majority noted that the armed robbery charge required proof defendant possessed the firearm, not just the BB gun. A negative test on the firearm may have resulted in an acquittal for armed robbery. The dissent believed any prejudice is speculative, agreeing with the holding of **People v. Scott**, 2011 IL App (1st) 100112. The dissent noted defendant had a potential remedy through a section 116-3 petition.

**People v. Rogers**, 2020 IL App (3d) 180088 Defense counsel was ineffective for failing to move for dismissal of a later-brought DUI charge on speedy trial grounds. Defendant was initially charged by citation with DUI under (a)(4). Prosecutor added (a)(6) DUI charge 114 days later. The Appellate Court concluded that the officer could have filed both charges initially; both were based on suspicion that defendant had consumed drugs. While the initial charge was brought by traffic citation, the additional DUI charge also could have been charged via the citation because both were misdemeanors. **People v. Jackson**, 118 Ill. 2d 179 (1987), which declined to apply compulsory joinder to a later-filed felony after the initial misdemeanor charge was brought by citation, was distinguished.

Coupled with the original 114-day delay, a subsequent continuance was counted against the State and resulted in defendant being tried outside of the speedy trial term. Accordingly, had counsel moved for dismissal of the (a)(6) charge, such a motion would have been granted. The Appellate Court vacated defendant's conviction under 625 ILCS 5/11-501(a)(6).

**People v. Williams**, 2020 IL App (1st) 162512 Defense counsel was not effective for failing to object to the State's use of defendant's prior aggravated unlawful use of a weapon



conviction as impeachment, and for introducing the conviction during defendant's direct examination. First, the law was in flux at the time of defendant's trial, with [\*\*People v. McFadden\*\*, 2016 IL 117424](#) suggesting the prior offense may not have been void until vacated, which defendant here did not do. Second, defense counsel had a strategic reason to alert the jury to this conviction, as it explained why defendant was living with the decedents despite the tension he described leading up to the attack. (Defendant explained he had been paroled there and could not obtain permission from DOC to move.)

[\*\*People v. Britt\*\*, 2020 IL App \(3d\) 170548](#) In a prosecution for violation of an order of protection, the State introduced a certified copy of defendant's prior conviction for domestic battery during its case-in-chief. Defense counsel explicitly stated that he had no objection. The State also cross-examined defendant by asking if he had prior convictions for aggravated battery and aggravated criminal sexual abuse. Defendant replied in the affirmative. During its findings, the court mentioned defendant's prior convictions as part of the reason to credit the complainant's testimony and find defendant guilty.

On appeal, the State conceded that it was improper to introduce the domestic battery conviction into evidence during its case-in-chief. While the conviction enhanced defendant's offense from a misdemeanor to a Class 4 felony, it was not an element of the offense and therefore should not have been disclosed under [\*\*725 ILCS 5/111-3\(c\)\*\*](#). The failure to object to this evidence prejudiced defendant because the court explicitly relied on the prior conviction in determining defendant's guilt. The Appellate Court further held that the State's method of impeachment by cross-examining defendant about his prior convictions, rather than introducing certified copies of conviction on rebuttal, was also improper.

[\*\*People v. McCallum\*\*, 2019 IL App \(5th\) 160279](#) Trial judge did not abuse his discretion in denying defendant's motion to bar admission of a redacted recording of his second police interview. Statements of investigators during questioning are generally admissible to demonstrate defendant's responses or the effect of the investigator's statements on defendant. Here, admission of the second interview was necessary to place the first interview in context. While defendant did not make an admission during the interview, his responses were relevant in that he did change his story during the second interview, and he showed a lack of remorse about the deaths of his friends. Further, the interview was not an integral part of the State's case against defendant, and defense counsel actually used the interview to show that defendant had consistently maintained his innocence. In reaching this conclusion, the court distinguished [\*\*People v. Hardimon\*\*, 2017 IL App \(3d\) 120772](#), where the majority of the recorded interview that was admitted at trial contained irrelevant and highly prejudicial comments, the police were overly aggressive, and defendant had not changed his version of events in response to ongoing questioning.

[\*\*People v. Balark\*\*, 2019 IL App \(1st\) 171626](#) Defense counsel was not ineffective for withdrawing a motion to suppress on the day of trial. During a valid traffic stop, an officer observed defendant, who was the front seat passenger, holding a gun which he placed into the glove box as the officer approached. The police then had defendant and the other officers exit the vehicle, at which time a crowd of residents began to gather and shout at the police. Citing safety concerns, the police relocated the vehicle and its occupants to the police station to complete their investigation.

Defendant argued that there was no basis to believe he had committed an offense because the officer did not know whether he possessed a valid concealed carry license prior to arresting him. The appellate court concluded that whether defendant had a valid concealed

carry license or not, he did not possess the firearm in accord with the statute where the officer observed it in defendant's hands. The Firearm Concealed Carry Act allows for carrying a "concealed" weapon, and a "concealed" firearm has long been understood to mean one carried in a manner so as to give no notice as to its presence. A firearm is not concealed simply by virtue of its being inside a vehicle, and the gun here was not concealed when it was in defendant's hand as the officer approached. Further, **Aguilar** does not invalidate probable cause for an arrest based on open possession of a firearm discovered during a lawful traffic stop. Because the motion to suppress would not have been granted, counsel was not ineffective for withdrawing it.

**People v. Ross**, 2019 IL App (1st) 162341 Counsel did not provide ineffective assistance by failing to seek suppression of defendant's statement that he "did not know anything about" the guns that were recovered from the vehicle in which he had been riding. Police officer's statement to defendant that officer knew why defendant and his co-defendant had run from the vehicle was an informational comment and did not constitute interrogation. So, the failure to provide **Miranda** warnings did not render defendant's statement inadmissible. Further, even if defendant's statement was suppressed, the State had ample evidence to convict so there was no likelihood that the outcome of the proceedings would have been different.

**People v. Utley**, 2019 IL App (1st) 152112 After parole officers found guns and drugs in his residence during a parole check, defendant was charged with possession of a controlled substance with intent to deliver, UUW/felon, and armed habitual criminal. He was convicted of all counts and sentenced to natural life in prison pursuant to the habitual offender statute.

Defendant alleged ineffective assistance of counsel because his attorney did not move to sever the charges. The weapons charges allowed the State to admit defendant's prior drug and gun convictions into evidence, while this evidence would not have been admissible in a trial on the drug charge. The Appellate Court majority agreed. Unlike **People v. Fields**, 2017 IL App (1st) 110311-B, where the court rejected a similar argument due to counsel's motion to bar mention of the specific crimes at issue and his strategic use of an "all-or-nothing" approach, here, the attorney did not seek to minimize the harm of the prior convictions in any way.

This failure was prejudicial in a case with several discrepancies and credibility contests. Because the jury heard that defendant had been previously convicted of crimes that involved the same type of conduct as the instant case, the jury may have inferred that the contraband at issue here also belonged to defendant, rejecting the defense's version of events.

Moreover, counsel was ineffective for withdrawing a motion to suppress defendant's inculpatory custodial statement. Defendant testified at trial that his request for counsel was ignored by interrogating officers, and that the officers threatened to arrest his wife and subject his children to DCFS. The statement was not recorded and conflicted with some of the testimony from the officers. Defendant's testimony was partially corroborated by the fact that his wife was in fact brought to the police station. Under these circumstances, there is a reasonable probability that the statement would have been suppressed and the outcome of the trial different.

**People v. Burnett**, 2019 IL App (1st) 163018 The record was insufficient to review a claim of ineffective assistance of trial counsel for failure to file a motion to suppress. Defendant on appeal alleged that officers lacked probable cause to seize defendant based on his possession of a firearm in a car, because possession alone is not illegal after **Aguilar**. But because no

motion to suppress was filed, the record is silent on the specific issue of probable cause. Neither party elicited testimony from the officer concerning the basis for the arrest. Any claim concerning the legality of the seizure would have to be supplemented with additional facts and raised in a post-conviction petition.

**People v. Charles**, 2018 IL App (1st) 153625 The trial court did not err in allowing defendant to be impeached with his prior conviction of aggravated unlawful use of a weapon (AUUW). In the trial court, defense counsel did not establish that the conviction was of a type rendered void under **Aguilar**, and the court found that its probative value outweighed any prejudice. While it was determined on appeal that the conviction was for an unconstitutional form of AUUW, and while **In re N.G.** has since established that the prior AUUW was void *ab initio* and not admissible for any purpose, defendant did not receive ineffective assistance of trial counsel. **In re N.G.** had not been decided at the time of trial, and defendant was not prejudiced, regardless, because the evidence was overwhelming.

**People v. Stewart**, 2018 IL App (3d) 160205 At defendant's trial for aggravated unlawful use of a weapon, the State introduced a "certification" letter from the Illinois State Police, stating that defendant did not have a valid FOID card at the time of the offense. The trial judge inquired of defense counsel whether there was any objection, and defense counsel responded that the letter was "self-authenticating." On appeal, defendant argued that admission of the letter violated his right to confrontation.

Defendant affirmatively waived the confrontation issue by counsel's acquiescing to admission of the letter at trial where the court specifically asked for any objections from counsel. Counsel did not provide ineffective assistance by that acquiescence where the record was devoid of any information that defendant actually had a valid FOID card.

**People v. Peel**, 2018 IL App (4th) 160100 Counsel is not ineffective for failing to request a limiting instruction for other crimes evidence. A defense attorney may strategically forego the instruction in the hopes of avoiding drawing undue attention to the other crime.

Nor was counsel ineffective in agreeing to answers to the jury. First, the jury wanted to know whether the "endangered individual" in the reckless discharge instruction could be defendant himself, and defense counsel did not act unreasonably in agreeing to answer by referring to the instructions. Even though a recent case holds that the individual must be someone other than defendant, that case was decided after defendant's trial. Counsel also may have acted strategically in informing the jury that a transcript would take 90 minutes to produce, because the witness' testimony included both favorable and unfavorable testimony.

**People v. Dalton**, 2017 IL App (3d) 150213 Trial counsel provided ineffective assistance of counsel where he failed to raise a speedy trial issue on behalf of an in-custody defendant. More than 120 days after the original charge, the State filed a more serious charge that was based on the same act. The court found that counsel had no strategic reason to fail to move to dismiss a charge which violated the right to a speedy trial, and that defendant would not have been convicted of the newly added offense had counsel made an appropriate motion.

**People v. Hardimon**, 2017 IL App (3d) 120772 At defendant's trial, the State introduced a video recording of defendant's interrogation. During the first third of the interrogation, the police questioned defendant about his whereabouts and knowledge of the shooting. Then the interrogation shifted from a conversational tone to accusations that defendant committed the

shooting. During the remainder of the recording, defendant adamantly denied the officers' accusations. At several points, the officers claimed that the evidence was so heavily weighed against defendant that he would be easily convicted at trial and face a lengthy prison sentence. The officers insisted that they were not lying because they had a reputation to protect.

Trial counsel's failure to ask that the latter two-thirds of the video be redacted constituted ineffective assistance of counsel. That portion of the video served only to impermissibly bolster the State's case and inflame the passions of the jury. Since defendant adamantly denied any involvement in the shooting, the final two-thirds had no probative value. It only served to improperly allow the officers to conclusively state that defendant was guilty. And since the remainder of the evidence was circumstantial and failed to directly connect defendant to the crime, the improper video evidence was highly prejudicial.

**People v. Peck**, 2017 IL App (4th) 160410 The police brought defendant to the police station, placed him in an interrogation room and gave him **Miranda** warnings. Defendant immediately said, "I want an attorney." The officer replied, "Okay, now like I explained to you out there...Persoun [defendant's girlfriend] is going to be arrested as part of this, okay?" In response, defendant asked what evidence the police had, and this commenced a conversation where defendant eventually confessed. Trial counsel, however, did not file a motion to suppress.

The Appellate Court held that trial counsel was ineffective for failing to file a motion to suppress. From defendant's perspective, the officer's statement was reasonably likely to elicit an incriminating response. Defendant only continued to speak after the police threatened his girlfriend. The officer's statement thus constituted an improper continuation of defendant's interrogation. And faced with these facts, counsel's failure to file a motion to suppress fell below an objective standard of reasonableness.

Defendant was prejudiced by counsel's deficient performance. The record showed that defendant's confession had an immense impact on the outcome of the case. It was the strongest piece of evidence used by the State to establish an element of the offense, and it made it difficult for defendant to provide alternative theories and request a jury instruction on lesser-included offenses.

**People v. Goods**, 2016 IL App (1st) 140511 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 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. The 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.

**People v. Lucious, 2016 IL App (1st) 141127** 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.

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. 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**. And, counsel's error was prejudicial under the second prong of **Strickland** since the improper evidence established an essential element of aggravated robbery.

**People v. Zambrano, 2016 IL App (3d) 140178** 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." 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. 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.

**People v. Davis, 2014 IL App (4th) 121040** 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. 373, 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**.

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.

[\*\*People v. Falco\*\*, 2014 IL App \(1st\) 111797](#) 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.

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.

[\*\*People v. Hill\*\*, 2014 IL App \(2d\) 120506](#) 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.

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.

**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."

**People v. Hobson, 2014 IL App (1st) 110585** At the second stage of post-conviction proceedings, 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). Counsel acted unreasonably by failing to object, and that there was no valid strategic reason for not objecting.

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 disclosed the promises of leniency and their false testimony had defense counsel interviewed them.

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.

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.

**People v. Wood, 2014 IL App (1st) 121408** 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.

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.

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.

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.

**People v. Kidd, 2013 IL App (2d) 120088** 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.

**People v. Simpson, 2013 IL App (1st) 111914** 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 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.

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.

And, 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, each suffered credibility issues. Further, the erroneous admission of a confession is rarely harmless 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 the other witnesses, defendant had established a reasonable likelihood that he would have achieved a better result had counsel objected to the videotape.

**People v. Coots, 2012 IL App (2d) 100592** Where jury sent out a note demonstrating that it was confused about a question of law, counsel’s failure to submit a proposed supplemental instruction was objectively unreasonable and prejudiced defendant given the closeness of the evidence. The trial court’s refusal to clarify the jury’s confusion 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).

**People v. Gallagher, 2012 IL App (1st) 101772** At defendants’s residential burglary trial, counsel claimed that defendant’s actions constituted a trespass, but not residential burglary. But, 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.”

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.

Defendant was prejudiced because there was a reasonable probability that a properly instructed jury would have convicted only on the lesser charge.

**People v. Hill, 2012 IL App (1st) 102028** 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 ecstasy 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.

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. The continued detention of defendant was not supported by probable cause or reasonable suspicion. 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. And, the continued detention of defendant was not a valid seizure incident to execution of the warrant.

There is a reasonable probability that the outcome of the trial would have been different had defendant's statement been suppressed. The crucial piece of evidence establishing possession of the weapon was the defendant's statement.

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\(c\)](#).

**People v. Moore**, 2012 IL App (1st) 100857 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.

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.

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 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.

**People v. Wright**, 2012 IL App (1st) 073106 The constitutional right to the effective assistance of counsel applies to pretrial proceedings to exclude evidence. 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.

**People v. McCarter**, 2011 IL App (1st) 092864 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."

**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.

**In re Austin M.**, 403 Ill.App.3d 667, 941 N.E.2d 903 (4th Dist. 2010) 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. By agreeing to the videotaped testimony, counsel gained an advantage for the defense by depriving the State of "more persuasive" live testimony.

Defense counsel was not ineffective although he failed to move to suppress a statement made by the minor to police. The statement would likely have been deemed voluntary had a motion to suppress been filed. 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.

Finally, counsel was not 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.

**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.

**People v. Mims**, 403 Ill.App.3d 884, 934 N.E.2d 666 (1st Dist. 2010) 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 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 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.

**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.

**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.

**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. 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. 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. 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. 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. 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**, 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. Moore**, 279 Ill.App.3d 152, 663 N.E.2d 490 (5th Dist. 1996) 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.

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. 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.

**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).

#### **§14-4(b)(5)**

#### **Mistakes of Fact or Law**

#### **United States Supreme Court**

**Hinton v. Alabama**, 571 U.S. 263, 134 S.Ct. 1081, 188 L.Ed2d 1 (2014) Where the essence of the State's case consisted of ballistics evidence, defense counsel acted unreasonably when he presented the testimony of a firearms and toolmark expert whom he believed to be unconvincing. 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. 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**."

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

#### **Other Federal Courts**

**Moore v. Bryant**, 348 F.3d 238 (7th Cir. 2003) 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.

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.

#### **Illinois Supreme Court**



**People v. Moore**, 2020 IL 124538 Trial counsel's performance was deficient where he did not offer to stipulate to defendant's felon status at defendant's jury trial for unlawful possession of a weapon by a felon. Defendant's prior conviction was for first degree murder. **People v. Walker**, 211 Ill. 2d 317 (2004), adopted the reasoning of **Old Chief v. United States**, 519 U.S. 172 (1997), and held that where only a defendant's felon status is at issue, a court should generally exclude the name and nature of the defendant's prior conviction because it has no probative value and carries a substantial danger of unfair prejudice..It would have been objectively unreasonable for the trial court to have refused a stipulation had it been offered.

Defendant was prejudiced by counsel's error. **Walker** made clear that the nature of a defendant's prior conviction has little probative value where it is only relevant to defendant's felon status and instead carries a high risk of prejudice because of the tendency to "overpersuade." Here, the only real issue was whether defendant possessed the firearm, and on that question the evidence was closely balanced. The arresting officer testified that during a traffic stop, defendant made a movement toward the center console, acted nervously, and volunteered that he had a loaded firearm in the console. There was a video of the stop, but no audio, and the video did not show any movement toward the center console. The gun was not tested for fingerprints. Defendant testified that he did not reach toward the center console and did not tell the officer he had a gun in the car. The owner of the gun testified that she accidentally left the gun in defendant's car the day before, and she produced a receipt confirming that the gun belonged to her. This was a "classic case of closely balanced evidence." Thus, the error in telling the jury that defendant's prior conviction was for murder was prejudicial. Defendant was denied the effective assistance of counsel, requiring reversal and remand for a new trial.

**In re Danielle J.**, 2013 IL 110810 The minor was denied the effective assistance of counsel where her attorney 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 it was statutorily precluded.

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

**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. 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. 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. 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).

### **Illinois Appellate Court**

[People v. McClendon](#), 2022 IL App (1st) 163406 Following his conviction of armed habitual criminal, defendant appealed. Defendant argued that trial counsel provided ineffective assistance on his motion to suppress evidence. Specifically, defendant argued that counsel should have argued that he was illegally seized, and that the gun and defendant's statement were the fruits of that illegal seizure. The Appellate Court agreed.

Police responded to a call of shots fired. They did not have a description of the shooter or any information about whether a vehicle was involved in the incident. About four blocks away from the area, responding officers observed defendant and another man sitting in a parked vehicle. An officer testified that the men slumped down in their seats when the police passed by and then drove away when the officers parked and started to approach. Eventually, other officers were directed to a parking lot where the vehicle had gone after driving away. Defendant and the other man were located on the porch of an adjacent residence, knocking on the door. Officers approached with their guns drawn, and one of the officers said defendant took out a gun and dropped it behind a couch on the porch. It was alleged that defendant later made a statement admitting he had possessed the gun.

The trial court found that defendant had abandoned the gun prior to being seized, and therefore denied the motion to suppress. At the suppression hearing, trial counsel failed to argue that defendant had been seized before abandoning the gun and that it was the illegal seizure that caused the abandonment. The Appellate Court concluded that the motion to suppress would have had merit had counsel made those arguments. Defendant was seized when officers approached the porch with their guns drawn, causing defendant to submit to that show of authority. Further, the police lacked probable cause or reasonable suspicion to seize defendant. No evidence connected him to the call of shots fired, and no officers saw

defendant engage in any crime prior to the seizure. Defendant only dropped the gun in response to being seized, thus the gun was the fruit of the illegal seizure.

The Appellate Court reversed defendant's conviction outright. Without the gun, or defendant's later statement, the State had no evidence to support the charge.

**People v. Tucker, 2017 IL App (5th) 130576** Defendant made a substantial showing in his second-stage post-conviction petition that trial counsel provided ineffective assistance in several ways.

(1) During opening statements, counsel disclosed to the jury inadmissible details of defendant's prior convictions.

(2) Counsel failed to lay a proper foundation to impeach a critical State witness.

(3) Counsel unsuccessfully tried to introduce a diagram to show that a State's witness could not have seen what he claimed to see. But since the diagram was not to scale, it could not accurately show what counsel intended and the trial court properly excluded it.

(4) Counsel made an unprofessional and bizarre closing argument where he, among other things, admitted his incompetence as a trial attorney and promised to retire from conducting trials.

The Appellate Court remanded the case for a third-stage evidentiary hearing.

**People v. Brown, 2014 IL App (4th) 120887** 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 life.

In a post-conviction petition, 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.

Defendant's *pro se* petition made an arguable claim of ineffective assistance. 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. The evidence at trial 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.

**People v. Davis, 2014 IL App (4th) 121040** 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. 373, 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 to predict the future and anticipate **Riley**.

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.

**People v. Pacheco**, 2013 IL App (4th) 110409 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."

Also, 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."

**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.

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. And, 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 and the testimony of the defendant. The court expressly relied on the prior conviction in assessing defendant's credibility in his bench trial.

**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.

**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. 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.

**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. 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).

#### **§14-4(b)(6)**

#### **Strategic Decisions**

#### **§14-4(b)(6)(a)**

#### **Generally**

#### **United States Supreme Court**

**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).

### **Illinois Supreme Court**

[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).

[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").

### Illinois Appellate Court

[People v. Willingham](#), 2020 IL App (1st) 162250 Newly discovered evidence of actual innocence does not have to be dispositive in order to be likely to alter the result on retrial. Under [People v. Robinson](#), 2020 IL 123849, the Supreme Court made clear that the standard is whether the evidence supporting the post-conviction petition places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt. Here, the affidavit of a previously unknown bystander, stating that he witnessed the altercation and saw the victim shoot at defendant before defendant returned fire, went to the heart of whether defendant acted in self-defense and, if believed, would place the trial evidence in a different light and undermine confidence in the guilty verdict. While the witness's affidavit conflicted with other trial testimony, it was not positively rebutted by the record and the court could not resolve the conflict at the second stage of post-conviction proceedings since credibility determinations are improper at that stage.

Defendant's petition also made a substantial showing of ineffective assistance of trial counsel for failing to call three witness who would have testified that the shooting victim and his fellow gang members were armed on the date of the altercation which led to the shooting. This would have supported defendant's claim of self-defense. While counsel may ultimately provide strategic reason for not calling the witnesses, an evidentiary hearing is required to resolve that question. Accordingly, defendant made a substantial showing of deficient performance. And, where the witnesses would have provided critical support for defendant's otherwise uncorroborated version that he acted in self-defense, defendant's petition also made a substantial showing of prejudice. Accordingly, the dismissal of defendant's petition was reversed, and the matter was remanded for an evidentiary hearing.

[People v. Gunn](#), 2020 IL App (4th) 170653 In a murder case where the defense argued self-defense or second-degree murder, defense counsel told the jury multiple times during opening statements that defendant would testify and explain why he stabbed the decedent and why he lied to the police during his interrogation. Defense counsel also told the trial court it did not need to read the **Zehr** principle concerning the defendant's failure to testify, since defendant would in fact be testifying. During trial, however, counsel advised defendant not to testify, and defendant did not take the stand.

After his conviction for first-degree murder, defendant filed a post-conviction petition alleging ineffective assistance of counsel. The Appellate Court reversed the second-stage dismissal of the petition and remanded for an evidentiary hearing. While in an ordinary appeal this type of claim might be rejected as trial strategy, in post-conviction proceedings this assumption is not applicable because the proceeding allows for a defendant to develop a record as to the basis for counsel's decision. Here, nothing unforeseeable occurred at trial

after counsel promised the testimony, and therefore an explanation from counsel should be elicited at an evidentiary hearing.

**People v. Upshaw**, 2017 IL App (1st) 151405 Although whether to present a witness is a matter of strategy, valid strategic decisions may be made only after there has been a thorough investigation of law and facts relevant to the options. In addition, it may be ineffectiveness to fail to present exculpatory evidence of which counsel is aware, including failing to call witnesses whose testimony would support an otherwise uncorroborated defense.

Here, defendant made a substantial showing that trial counsel was deficient for failing to contact a known alibi witness who alleged in his affidavit that he was with defendant in defendant's home at the time the offense occurred on the street. The affidavit indicated that defendant provided trial counsel with the witness's address and telephone number and said that the witness would be willing to testify to defendant's alibi. The record suggests no strategic reason that counsel would have decided not to investigate the alibi or interview the witness.

In addition, the prejudice component of **Strickland** was satisfied where the case against defendant rested on an inculpatory statement which he gave after 28½ hours in police custody. That statement was inconsistent with the events as related by a police officer's testimony, and defendant did not fit the description of the shooter. And, a jury note during deliberations indicated an impasse concerning the credibility of defendant's statement.

**People v. Coleman**, 2012 IL App (4th) 110463 Defendant filed a post-conviction petition claiming, among other things, that 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 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, stating 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. 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.

**People v. Woods**, 2011 IL App (1st) 092908 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.

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.

Here, 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.

Defendant could not show that defense counsel acted unreasonably. 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. 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.

**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.

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.

#### **§14-4(b)(6)(b)**

#### **Counsel Not Ineffective**

#### **United States Supreme Court**

**Harrington v. Richter**, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) 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.

Counsel did not act unreasonably by failing to consult a forensic blood expert or offer expert testimony on blood evidence. It was only after trial, when forensic evidence concerning the source of blood found at the scene "emerged," that it could be concluded that blood evidence was a critical issue.

Likewise, 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.

**Knowles v. Mirzayance**, 556 U.S. 111, 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.

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."

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.

#### **Illinois Supreme Court**

**People v. Manning**, 241 Ill.2d 319, 948 N.E.2d 542 (2011) 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. 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, he also said he did not think that defendant's background would influence his decision.

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, 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.

**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.

**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. 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. 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.

**People v. Childress**, 191 Ill.2d 168, 730 N.E.2d 32 (2000) 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.

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. 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. 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. 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. 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. 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. Flores**, 128 Ill.2d 66, 538 N.E.2d 481 (1989) 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."

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

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. Kubat**, 114 Ill.2d 424, 501 N.E.2d 111 (1986) 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).

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.

### **Illinois Appellate Court**

**People v. Smith**, 2024 IL App (2d) 230539 The trial court did not err in dismissing defendant's post-conviction petition over his claim that he received ineffective assistance of trial counsel during his decision to waive a jury trial. Defendant claimed that counsel told him that during a 402 conference, the judge said, "I don't think he meant to shoot this guy," apparently referring to defendant's contention that the shooting was accidental. Based on counsel's recounting of this statement, defendant agreed to proceed to a bench trial, at which he was ultimately convicted of murder. Defendant argued that he would not have waived his right to a jury trial absent this "promise" from defense counsel.

The appellate court noted that there was no promise and no definitive suggestion that the trial court would find defendant not guilty or even guilty of a lesser charge. Counsel's recounting of the judge's statement was an indication of his strategic belief that a bench trial

gave defendant a better chance at acquittal or a lesser conviction. It was not a guarantee of a certain result.

**People v. Reinking, 2024 IL App (4th) 230486** Defendant was charged with unlawful delivery of a firearm under section 24-3(A)(e), which prohibits giving a firearm to someone who has been treated in a mental institution within the previous five years. The State alleged defendant violated the statute by returning an AR-15 to his son after his involuntary stay in a hospital's mental health unit.

The parties stipulated to several facts, including to the nature and length of the son's stay at the hospital and the fact that defendant "gave" the weapon to his son within the prohibited time period. The issues at trial were whether defendant knew that his son received treatment for mental health while in the hospital, as required by the statutory definition of "mental institution," and whether defendant could "give" the firearm to his son if his son legally owned the firearm. The trial court found defendant guilty. It found defendant's testimony that he was ignorant of the nature of his son's hospitalization lacked credibility, given defendant was present for the commitment, and visited his son in the hospital. The court also found defendant "gave" the firearm to his son as contemplated by the statute.

On appeal, defendant argued the court erred in denying a pretrial motion to dismiss because the indictment failed to state the nature of the charge, and because the statute is unconstitutionally vague. The appellate court affirmed. Although defendant argued the charge did not specify the unlawful "giving" conduct, and "giving" can have different meanings, the indictment tracked the language of the statute and need not have specified the exact means by which the conduct was carried out. Nor is the statute unconstitutionally vague. Defendant argued that no person could understand that the "giving" of a firearm also encompassed "returning" a firearm to its lawful owner. The appellate court held that a person of ordinary intelligence could understand these acts to be one and the same. The plain language of the statute conveys its purpose – preventing the mentally ill from obtaining firearms, regardless of how or why the firearm is given.

The appellate court also held the State proved defendant's knowledge that his son had been treated in a mental institution. Defendant argued the trial court should have accepted his testimony that he was hard of hearing and therefore didn't understand why or where his son was being taken by the police. But defendant admitted that he knew his son had been claiming his phone was hacked by Taylor Swift and was acting erratically. The defendant also visited his son in the mental hospital. A rational trier of fact could have found defendant knew the nature of his son's hospitalization.

Finally, the appellate court affirmed the trial court's rejection of defendant's ineffectiveness claim after a **Krankel** hearing. Defendant argued that his attorney should not have stipulated to the fact that he "gave" his son the firearm and that he objected to this stipulation. But defense counsel testified that defendant later agreed to all of the stipulations after consultation. The appellate court would not re-weigh the credibility findings of the trial court. Defendant also argued that his attorney should have presented a defense based on a conversation defendant had with the sheriff's office before returning the firearm, in which he was told that doing so was legal under the FOID Act. Nor would the appellate court question counsel's strategic decisions. But defense counsel was examined at length during the hearing and explained why he chose to instead focus on defendant's knowledge. The appellate court would not question counsel's strategic decision to settle on an alternative valid defense.

**People v. Hernandez-Chirinos, 2024 IL App (2d) 230125** Defendant was convicted of predatory criminal sexual assault and abuse of his 12 year-old stepdaughter. The

complainant made an outcry against defendant to her mother, who brought her to a hospital, where it was discovered she was pregnant. In her initial interview with a child advocate, the complainant made several allegations of abuse against defendant. But DNA testing soon revealed the father of complainant's child was her stepbrother, not her stepfather. In a second interview, the complainant alleged her stepbrother sexually abused her as well, and that she did not reveal that abuse in the first interview because she feared her stepbrother and did not want to upset her mother.

The parties agreed that the rape shield statute did not prevent the admission of evidence of the stepbrother's abuse, nor would it prevent the defense from cross-examining the complainant about her omission of this allegation from her initial interview. But the trial court denied the defendant's argument that the completeness doctrine required the State to publish the recording of the second interview after the first interview.

At trial, the jury heard the initial interview, the complainant's testimony about the sexual abuse by both her stepfather and stepbrother, various other outcry statements to friends, and a stipulation to the stepbrother's arrest for predatory criminal sexual assault of the complainant. The defense cross-examined the complainant about her omissions, inconsistencies, and whether she blamed defendant only because she feared her stepbrother or upsetting her mother. After hearing this evidence the jury convicted defendant of all counts.

On appeal, defendant argued that the second interview should have been played for the jury pursuant to the completeness doctrine and [Illinois Supreme Court Rule 106](#), and that counsel was ineffective for failing to play it during the defense case-in-chief. The appellate court first highlighted the distinction between the common law completeness doctrine and [Rule 106](#), noting that defendant's objection below never mentioned [Rule 106](#). Under [Rule 106](#), a party may seek introduction of any written or recorded statement that "ought in fairness" be considered, regardless of when it was made. Under the common law completeness doctrine, however, the writings or recordings must have been made at the same time. Because defendant's motion included only the common law grounds, he forfeited a [Rule 106](#) objection. Because the statement defendant sought to admit was made a month after the initial statement, the common law completeness doctrine does not apply.

Regardless, the appellate court would not find plain error with regard to [Rule 106](#), because counsel could have played the recording in the defense case-in-chief. The trial court's denial of defendant's motion to publish the statement pertained only to the State's case-in-chief.

Further, counsel was not ineffective for failing to introduce the statement during the defense case-in-chief because the jury had already heard ample evidence about the stepbrother's abuse and the complainant's initial failure to disclose that abuse. The jury would have fully understood the allegations against the stepbrother, and the potential implications for the complainant's credibility. In light of this, defense counsel could have strategically determined that playing the recording would have minimal probative value and only serve to make the complainant more sympathetic in the eyes of the jury.

**[People v. Hayes, 2022 IL App \(4th\) 210409](#)** Defendant shot and killed a woman. He claimed he was aiming at a man who struck him in the head with a firearm nine months earlier. Defense counsel argued to the jury that defendant's act was mitigated by the serious provocation of the man who attacked him. Defendant provided testimony in support of this defense. At the close of evidence, however, the trial court denied the defense's request for a second degree murder instruction. Defendant was found guilty of first degree murder.



On appeal defendant argued that counsel was ineffective for pursuing a frivolous defense, or, in the alternative, the trial court erred in refusing the second degree murder instruction. The appellate court initially took issue with this argumentation, finding that while a defendant may put forth inconsistent defenses at trial, “[i]t seems a less tenable pursuit on appeal.”

To show second degree murder, the defendant must prove he was acting under a sudden and intense passion resulting from serious provocation. Serious harm or injury is a sufficient provocation, but the killing is no longer mitigated if enough time passes for tempers to cool. Here, counsel did not perform deficiently. Although the shooting occurred nine months after the injury, counsel was left with few options. The State had ample evidence that defendant was the shooter, including defendant’s girlfriend’s eyewitness testimony and overhear tapes containing defendant’s admissions. The State also tendered a videotaped confession in discovery which, though not ultimately admitted, would have factored into counsel’s decision. “A weak or insufficient defense does not indicate ineffectiveness of counsel in a case where a defendant has no defense.” **People v. Ganus**, 148 Ill. 2d 466 (1992). For the same reasons, no prejudice resulted from counsel’s decision, as any defense was doomed in the face of overwhelming evidence.

Finally, the trial court did not abuse its discretion in refusing the instruction. The court was aware of no Illinois cases in which the cooling off period lasted nine months, and counsel’s argument that the presence of his attacker rekindled the sudden and intense passion was not supported by law. Thus, not even “slight” evidence supported the defense.

**People v. Sapp**, 2022 IL App (1st) 200436 The Appellate Court refused to find counsel ineffective for failing to question any venire members during *voir dire*. An attorney’s decision whether to question a potential juror on a particular subject is considered to be one of trial strategy. Although defendant argued that prejudice results when the State “builds a relationship” with the jury by complimenting venire members in follow-up questions, the court found this argument speculative. Defendant could not point to any concrete prejudice resulting from defense counsel’s decision to refrain from questioning. Defendant also cited a Texas Appellate Court case finding that the failure to participate in *voir dire* is a sixth amendment violation under **Cronic**, but the Appellate Court noted the case had not been followed by other Texas courts, and that it was not binding on this court.

**People v. Gunn**, 2021 IL App (4th) 200398 Defendant was convicted of murder after alleging self-defense at trial. In a post-conviction petition, defendant claimed his attorney was ineffective where, at defendant’s jury trial, counsel promised the jury in opening statement that it would hear from defendant, and waived admonishments concerning defendant’s failure to testify, before changing course midtrial and advising him not to testify.

The facts at the third stage evidentiary hearing established that both counsel and defendant expected that defendant would testify in his own defense. Defense counsel testified that after hearing the State’s case, including favorable testimony from a State’s witness that she did not anticipate, she made a strategic decision to advise defendant not to testify. Counsel explained that the unanticipated weakness of the State’s case, and the risks posed by submitting defendant to cross-examination, militated against having defendant testify. The circuit court found this testimony credible and dismissed the petition.

Defendant argued on appeal that based on counsel’s review of police reports, she would have been aware of the “surprise” testimony prior to trial. She also would have understood, prior to trial, the risks of calling defendant to the stand. Thus, no event occurred after the promise to the jury and the waiver of admonishments that would warrant the

change in strategy. The Appellate Court disagreed and deferred to the circuit court's credibility determination. While the risk of calling defendant was known, counsel credibly testified that it was only after she heard the State's case that she concluded it was a risk not worth taking.

**People v. McCall**, 2021 IL App (1st) 172105 After his murder conviction, the trial court held a preliminary **Krankel** inquiry on defendant's allegations of ineffective assistance of counsel. The motion was denied without a **Krankel** hearing. A majority of the Appellate Court affirmed.

The majority first held that defendant failed to show possible neglect for failing to file a motion to suppress evidence found in defendant's home, where a triple murder took place. The police did not violate the fourth amendment because the items were found in plain view after a warrantless entry that was justified by the emergency aid exception. As in **People v. Ramsey**, 2017 IL App (1st) 160977, the Appellate Court held that officers who are legally inside a home may recover items in plain view, and it does not matter whether the recovering officers, including evidence technicians, arrive after the emergency has ended. As long as the initial responding officers could have recovered the evidence because it was in plain view, the search complies with the fourth amendment.

Nor did defendant show possible neglect for failing to file a motion to suppress defendant's custodial statements. When detectives brought defendant into an interview room, they told defendant that they'd been looking for him because people in the neighborhood said that defendant had killed his family. Defendant told the detectives that he killed them in self-defense, explaining how it happened. The detectives offered defendant medical attention, left the interview room "for a short time" and then returned and advised defendant of his **Miranda** rights. Defendant provided further statements admitting to the crimes but asserting self-defense.

The failure to file a motion was sound strategy where the defense theory at trial was self-defense, and the custodial statements supported that defense. Thus, there was no reason to suppress the initial statement. Furthermore, the post-warning statement was not elicited via the deliberate "question first, warn later" technique that violates the fifth amendment. The unwarned "interrogation" in this case was a single statement by a detective that the police had been looking for defendant and then a follow-up question later referencing defendant's response. It resembled the permissible interrogation in **Oregon v. Elstad**, 470 U.S. 298 (1985), and was a far cry from the systematic, exhaustive, psychologically skillful interrogation in **Missouri v. Seibert**, 542 U.S. 600 (2004). In any event, suppression of the statements would not have affected the outcome of the case. Defendant contended that absent his statements, he could have pursued a reasonable doubt strategy at trial, but the Appellate Court found the evidence overwhelming.

The dissent would have remanded for a full **Krankel** hearing because trial counsel's explanation for failing to file a **Seibert** motion did not adequately address the issues with the statements. In fact, counsel's explanation betrayed a fundamental misunderstanding of what occurred. The video of the interrogation, which was not played at the preliminary **Krankel** inquiry, plainly showed that there was a pre-warning statement that would have been suppressed, and a post-warning statement that at least arguably could have been suppressed, but counsel's explanation showed she was unaware of these circumstances. The dissent disagreed with the majority's decision to "fill in the blanks" on behalf of trial counsel, noting that the entire purpose of **Krankel** is to provide the Appellate Court with a record on which to evaluate an ineffectiveness claim.

**People v. Bell**, 2021 IL App (1st) 190366 The trial court did not err in admitting four Twitter posts into evidence for the limited purpose of identification. The complainant testified that she used the tweets, two of which referenced her shooting and two of which showed photographs of codefendant and defendant with weapons, to identify her assailants. Her explanation of how she observed the tweets on her phone before taking a screen shot adequately laid a foundation. While defendant alleged a failure to prove the identity of the poster, neither the witness nor the State used either the written or photographic tweets to establish any admission or evidence other than explaining how the complainant arrived at her identification.

Nor was counsel ineffective for failing to move for a severance based on the tweets. Although defendant alleged the tweets apparently came from the co-defendant's account and implicated defendant in the offense in violation of **Bruton**, the tweets were not admitted as prior statements of the codefendant. They were admitted for the limited purpose of identification, and would have been admissible against defendant even if the cases were severed.

Finally, the court rejected several additional claims of ineffectiveness, finding no unreasonable performance. These included: failure to object to codefendant's opening statement which revealed defendant would testify (sound strategy where trial counsel testified at a post-trial hearing that the attorneys collaborated on the defense and had no problem with the statement); failing to impeach the complainant with prior inconsistent statements casting doubt on her ability to observe (sound strategy where trial counsel explained he did not want to "beat up" on a sympathetic victim who made the statements in question after suffering a traumatic event); failure to object to the complainant's references to her subsequent miscarriages (sound strategy where trial counsel stated the defense theory was not that the complainant was not sympathetic, only that she was mistaken); and admitting evidence that defendant and co-defendant had been arrested with a gun similar to the one used in the crime (trial counsel explained the ballistics did not match and it therefore undermined the witness' testimony and photographic tweets, a sound strategy).

**People v. Gavin**, 2021 IL App (1st) 182085 Counsel was not ineffective for failing to elicit the fact that a witness did not make an identification of the defendant as the shooter, or cross-examine an officer about the witness's failure to identify defendant in a show up. Trial counsel testified at a post-trial hearing that she feared the witness would identify defendant for the first time from the stand, and that the officer might suddenly hedge on the non-identification at the show-up. Thus, strategic reasons existed for counsel's omissions. Additionally, where the witness had testified he did not get a good look at the shooter and had not identified defendant at any point in State's case, and other, more persuasive evidence implicated defendant in the crime, defendant could not show prejudice.

**People v. Holliday**, 2020 IL App (5th) 160547 Where the defense stipulated to the admission of Facebook photos, the doctrine of invited error applied and defendant could not obtain plain error review on the question of whether the photos had been properly authenticated. Defendant's argument that counsel was ineffective for stipulating to the photos failed, as well, because the record demonstrated that the decision to stipulate was a

strategic choice and because defendant was not prejudiced where there was ample additional evidence to support his conviction.

**People v. Williams**, 2020 IL App (1st) 162512 Defense counsel was not effective for failing to object to the State's use of defendant's prior aggravated unlawful use of a weapon conviction as impeachment, and for introducing the conviction during defendant's direct examination. First, the law was in flux at the time of defendant's trial, with **People v. McFadden**, 2016 IL 117424 suggesting the prior offense may not have been void until vacated, which defendant here did not do. Second, defense counsel had a strategic reason to alert the jury to this conviction, as it explained why defendant was living with the decedents despite the tension he described leading up to the attack. (Defendant explained he had been paroled there and could not obtain permission from DOC to move.)

**People v. Knapp**, 2019 IL App (2d) 160162 Where defendant's *pro se* post-conviction petition did not include an allegation that he was prevented from testifying at trial after informing counsel of his desire to do so, defendant failed to state the gist of a claim of ineffective assistance of counsel for inducing him not to testify. The Court declined to infer that defendant made such a request because the trial record showed that defendant was admonished by the court of his right to testify, and defendant waived that right without mentioning any pressure from counsel.

**People v. Massey**, 2019 IL App (1st) 162407 At defendant's trial for murder, defense counsel was not ineffective for not "more vigorously" arguing that the co-defendant (Ealy) was the sole shooter and that defendant was not accountable for the shooting. It was reasonable for counsel not to seek a trial severance as a matter of strategy because evidence pointed to a single shooter and counsel could have determined defendant was more likely to get an acquittal by giving the jury the option of convicting Ealy at a joint trial. While Ealy's hearsay statements were admitted at the joint trial, those statements did not implicate defendant so there was no need for counsel to object to them. Likewise, there was no basis to object to Ealy's closing argument which focused on the absence of any witness testimony that Ealy was the shooter. Defense counsel's closing argument, which challenged the credibility of the State's witnesses rather than focusing on Ealy as the shooter, was a matter of trial strategy and was not deficient.

**People v. Edmondson**, 2018 IL App (1st) 151381 Trial counsel was not ineffective during closing arguments despite arguing only misidentification and reasonable doubt in a case where he requested jury instructions on self-defense and second-degree murder. The content of closing argument is a quintessential matter of trial strategy. Although an attorney's decision to forego argument on affirmative defenses and lesser or mitigated offenses could theoretically constitute deficient performance, in most cases, including this one, courts must defer to counsel's strategic decision. Here, the self-defense and second-degree murder arguments would be particularly weak, and counsel's decision to focus on reasonable doubt was therefore sound strategy.

**People v. Brickhouse**, 2018 IL App (3d) 150807 The police arrested defendant and placed him in an interrogation room. While the detective asked defendant to sign a consent form for videotaping the interrogation, defendant stated, "I can't ask for a lawyer?" The detective responded that they would get to that, but that he first needed his consent to record the interrogation. Defendant signed the consent and the detective immediately **Mirandized**

defendant. Defendant signed a **Miranda** waiver and gave an exculpatory statement, followed later by two inculpatory **Mirandized** statements.

The circuit court denied defendant's post-conviction claim of ineffective assistance of counsel after an evidentiary hearing. The Appellate Court affirmed. It held that the defendant's statement was ambiguous and not a clear request for counsel, particularly where it was made prior to **Miranda** warnings. Moreover, it found that the detective did not deny counsel, but rather, within 30 seconds, read defendant his **Miranda** rights. The court further found the statement voluntary. The court also held that counsel's decision was strategic where the initial statement was exculpatory and counsel saw no basis for suppressing the latter statements.

**People v. Peel, 2018 IL App (4th) 160100** Counsel is not ineffective for failing to request a limiting instruction for other crimes evidence. A defense attorney may strategically forego the instruction in the hopes of avoiding drawing undue attention to the other crime.

Nor was counsel ineffective in agreeing to answers to the jury. First, the jury wanted to know whether the "endangered individual" in the reckless discharge instruction could be defendant himself, and defense counsel did not act unreasonably in agreeing to answer by referring to the instructions. Even though a recent case holds that the individual must be someone other than defendant, that case was decided after defendant's trial. Counsel also may have acted strategically in informing the jury that a transcript would take 90 minutes to produce, because the witness' testimony included both favorable and unfavorable testimony.

**People v. Varnauskas, 2018 IL App (3d) 150654** Where defendant's vehicle was equipped with a bicycle rack which obscured all but two numbers of the license plate, a traffic stop for a violation of **625 ILCS 5/3-413(b)** was proper. That subsection provides for the placement of vehicle license plates and states that they are to be "free from any materials that would obstruct the visibility of the plate." Defendant's counsel initially filed a motion to suppress, but abandoned that motion based on **People v. Gaytan, 2015 IL 223**, which construed a prior version of the statute as encompassing only obstructions which were physically attached to the license plate, but which also held that officers had an objectively reasonable belief that a trailer hitch violated the statute because it was ambiguous. Counsel's abandonment of the motion was reasonable in light of **Gaytan** and because the statute had since been amended to remove the ambiguity.

**People v. Jackson, 2018 IL App (1st) 150487** In joint, separate trials for attempt murder of a peace officer, co-defendant's counsel elicited facts tending to show that the shooters would not know their target was an officer. Defendant's counsel, who argued that defendant did not fire a gun at all, and that co-defendant, acting alone, fired all of the shots, did not elicit the same facts. Defendant was convicted of attempt murder of a peace officer, while co-defendant was convicted only of attempt murder. The Appellate Court rejected defendant's ineffectiveness claim, finding counsel's all-or-nothing strategy sound. Given the fact that officers saw only co-defendant firing, counsel could forego arguing that defendant would not have known the target was a police officer, as such an argument may have confused or distracted the jury, even though defendant's jury did receive a lesser-included offense instruction.

While counsel performed deficiently in failing to object to the officers' testimony detailing their awards and commendations, defendant could not show prejudice in light of his presence at the scene and positive GSR tests on his sleeve.



**People v. Fields**, 2014 IL App (1st) 110311-B 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.

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

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.

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.

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.

**People v. Shamlodhiya**, 2013 IL App (2d) 120065 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.

**People v. Poole**, 2012 IL App (4th) 101017 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."

**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 kidnapping 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.

#### **§14-4(b)(6)(c)**

#### **Counsel Ineffective**

#### **Illinois Supreme Court**

**People v. Moore**, 2020 IL 124538 Trial counsel's performance was deficient where he did not offer to stipulate to defendant's felon status at defendant's jury trial for unlawful possession of a weapon by a felon. Defendant's prior conviction was for first degree murder. **People v. Walker**, 211 Ill. 2d 317 (2004), adopted the reasoning of **Old Chief v. United States**, 519 U.S. 172 (1997), and held that where only a defendant's felon status is at issue, a court should generally exclude the name and nature of the defendant's prior conviction

because it has no probative value and carries a substantial danger of unfair prejudice..It would have been objectively unreasonable for the trial court to have refused a stipulation had it been offered.

Defendant was prejudiced by counsel's error. **Walker** made clear that the nature of a defendant's prior conviction has little probative value where it is only relevant to defendant's felon status and instead carries a high risk of prejudice because of the tendency to "overpersuade." Here, the only real issue was whether defendant possessed the firearm, and on that question the evidence was closely balanced. The arresting officer testified that during a traffic stop, defendant made a movement toward the center console, acted nervously, and volunteered that he had a loaded firearm in the console. There was a video of the stop, but no audio, and the video did not show any movement toward the center console. The gun was not tested for fingerprints. Defendant testified that he did not reach toward the center console and did not tell the officer he had a gun in the car. The owner of the gun testified that she accidentally left the gun in defendant's car the day before, and she produced a receipt confirming that the gun belonged to her. This was a "classic case of closely balanced evidence." Thus, the error in telling the jury that defendant's prior conviction was for murder was prejudicial. Defendant was denied the effective assistance of counsel, requiring reversal and remand for a new trial.

**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."

## Illinois Appellate Court

**People v. Hampton**, 2021 IL App (5th) 170341 Trial counsel's performance was deficient, but defendant could not show prejudice due to overwhelming evidence. Defendant was convicted of murder after the State alleged he and two accomplices waited outside a nightclub before shooting the victim as he exited the club. Counsel first erred in eliciting evidence of defendant's other crimes. Despite prevailing on a pre-trial motion to bar defendant's criminal history, counsel asked defendant to detail his record on direct-examination. Counsel's decision to elicit testimony about defendant's other charges did not constitute sound trial strategy.

Counsel also erred in failing to object to an officer's testimony describing a surveillance video viewed by the jury. The officer opined that an object removed from the victim's body after the shooting was not a gun. The testimony was inadmissible because the officer had no firsthand knowledge of the events, and was in no better position to understand the contents of the video than a typical juror, such that the testimony invaded the province of the jury.

The defendant could not show prejudice, however, because, despite the defense theory of self-defense, there was no evidence supporting the notion that the victim was armed. The victim was shot immediately after leaving a club that had metal detectors at the entrance, defendant admitted he did not see a firearm, and the shell casings at the scene all came from the same firearm.

**People v. Utley**, 2019 IL App (1st) 152112 After parole officers found guns and drugs in his residence during a parole check, defendant was charged with possession of a controlled substance with intent to deliver, UUW/felon, and armed habitual criminal. He was convicted of all counts and sentenced to natural life in prison pursuant to the habitual offender statute.

Defendant alleged ineffective assistance of counsel because his attorney did not move to sever the charges. The weapons charges allowed the State to admit defendant's prior drug and gun convictions into evidence, while this evidence would not have been admissible in a trial on the drug charge. The Appellate Court majority agreed. Unlike **People v. Fields**, 2017 IL App (1st) 110311-B, where the court rejected a similar argument due to counsel's motion to bar mention of the specific crimes at issue and his strategic use of an "all-or-nothing" approach, here, the attorney did not seek to minimize the harm of the prior convictions in any way.

This failure was prejudicial in a case with several discrepancies and credibility contests. Because the jury heard that defendant had been previously convicted of crimes that involved the same type of conduct as the instant case, the jury may have inferred that the contraband at issue here also belonged to defendant, rejecting the defense's version of events.

Moreover, counsel was ineffective for withdrawing a motion to suppress defendant's inculpatory custodial statement. Defendant testified at trial that his request for counsel was ignored by interrogating officers, and that the officers threatened to arrest his wife and subject his children to DCFS. The statement was not recorded and conflicted with some of the testimony from the officers. Defendant's testimony was partially corroborated by the fact that his wife was in fact brought to the police station. Under these circumstances, there is a reasonable probability that the statement would have been suppressed and the outcome of the trial different.

**People v. Lucious, 2016 IL App (1st) 141127** 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.

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**.

And, 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.

**People v. Tayborn, 2016 IL App (3d) 130594** 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.

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. Dupree, 2014 IL App (1st) 111872** 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.

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. Counsel's strategy was to cast doubt on the witness's credibility by referring to his inconsistent statements, and such a strategy did not require counsel to open the door to admission of the second statement. 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.

Defendant was prejudiced by counsel's errors because the result of the trial was unreliable. The evidence against defendant was far from compelling, as there was no physical evidence linking him to the shooting, 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.

**People v. Johnson, 2013 IL App (2d) 110535** 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 UUV 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 UUV 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.

**People v. Gallagher, 2012 IL App (1st) 101772** At defendants's residential burglary trial, counsel claimed that defendant's actions constituted a trespass, but not residential burglary. 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.

**People v. Watson, 2012 IL App (2d) 091328** 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.

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. 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 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.

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.

Defendant was prejudiced by counsel's deficient performance. DNA evidence is often assumed to have a special aura of certainty and mystic infallibility. 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.

The court 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 were too vague to be considered a judicial confession.

**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.

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.

**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. 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. 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. 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. 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.

"[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. 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. 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."

## **§14-4(b)(7)**

### **Opening & Closing Statements**

#### **United States Supreme Court**

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

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.

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."

### **Illinois Supreme Court**

**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.

### **Illinois Appellate Court**

**People v. Suggs**, 2022 IL App (2d) 200713 Defense counsel was not ineffective for commenting in opening statements that the jury would hear testimony from police officers that defendant denied committing the charged act but then failing to present that testimony. While defense counsel's failure to present promised testimony generally is "highly suspect," here it was the result of unforeseen circumstances.

The officers were on the State's witness list and were present in court on the day of trial. The State did not call either of the officers as witnesses, however, so counsel was not able to cross-examine them and elicit testimony about defendant's denial. This did not obligate defense counsel to call the officers as defense witnesses, though. Counsel could not have called them solely to elicit defendant's own self-serving denial. And, calling the officers could have elicited harmful testimony. Further, the jury was given the typical admonishments that opening statements are not evidence, which is a factors to consider in deciding whether a defendant was prejudiced by a failure to present promised evidence. And, while defendant's denial to the police was consistent with his defense that he had not committed the offense, it was not the primary basis for the defense theory.

Further, the State's comments in rebuttal closing argument, that defendant could have called an eyewitness to the incident – his mother – if he really had not committed the offense and that defendant failed to provide evidence rebutting the complaining witnesses' claim that he sought medical treatment for his injuries, did not constitute improper burden shifting. These comments were invited by defense counsel's closing argument statement that the State had failed to call the eyewitness or to produce corroborating medical evidence. Where defendant argues in closing that the State failed to produce evidence to which the defense had equal access, the State may respond by commenting on the defendant's own failure to produce that evidence. Because the State's arguments were not error, defense counsel did not render deficient performance by failing to object to those arguments.



**People v. Kindle, 2021 IL App (1st) 190484** The record was insufficient to establish that counsel was ineffective for failing to deliver on a promise made during opening statement. Counsel had informed the jury in opening that the evidence would show that defendant left the scene before his three co-defendants began beating the victim. At trial, however, after a witness testified that all four co-defendants were on the scene for the beating, counsel abandoned this theory and instead attacked the credibility of the eyewitness who placed defendant at the scene. The record does not show why counsel abandoned the idea that defendant left the scene before the crime. There may have been a sound strategic reason for the decision. Therefore, defendant should instead raise the claim in a post-conviction petition.

**People v. Randall, 2021 IL App (1st) 191194** The circuit court did not err in dismissing defendant's post-conviction petition at the second stage. The petition alleged counsel's ineffectiveness for promising the jury in opening statements that it would receive a second-degree murder instruction, where the judge ultimately denied the instruction.

The Appellate Court found counsel did not act unreasonably. Counsel's opening explained to the jury that a second-degree murder verdict was warranted because the victim provoked defendant through physical and verbal assault. To develop this defense, counsel obtained a stipulation from the State establishing that defendant weighed 140 pounds, while the victim weighed 190 pounds. Counsel then attempted to elicit details of the assault by calling defendant to the stand. Yet defendant himself undercut the second-degree murder strategy by minimizing the victim's attack. He testified that the victim actually weighed 110 pounds, and that as she lashed out at him he was able to pin her down and laugh at her. This testimony prevented the trial court from granting defense counsel's request for a second-degree murder instruction.

While it may have been unreasonable for counsel to pursue a second-degree murder strategy had he known how defendant would testify, nothing in the petition suggested that he did. In fact, defendant averred in the petition that the victim did place him in fear of serious bodily injury. Moreover, defendant could not show prejudice given the overwhelming evidence at trial, including his testimony that he shot an unarmed woman and gave a false alibi at the time of his arrest.

**People v. Sanders, 2020 IL App (3d) 180215** Defense counsel provided ineffective assistance by making unsupported and prejudicial statements about race during closing argument. The defendant was a black truck driver who testified he got into a fight and accidentally shot a white truck driver over a misunderstanding about the defendant's presence in his cab. Defendant fled the scene and was tried for aggravated battery and possession of a stolen vehicle. In an ostensible attempt to explain why an innocent person might flee, the defense attorney engaged in a long diversion about race relations, fear of other races, and personal opinions about race that had no basis in the evidence at trial. He further referred to his client as a "big scary black guy" and made other comments about defendant's race.

The Appellate Court found this focus on race, including several comments that had no basis in the evidence and others that portrayed his client negatively, was prejudicial error. A special concurrence would have clarified that not all comments about race in closing argument are improper, only those that are not based on evidence and prejudicial.

**People v. Pratt, 2020 IL App (1st) 161085** Defense counsel was not ineffective for failing to give a closing argument at the conclusion of defendant's jury trial. Waiver of closing argument is generally a matter of trial strategy, as waiver denies the prosecution the opportunity to present an "impassioned" rebuttal. Here, the record showed defendant was

afforded excellent representation by counsel, and the waiver of closing argument was a tactical decision. While counsel told jurors during opening statements that they would “hear” from defendant, but defendant did not testify, jurors still heard defendant’s statements made during police interviews, so there was no need to make a closing argument to explain defendant’s failure to testify. Even if counsel’s performance was deficient, defendant was not prejudiced because the evidence against him was overwhelming.

The concurrence, though agreeing with the outcome due to the overwhelming evidence, did not agree that counsel performed reasonably; it expressed “strong disapproval and disbelief” regarding counsel’s decision, and stated that skipping summation would be sound trial strategy in ‘very few cases.

**People v. Gunn, 2020 IL App (4th) 170653** In a murder case where the defense argued self-defense or second-degree murder, defense counsel told the jury multiple times during opening statements that defendant would testify and explain why he stabbed the decedent and why he lied to the police during his interrogation. Defense counsel also told the trial court it did not need to read the **Zehr** principle concerning the defendant’s failure to testify, since defendant would in fact be testifying. During trial, however, counsel advised defendant not to testify, and defendant did not take the stand.

After his conviction for first-degree murder, defendant filed a post-conviction petition alleging ineffective assistance of counsel. The Appellate Court reversed the second-stage dismissal of the petition and remanded for an evidentiary hearing. While in an ordinary appeal this type of claim might be rejected as trial strategy, in post-conviction proceedings this assumption is not applicable because the proceeding allows for a defendant to develop a record as to the basis for counsel’s decision. Here, nothing unforeseeable occurred at trial after counsel promised the testimony, and therefore an explanation from counsel should be elicited at an evidentiary hearing.

**People v. Edmondson, 2018 IL App (1st) 151381** Trial counsel was not ineffective during closing arguments despite arguing only misidentification and reasonable doubt in a case where he requested jury instructions on self-defense and second-degree murder. The content of closing argument is a quintessential matter of trial strategy. Although an attorney’s decision to forego argument on affirmative defenses and lesser or mitigated offenses could theoretically constitute deficient performance, in most cases, including this one, courts must defer to counsel’s strategic decision. Here, the self-defense and second-degree murder arguments would be particularly weak, and counsel’s decision to focus on reasonable doubt was therefore sound strategy.

**People v. Tucker, 2017 IL App (5th) 130576** Defendant made a substantial showing in his second-stage post-conviction petition that trial counsel provided ineffective assistance in several ways.

(1) During opening statements, counsel disclosed to the jury inadmissible details of defendant’s prior convictions.

(2) Counsel failed to lay a proper foundation to impeach a critical State witness.

(3) Counsel unsuccessfully tried to introduce a diagram to show that a State’s witness could not have seen what he claimed to see. But since the diagram was not to scale, it could not accurately show what counsel intended and the trial court properly excluded it.

(4) Counsel made an unprofessional and bizarre closing argument where he, among other things, admitted his incompetence as a trial attorney and promised to retire from conducting trials.

The Appellate Court remanded the case for a third-stage evidentiary hearing.

**People v. Lewis, 2015 IL App (1st) 130171** 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** 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.

**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.

**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. 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. 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. 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.

#### **§14-4(b)(8)**

#### **State Interference/Extrinsic Factors**

#### **United States Supreme Court**

**Weatherford v. Bursey**, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) 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).

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.

**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.

**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).

**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.

### **Illinois Supreme Court**

**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).

### **§14-4(b)(9)**

#### **Post-trial Motion & Sentencing**

### **Other Federal Courts**

**Griffin v. Pierce**, 622 F.3d 831 (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.

### Illinois Supreme Court

**People v. Burnett**, 237 Ill.2d 381, 930 N.E.2d 953 (2010) 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.

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.

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.

**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. 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.

### **Illinois Appellate Court**

[People v. Maury, 2025 IL App \(4th\) 220887](#) The appellate court held that where a defendant is appointed new counsel to represent him in post-trial proceedings pursuant to [People v. Krankel, 102 Ill. 2d 181 \(1984\)](#), new counsel is not required to present all non-frivolous claims in order to provide objectively reasonable performance, disagreeing with [People v. Downs, 2017 IL App \(2d\) 121156-C](#).

Rather, **Krankel** counsel's performance is judged under the traditional standard for assessing claims of ineffective assistance of counsel, including the strong presumptions that counsel's conduct was within the wide range of that which is reasonably professional and that the challenged action or inaction may have been the product of sound trial strategy. Under the traditional ineffective-assistance analysis, counsel's decision not to present all of a defendant's non-frivolous claims will only be deemed ineffective where counsel's performance was deficient and defendant was prejudiced by that performance. Here, even assuming counsel performed deficiently, defendant could not meet the prejudice standard, and thus his claim of ineffective assistance of post-trial counsel was rejected.

[People v. Cuevas, 2018 IL App \(2d\) 151100](#) Defendant made a substantial showing of plea counsel's ineffectiveness for not filing a motion to reconsider sentence following an open guilty plea, and for not investigating mitigation witnesses. Under [Roe v. Ortega-Flores, 528 U.S. 470 \(2000\)](#), an attorney's ineffectiveness is established when defendant specifically

instructs the attorney to perfect his post-plea appeal and counsel fails to do so. However, to establish a substantial showing of such a claim at the second stage, the defendant must corroborate his bare allegation that he asked counsel to move to reconsider and appeal, by explaining the basis for the motion and showing a reasonable probability of its success.

Defendant here met that burden by including affidavits from mitigation witnesses who would rebut the aggravation presented by the State at his sentencing hearing. And given defendant's allegation that counsel knew of but did not contact these witnesses, the petition also made a substantial showing of ineffectiveness based on the failure to investigate the witnesses.

**People v. Billups**, 2016 IL App (1st) 134006 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."

Counsel provided ineffective assistance by failing to object to the trial court's consideration of the two improper convictions. **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.

**People v. Tapia**, 2014 IL App (2d) 111314 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.

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.

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.

**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.

**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.

## **§14-4(b)(10)**

### **On Appeal**

### **United States Supreme Court**

**Roe v. Flores-Ortega**, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) 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.

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.

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).

**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).

**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).

### **Illinois Supreme Court**

**People v. English**, 2013 IL 112890 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.

**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**, 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) 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."

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. 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).

### **Illinois Appellate Court**

**People v. Mischke**, 2024 IL App (2d) 240031 The trial court did not err in dismissing defendant's post-conviction petition at the second stage. In his petition, defendant argued that he was not proved guilty beyond a reasonable doubt of felony murder. A claim of insufficient evidence does not allege a constitutional violation and thus is not cognizable in a post-conviction petition. And, regardless, defendant's sufficiency claim would fail on the merits. Defendant asserted that the State failed to establish that he was still in flight from a burglary at the time he caused the fatal accident that formed the basis of the felony murder charge. But, defendant had admitted at a post-trial hearing that he was indeed fleeing at the time of the crash. That voluntary admission of guilt would preclude relief on the merits, and the claim was properly dismissed.

Defendant also raised a claim of ineffective assistance of appellate counsel for arguing on direct appeal that the trial court had erroneously sentenced defendant to concurrent terms of imprisonment of 26 years for felony murder and 7 years for DUI when they were mandatorily consecutive, resulting in a remand for resentencing where the trial court imposed the same terms but ordered them to run consecutively. Attached to defendant's petition was his own affidavit wherein he admitted counsel discussed the issue with him and advised him to consider abandoning the appeal. Defendant went on to state that he had asked counsel whether the issue could be raised by the State at some future point in time, and upon counsel's confirming that it could, defendant authorized counsel to raise the issue on appeal. Also, during oral argument on direct appeal, defendant's counsel acknowledged that the appeal could result in a longer sentence and, without disclosing the specific nature of his conversations with defendant, explained that OSAD's policy is to communicate with clients about their appeals and confirmed that he complied with office policy in every case. On this record, the appellate court concluded that defendant chose to raise the sentencing issue on appeal against the advice of counsel and thus could not now claim ineffective assistance. The dissenting justice would have remanded for an evidentiary hearing on this issue, where both defendant and appellate counsel could testify to the specific content and circumstances of their communications.

**People v. Sanabria**, 2021 IL App (1st) 190827 Defendant stated the gist of a claim of ineffective assistance of counsel for failing to pursue his direct appeal even though defendant had absented himself during trial and for several years thereafter. Trial counsel had filed a timely notice of appeal and had represented himself as "counsel of record" at that time. But, counsel never filed the record on appeal or a brief, resulting in the appeal being dismissed for want of prosecution.

The Appellate Court rejected the State's argument that defendant's direct appeal would have been dismissed under the "fugitive dismissal rule," and thus there was no prejudice. The "fugitive dismissal rule" is discretionary; it allows the court to refuse to hear an appeal brought by a fugitive defendant but does not require it. The State's assertion that defendant's appeal would have been dismissed under that rule was without support,

especially given that the court's dismissal order referred only to the failure to prosecute the appeal and not the fact that defendant's whereabouts were unknown at the time.

Further, summary dismissal of defendant's *pro se* post-conviction petition was not warranted based on defendant's failure to attach documents or affidavits. Defendant's petition alleged ineffective assistance of counsel for failing to pursue his appeal, which resulted in its dismissal. The record showed that counsel filed a notice of appeal and that the appeal was ultimately dismissed for want of prosecution. Thus, the record supported defendant's petition, even in the absence of an affidavit, such that dismissal based on lack of supporting documentation was inappropriate.

**People v. Parada, 2020 IL App (1st) 161987** Defendant could not make a substantial showing of appellate counsel's ineffectiveness where, after defendant fled during trial and was sentenced *in absentia*, counsel filed a notice of appeal but took no further steps to litigate the appeal, and the appeal was dismissed.

Defendant was convicted and sentenced *in absentia* because he fled to California before the end of his trial. His attorney filed a notice of appeal, but after eight months, noting that defendant was a fugitive and that no docketing statement, record, or brief had been filed, the Appellate Court dismissed his appeal. Years later, in a post-conviction petition, defendant alleged ineffective assistance of counsel for failure to complete his appeal. The circuit court dismissed at the second stage and the Appellate Court affirmed. Under the "presumption of prejudice plus" test, counsel is ineffective if the failure to perfect an appeal actually causes the loss of appellate rights. Here, due to the century-old "fugitive dismissal rule," defendant's appeal would have been dismissed whether counsel pursued it or not. Defendant tried to reinstate his appeal upon his return, but it was in the Appellate Court's and Supreme Court's discretion to deny reinstatement, and that denial had nothing to do with counsel's performance.

**People v. Guerrero, 2018 IL App (2d) 160920** Defendant's post-conviction petition made a substantial showing of appellate counsel's ineffectiveness. To prove predatory criminal sexual assault alleging digital penetration of the vagina, the State must establish intrusion beyond a reasonable doubt. Here, the complainant's testimony on whether defendant's finger intruded her vagina was ambiguous, and in response to a direct question she denied any intrusion, so appellate counsel was ineffective for not challenging the sufficiency of the evidence on direct appeal.

The remedy for a petition that has made a substantial showing of appellate counsel's ineffectiveness for failure to raise a reasonable doubt issue is to grant the same relief that would have been granted on direct appeal. Here, had this issue been raised on direct appeal, the Appellate Court would have reduced the conviction to the lesser-included offense of aggravated criminal sexual abuse, using its authority under Rule 615(b)(3). Although the dissent would require the State to request a reduction, which it had not done here (instead arguing that the only proper relief would be an evidentiary hearing), the majority believed that judicial economy justified the *sua sponte* reduction to obtain the correct legal result. But as the dissent noted, the "correct legal result" would have been an acquittal, because the State did not provide lesser-included offense instructions.

**People v. Mares, 2018 IL App (2d) 150565** On direct appeal from defendant's conviction of armed violence, appellate counsel filed a successful motion for summary order challenging excessive court costs. In that motion, counsel represented that he had "found no other issues

to raise on appeal.” In a subsequently filed post-conviction petition, defendant challenged counsel’s representation on direct appeal, arguing that the summary motion was improper and that appellate counsel should have filed an **Anders** motion if there were no meritorious issues.

The “judgment” on appeal in a direct appeal is not limited to the conviction and sentence, but also includes things such as court costs. Where the only issue of merit in a direct appeal pertains to court costs, the Appellate Court majority held that a motion for summary relief is an appropriate mechanism for disposing of the appeal. Such an appeal is not “wholly frivolous,” so an **Anders** motion is not required.

The dissent suggested that a judgment should be separated into primary (“liberty interests,” specifically conviction and sentence) and collateral (costs and fees) components when evaluating whether defendant’s rights to direct appeal and appellate advocacy have been satisfied. Where appellate counsel identifies a only a costs issue, counsel should file a summary motion concerning costs and also move to withdraw pursuant to **Anders**. The dissent would conclude that a defendant is denied the constitutional right to a direct appeal where appellate counsel challenges only the collateral judgment and does not also file an **Anders** motion with regard to the primary judgment.

**People v. Stockton, 2018 IL App (2d) 160353** Claims not included in a post-conviction petition are forfeited under the Post-Conviction Hearing Act. A reference to the Sixth Amendment in defendant’s *pro se* post-conviction petition was inadequate to present a claim of ineffective assistance of appellate counsel. The petition failed to allege any error by appellate counsel, and the right to effective assistance of appellate counsel falls under the 14th Amendment, not the Sixth. The Court rejected defendant’s argument on appeal that her petition stated the gist of a claim of ineffective assistance of appellate counsel.

**People v. Upshaw, 2017 IL App (1st) 151405** Defendant made a substantial allegation that appellate counsel was ineffective for failing to argue on direct appeal that an **Apprendi** violation occurred. Defendant was sentenced to an extended term of 50 years based on the trial court’s finding that the offense was accompanied by exceptionally brutal behavior indicative of wanton cruelty. **Apprendi** requires that the finding of exceptionally brutal and heinous behavior be made by the jury rather than by the trial court.

Although trial counsel’s failure to object at trial meant that a plain error analysis was required on appeal, the Appellate Court concluded that even under the plain error standard the issue would have succeeded. First, the evidence to support the extended term sentence was at best closely balanced. Second, appellate counsel was clearly aware of the **Apprendi** rule, because another **Apprendi** issue was raised. Under these circumstances, defendant made a sufficient allegation of ineffectiveness to withstand second stage dismissal.

The trial court’s dismissal order was reversed and the cause remanded for third stage proceedings.

**People v. Ramirez, 2017 IL App (1st) 130022-B** On direct appeal, defendant alleged that the sentencing court considered improper factors. The claim was not included in the post-trial motion, and while appellate counsel raised plain error, she did so in a three-sentence argument which did not specify which prong applied. The Appellate Court found both the plain error argument, and the underlying sentencing issue, forfeited. On rehearing, a different appellate attorney asked the court to find the original appellate attorney ineffective and to consider the sentencing issue on its merits. The Appellate Court refused, finding the ineffectiveness claim forfeited.

The Illinois Supreme Court remanded in a supervisory order issued in light of [People v. Veach, 2017 IL 120649](#). The Appellate Court found **Veach** inapplicable, but nevertheless decided to reach the issue of appellate counsel's ineffectiveness, citing **Veach's** admonishment to consider ineffectiveness claims when the record permits, and the principle that waiver is a limitation on the parties, not the courts.

Although the Appellate Court found appellate counsel's failure to include a complete plain error argument constituted deficient performance, it did not find prejudice. The sentencing court did not consider improper factors. First, its "passing reference" to defendant's use of a gun, without more, did not arise to improper consideration of facts inherent in the offense. Second, despite defendant's denial that he was a gang member, the sentencing court properly cited defendant's gang involvement in aggravation, where he fired a gun from a crowd of people flashing gang signs.

[People v. Meeks, 2016 IL App \(2d\) 140509](#) Where a claim of ineffective assistance of counsel is based on the failure to raise a particular issue on appeal, **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.

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.

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.

[People v. Reed, 2014 IL App \(1st\) 122610](#) 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.

**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.

**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.

**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.

**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. 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."

#### **§14-4(b)(11)**

#### **Other**

### **United States Supreme Court**

**Smith v. Robbins**, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) 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.

### **Illinois Supreme Court**

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

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.

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.

**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. 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. 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. 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).

### **Illinois Appellate Court**

**People v. Davis**, 2022 IL App (1st) 200467 The Appellate Court reversed the second-stage dismissal of defendant's post-conviction petition. Defendant was tried *in absentia* and convicted. Subsequently, he was sentenced *in absentia*, as well. When he was arrested several months later, he filed a *pro se* motion for new trial and sentencing hearing, as well as a notice of appeal. The court appointed counsel on the motion, and counsel ultimately withdrew it. Defendant then filed another *pro se* notice of appeal. Defendant's appeal was later dismissed due to lack of jurisdiction.

Defendant then filed the post-conviction petition that was the subject of the instant appeal. In his *pro se* petition, defendant alleged, among other things, that trial counsel failed to preserve his right to direct appeal. The Appellate Court agreed that defendant had made a substantial showing of a meritorious claim on this basis.

The record showed that trial counsel had not filed a notice of appeal after defendant was tried and sentenced *in absentia*. And, in his petition, defendant alleged that he told trial counsel he wanted to appeal, an allegation which had to be accepted as true given that the petition was at the second stage of proceedings. While the Appellate Court might have dismissed such an appeal while defendant remained absent, such a dismissal would have been without prejudice and subject to reinstatement upon defendant's request. Instead, the failure to file a notice of appeal resulted in the complete denial of defendant's right to a direct appeal.

The Appellate Court remanded the matter for further post-conviction proceedings in which defendant must show that he either specifically instructed trial counsel to file a notice of appeal, that he demonstrated that he desired to appeal, or that a rational defendant would have wanted to file an appeal because there were nonfrivolous grounds for an appeal.

**People v. Corbett, 2022 IL App (2d) 200025** Defendant was charged with misdemeanor offenses in three separate cases. Over the course of several years, defendant vacillated between being unfit and being found to have been restored to fitness. In 2019, defendant was again found unfit. At that fitness hearing, the psychologist assigned to evaluate defendant testified to the bases for her conclusion that defendant was unfit, noting that he suffered from a delusional disorder and had "fixed false beliefs," including a belief that others were conspiring against him. She also testified that she believed defendant would be able to be restored to fitness within a year and that he would need inpatient treatment. The court agreed that defendant was unfit, found that there was a substantial probability that he would attain fitness within one year, and ordered inpatient treatment.

On appeal, defendant argued that the evidence did not support the determination that there was a substantial probability that defendant would attain fitness within a year if treated. Defendant argued that the court erred in adopting the psychologist's conclusory statement that defendant could be restored to fitness within a year and that defense counsel rendered ineffective assistance by failing to argue that restoration was unlikely and failing to move for a discharge hearing.

The Appellate Court concluded that defense counsel rendered ineffective assistance. Counsel did not exercise any strategy where she failed to take the basic steps necessary to ensure that the trial court properly considered the substantial probability issue rather than simply accepting the psychologist's conclusory opinion. Counsel did not ask the psychologist to elaborate as to the basis for her opinion and did not appear to have given any consideration to the substantial probability issue where counsel simply "defer[red] to the Court in terms of whether he could be restored within a year."

Had counsel's performance not been deficient, there was a reasonable probability that the results of the proceedings would have been different. The psychologist had not been able to conduct a formal evaluation of defendant due to his repeated refusal to cooperate. The Appellate Court noted that a defendant's perpetual refusal to cooperate may be relevant to the likelihood of attaining fitness within a year, especially given defendant's history of vacillating between being fit and being unfit.

The Appellate Court reversed the trial court's finding that it was substantially probable that defendant would attain fitness within one year and remanded for further proceedings.

**People v. Townsend, 2020 IL App (1st) 171024** Trial court erred in summarily dismissing defendant's petition which stated the gist of a claim of ineffective assistance of counsel for overriding defendant's desire to proceed to a bench trial rather than a jury trial. The trial record contained no objection by defendant to his counsel's statement that defendant would proceed to a jury trial. In an affidavit attached to his post-conviction petition, defendant alleged that he told trial counsel he wanted a bench trial, but counsel refused that request. The trial court concluded that the defendant's claim was meritless because the evidence was overwhelming and he would have been convicted at a bench trial, as well.

The Appellate Court held that defendant is not required to show the probability of a different trial outcome to establish prejudice under **Strickland**. The right to waive a jury trial belongs exclusively to defendant, and prejudice is presumed "if there is a reasonable probability that the defendant would have waived a jury trial." Defendant's failure to object to counsel's statement regarding a jury trial did not affirmatively rebut his claim, consistent with **People v. Barkes, 399 Ill. App. 3d 980 (2010)**.

And, while defendant alleged in his petition that he told his public defender about his desire for a bench trial, but did not assert that he renewed that request with subsequently-retained private counsel, that deficiency was not fatal. A defendant need only presented a limited amount of detail to support his claim. The petition still set forth an arguable claim of ineffective assistance.

Finally, the Appellate Court declined defendant's request for a different judge on remand. While the court erred in basing its ruling on whether a bench trial would have resulted in a different outcome, that was simply a misapplication of the law and did not indicate that the judge was biased against defendant.

**People v. Othman, 2020 IL App (1st) 150823-B** The trial court erred in admitting other crimes evidence. In a murder trial, the State's witnesses alleged that defendant shot his uncle in 2008, and that in 2010 he gave a gun to his girlfriend. A jailhouse informant testified that defendant told him about the 2008 shooting and the 2010 decision to give a gun to his girlfriend. At trial, the State argued that the informant's knowledge of the gun possession in 2010 lent credence to his testimony that defendant confessed to him. The Appellate Court found reversible error, holding that other crimes evidence can't be used to bolster the credibility of State witnesses. Moreover, the trial court erred when it instructed the jury that the other crime could be considered as evidence of intent, despite the fact that the State used it only to bolster its informant's credibility, causing confusion and prejudice to the defense.

Defendant also received ineffective assistance of counsel because his trial attorney failed to object to hearsay. A State witness testified that she knew defendant killed the decedent because she heard it from "friends in the neighborhood." Counsel's failure to object to these anonymous out-of-court accusations rendered his performance deficient. The decision was not strategic, and prejudicial.

**People v. Mooney, 2019 IL App (3d) 150607** Defense counsel rendered deficient performance by twice agreeing to toll the speedy trial term where neither continuance was factually attributable to defendant and counsel had announced ready for trial. On the first date, there were scheduling issues with a State witness, and on the second, the continuance was necessitated by the State's late disclosure of a video of defendant's arrest. Defendant was prejudiced because he was brought to trial outside of the speedy-trial period as a result of counsel's agreement to those continuances. The Court acknowledged that a prejudice determination is somewhat speculative under these facts because it is impossible to know



whether a speedy-trial motion to dismiss would have been granted or whether defendant would have been brought to trial within the term in the absence of counsel's agreement. To find no prejudice, however, would render counsel's actions essentially unreviewable.

**People v. Lee**, 2018 IL App (3d) 160100 Counsel was not ineffective for failing to argue that the police improperly seized contraband discovered during a search warrant. The officer testified that the plastic bag found in the defendant's bed sheets contained an unknown substance similar to oatmeal, and did not resemble drugs. But it was packaged like drugs and ultimately tested positive for cocaine. Under these circumstances, the appearance of the bag satisfied the "immediately apparent" standard for seizure of items in plain view – it created a reasonable probability that defendant possessed contraband in the view of an objectively reasonable officer. Two members of the court outright rejected the holding of **People v. Humphrey**, 361 Ill. App. 3d 947 (2005), which found an improper seizure where an officer did not know what types of pills were in a tupperware container in defendant's car; a third concurring justice found **Humphrey** good law but distinguishable.

**People v. Brickhouse**, 2018 IL App (3d) 150807 The police arrested defendant and placed him in an interrogation room. While the detective asked defendant to sign a consent form for videotaping the interrogation, defendant stated, "I can't ask for a lawyer?" The detective responded that they would get to that, but that he first needed his consent to record the interrogation. Defendant signed the consent and the detective immediately **Mirandized** defendant. Defendant signed a **Miranda** waiver and gave an exculpatory statement, followed later by two inculpatory **Mirandized** statements.

The circuit court denied defendant's post-conviction claim of ineffective assistance of counsel after an evidentiary hearing. The Appellate Court affirmed. It held that the defendant's statement was ambiguous and not a clear request for counsel, particularly where it was made prior to **Miranda** warnings. Moreover, it found that the detective did not deny counsel, but rather, within 30 seconds, read defendant his **Miranda** rights. The court further found the statement voluntary. The court also held that counsel's decision was strategic where the initial statement was exculpatory and counsel saw no basis for suppressing the latter statements.

**People v. Nesbit**, 2016 IL App (3d) 140591 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.

**People v. Bowens, 2013 IL App (4th) 120860** 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.

**People v. Gilbert, 2013 IL App (1st) 103055** 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.

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.

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.

**People v. Holt, 2013 IL App (2d) 120476** 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.

**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.

**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.

**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.

## §14-5

### Reasonable Assistance and Other Standards

#### Illinois Supreme Court

**People v. Stoecker**, 2020 IL 124807 Defendant's due process rights were violated by the trial court's granting of the State's motion to dismiss defendant's 2-1401 petition at an *ex parte* hearing just four days after the motion to dismiss was filed. Neither defendant nor his attorney had notice of the hearing.

However, the Court concluded that the due process violation was subject to harmless error review because the lack of notice and reasonable opportunity to respond do not fit within the narrow class of structural errors that are so serious they warrant automatic reversal. And the violation here was harmless where the petition was barred by the statute of limitations, *res judicata*, and forfeiture.

Appointed counsel in 2-1401 proceedings is held to a due diligence standard because the appointment of counsel is wholly discretionary. Due diligence means that "counsel has an obligation, to the best of his or her legal ability, to make a cogent argument in support" of the petition and "to overcome any procedural hurdles where it can legally and ethically be done." Here, since defendant's petition did not include an arguably meritorious claim, counsel's failure to amend it was not a violation of the due diligence standard.

**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.

#### Illinois Appellate Court

**People v. Walker**, 2018 IL App (3d) 150527 Although section 2-1401 does not provide for the appointment of counsel, a court has discretion to appoint counsel in such proceedings. The level of assistance required of appointed counsel in a 2-1401 petition is an open question. Here, the Appellate Court considered reasonable assistance (as in the post-conviction petition context) and due diligence as potential standards. While the Appellate Court was inclined "to find that a section 2-1401 petitioner who is appointed counsel is entitled to reasonable assistance," it ultimately did not resolve the question because counsel's performance was inadequate under either standard.

**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.

## **§14-6**

### **Conflict of Interest**

#### **§14-6(a)**

##### **Generally**

### **United States Supreme Court**

**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.

**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.

### **Illinois Supreme Court**

**People v. Cole (Campanelli)**, 2017 IL 120997 A criminal defendant has a Sixth Amendment right to the effective assistance of counsel, which includes assistance by an attorney whose allegiance is not diluted by conflicting interests. Requiring or permitting a single attorney to represent co-defendants does not *per se* violate the Sixth Amendment. However, because a possible conflict of interest is inherent in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that a potential conflict imperils his right to a fair trial.

**Rule 1.10 of the Illinois Rules of Professional Conduct** of 2010, which prohibits lawyers associated in a “firm” from knowingly representing a client when any member of the firm practicing alone would be prohibited from doing so by a conflict of interest, does not prohibit representation of co-defendants by separate assistant public defenders. First, the plain language of the definition of the term “firm” excludes public defender offices (Illinois Rule of Professional Conduct of (2010) Rule 1.10 cmt. 1). Second, it must be assumed that when the Supreme Court adopted Rule 1.10(a), it was aware of and did not intend to invalidate existing Illinois precedent that a public defender’s office is not a “firm” for purposes of conflict of interest law. Third, the court reiterated its precedent holding that the adversarial tendencies of lawyers within the public defender’s office provide sufficient protection against the risk of



a conflict of interest occurring between assistant public defenders representing co-defendants.

The court rejected the argument that the Public Defender of Cook County is the attorney for every case to which the office is appointed, so that a conflict of interest necessarily occurs even where different assistant public defenders represent co-defendants. The court stressed that the Public Defender herself does not provide representation for every defendant. Instead, the assistant public defender assigned to a particular case represents the individual client. The fact that the Public Defender has supervisory authority over every assistant public defender does not, in and of itself, disqualify the entire office from representing co-defendants.

In specific circumstances an actual conflict of interest may exist where separate assistant public defenders represent co-defendants. Where counsel brings the possibility of such a conflict to the court's attention before trial, only the gist of a conflict need be presented to require the appointment of new counsel.

This does not mean that the trial court may not inquire as to the basis of the representations regarding a conflict of interest, however, so long as the attorney is not improperly required to disclose confidential communications of the client. One of the trial court's responsibilities is to take adequate steps to deal with the possibility of conflicts, including ascertaining whether the risk of conflict is too remote to warrant separate counsel.

**People v. Peterson, 2017 IL 120331** Defendant was convicted in a jury trial of the first degree murder of his third ex-wife, and was sentenced to 38 years imprisonment. At the time of his third ex-wife's death, defendant was married to his fourth wife. At the time of the trial, defendant's fourth wife was deceased.

Under **People v. Gacy, 125 Ill. 2d 117, 530 N.E.2d 1340 (1988)**, a *per se* conflict may arise if defense counsel enters into a book deal about the case during the course of the representation. There was no *per se* conflict of interest here, however, where defense counsel and defendant entered into a contract with a media company which was to provide publicity and appearances for defendant and defense counsel. A total of \$15,900 was paid into defense counsel's trust fund as a result of the contract. The money was used to pay counsel's fees and the costs of the defense. The contract ended some five months before trial.

The court distinguished **Gacy** on the ground that counsel's participation in the contract did not afford him a financial stake in the case that was directly adverse to defendant's interests. The court also noted that the record was unclear as to the precise terms of the contract, and that the proper forum to determine whether defense counsel violated any ethical rules was the Attorney Registration and Disciplinary Commission.

**People v. Rivera, 2013 IL 112467** 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. Fields, 2012 IL 112438** *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.

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.

Supreme Court 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.

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."

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.

**People v. Taylor, 237 Ill.2d 356, 930 N.E.2d 959 (2010)** 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 decision-making due to the conflict.

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 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.

**People v. Hernandez**, 231 Ill.2d 134, 896 N.E.2d 297 (2008) 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.

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.

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.

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) 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.

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. Ortega**, 209 Ill.2d 354, 808 N.E.2d 496 (2004) 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.

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. Moore**, 189 Ill.2d 521, 727 N.E.2d 348 (2000) 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.

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.

### **Illinois Appellate Court**

**People v. Zirko**, 2021 IL App (1st) 162956 A defendant has the right to reasonable assistance of post-conviction counsel. Reasonable assistance includes the right to conflict-free representation. Whether an attorney labored under a conflict of interest while representing a defendant is a question of law subject to *de novo* review.

Here, defendant was represented by the same attorney at trial and during post-conviction proceedings in the trial court. That attorney also represented defendant on appeal, until the Appellate Court *sua sponte* raised a concern about whether he had a conflict of interest. In response to the Appellate Court's request for supplemental briefing on the conflict question, defendant requested and was granted new counsel on appeal.

New appellate counsel argued that post-conviction counsel labored under a conflict of interest and provided unreasonable assistance. The Appellate Court rejected defendant's request to create an additional category of *per se* conflicts of interest for situations where the same attorney represents defendant at trial and in post-conviction proceedings and alleges his own ineffectiveness at trial. The court agreed, however, that counsel here labored under an actual conflict of interest. The record demonstrated that counsel failed to support at least one post-conviction claim of ineffective assistance with necessary and available photographic evidence. The court could "conceive of no strategic reason" to raise such an issue and not support it with available evidence. Accordingly, the Appellate Court reversed the second-stage dismissal of defendant's petition and remanded for new second-stage proceedings with new counsel.

**People v. Boswell, 2020 IL App (4th) 180165** Defendant's post-conviction petition alleged a conflict of interest and included an affidavit from an investigator with the McLean County Public Defender's office, claiming that Kim Campbell, the McLean County Public Defender, stated that she helped the prosecution write its closing argument in defendant's case. These allegations, taken as true at the second stage, made a substantial showing of a *per se* conflict of interest. Although Campbell did not represent defendant, and the conflict of one public defender is not necessarily imputed to other public defenders, Campbell's role was more unusual and egregious than the typical conflicts seen in public defender's offices. Campbell did not just have a relationship with the prosecution, she actively assisted the prosecution while simultaneously employing and supervising defendant's attorneys.

Further, the investigator's allegation that she told defendant's attorney about Campbell's statements, and that defense counsel did not inform the judge, made a substantial showing of an actual conflict of interest as well.

**People v. Shepherd, 2018 IL App (3d) 160724** Defendant was not entitled to suppression of evidence based on purported ethical violations by an attorney. The defendant attempted to hire the attorney for pending sex crime charges, but, before he paid the attorney, he solicited murder from another jail inmate who happened to be the attorney's current client. That inmate informed his attorney and the authorities, and the attorney immediately told defendant's father, who was supposed to pay the retainer, that he would not represent defendant. Meanwhile the client obtained defendant's incriminating solicitations on a wiretap. The trial court suppressed these recordings based on a conflict of interest arising from the attorney's representation of the inmate.

The Appellate Court found no conflict, as defendant and the attorney never formulated a client-attorney relationship; that relationship was contingent on payment of the retainer, which had yet to occur. Regardless, nothing the attorney did would trigger the exclusionary rule, which results from wrongdoing by the State, not defense attorneys. While a violation of privilege could result in the suppression of evidence, here, the defendant never alleged that anything he said was privileged.

**People v. Gacho, 2012 IL App (1st) 091675** 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.

**People v. Stanford**, 2011 IL App (2d) 090420 (2d Dist. 2011) 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.

**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.

**People v. Daly**, 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.

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.

**People v. Woidtke**, 313 Ill.App.3d 399, 729 N.E.2d 506 (5th Dist. 2000) 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.

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).

## **§14-6(b)**

### **Conflict Between Current Clients**

## **§14-6(b)(1)**

### **Generally**

### **Illinois Supreme Court**

**People v. Hernandez**, 231 Ill.2d 134, 896 N.E.2d 297 (2008) 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.

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. Graham**, 206 Ill.2d 465, 795 N.E.2d 231 (2003) 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."

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. 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. 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. 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**, 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. 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. 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. 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. 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.

### Illinois Appellate Court

**People v. Parks**, 2025 IL App (4th) 230597 Defendant received ineffective assistance of counsel during a police interrogation, because his attorney: (1) had a *per se* conflict, and (2) acted unreasonably when he urged his client to speak to police. The trial court erred when it refused to suppress the resulting statement. The appellate court reversed defendant's convictions and remanded for a new trial.

Defendant approached attorney Granger on January 16, 2019 because Jaime Stephens had been shot in defendant's car and the police were investigating him for murder. Granger agreed to represent him. A few days later, Granger accompanied a client, Davis-Puckett, to the police station on an unrelated warrant. The police asked to speak with Davis-Puckett about a murder investigation. The police asked how Davis-Puckett ended up with defendant's car. Davis-Puckett explained that defendant offered to sell him the car and left it at his house. Granger terminated the discussion, believing there may be a connection between Davis-Puckett's case and Granger's case.

Nevertheless, the next day, Granger agreed to facilitate a discussion between the police and defendant so defendant could "clear himself." Granger told defendant if he provided "good" information he may receive a cooperation agreement (something the interrogating officer later disputed.) At the station, police informed defendant he was being charged with Stephens' murder. At Granger's urging, defendant made a statement. Defendant admitted to driving a car with his friend Whittie, that they picked up Stephens, whom they suspected of stealing a friend's jewelry, and that he heard gunfire. He believed Stephens had the gun and tried to shoot either him or Whittie. Whittie fought for the gun and was shot twice, and Stephens ended up dead.

Before trial, the State moved to disqualify Granger from representing defendant, citing a conflict with Granger's representation of Davis-Puckett, one of its witnesses. The court granted the motion. Defendant's new attorney filed a motion to suppress defendant's custodial statement, arguing the lack of a knowing waiver of his right to remain silent stemming from Granger's conflict of interest. The court denied the motion, and defendant was eventually convicted of murder.

The appellate court first clarified that defendant had a State constitutional due process right to the assistance of conflict-free counsel during a custodial interrogation, even if that right has not been recognized under the fifth or sixth amendments. Given that Granger had concurrent attorney-client relationships with both defendant and Davis-Puckett, a prosecution witness, he had one of the three enumerated *per se* conflicts recognized under Illinois law. Because Granger represented defendant during the custodial interrogation, the resulting statement from that interrogation must be considered involuntary.

The court also held that Granger's decision to urge defendant to make incriminating statements, after being informed that he faced murder charges, was ineffectiveness under the **Strickland** standard. Specifically, Granger actively elicited highly incriminating information in violation of the attorney-client privilege and with no agreement with the State secured in advance; he effectively became an interrogator of his own client by telling defendant at the beginning of the interview to "get into it" and tell the detectives "exactly what you told me what happened;" he admonished defendant he needed to share "all of it" and "everything you know right now" in order to "help yourself;" he also told defendant in the



presence of detectives that he “technically” committed a “criminal offense,” and he confronted defendant in the presence of detectives about his apparently inaccurate accounts of where he drove after the murder and what happened to the murder weapon. Defendant’s statement was for all intents and purposes a confession to at least some involvement in the offense. Given that a confession is the most powerful evidence the State can offer, the deficient performance was prejudicial and warranted a new trial. Moreover, trial counsel was ineffective for not including this basis for suppression in his motion to suppress.

**People v. Hill, 2023 IL App (1st) 150396** A *per se* conflict of interest existed where, prior to defendant’s trial on a charge of first degree murder, defendant’s trial counsel simultaneously represented an eyewitness to the murder on an unrelated criminal charge. That eyewitness initially had identified defendant as the offender and then later recanted that identification. The contemporaneous representation, which lasted for approximately one year, occurred after the recantation and terminated prior to defendant’s trial.

The court held that defendant knowingly and intelligently waived the conflict. He was specifically admonished of the conflict by the trial court at a pretrial hearing, he confirmed his knowledge of the conflict, and he agreed that he was waiving the conflict. Additionally, the State had filed a motion to disqualify counsel because of the conflict, and that motion set out in detail the associated risks to defendant of proceeding with conflicted counsel. While there is no precise formula for ensuring that a waiver is knowing and intelligent, the circumstances here were sufficient to show an adequate waiver, and the trial court did not abuse its discretion in accepting defendant’s waiver.

**People v. Buckhanan, 2017 IL App (1st) 131097** As part of the right to the assistance of counsel there is a presumption in favor of counsel of choice and the State may overcome this presumption only if it proves that there is either an actual conflict or serious potential for conflict. If such a conflict or potential conflict exists, the court must determine if the interests threatened by the conflict are weighty enough to overcome the right to counsel of choice.

In weighing these interests, courts must consider the following factors: (1) the likelihood that a conflict will actually occur; (2) the defendant’s interest in having the undivided loyalty of counsel; (3) the State’s right to a fair trial in which defense counsel does not use confidential information to attack a State’s witness; (4) the appearance of impropriety if the jury learns of the conflict; and (5) the probability that continued representation will provide grounds for reversal on appeal. In weighing these interests, courts should always consider alternatives to disqualification.

Defendant hired private counsel to represent him in a first degree murder case. Counsel’s father, also a lawyer, represented a potential witness for the State. For purposes of this appeal, the Appellate Court treated the father/son lawyers as though they were partners. Shortly before the start of trial, the State moved to disqualify the son as counsel for defendant. The State’s witness gave a statement to police that indicated defendant knew the police were looking for him shortly after the offense occurred. The father was present for this statement and, even though there were several other people present including a detective and a prosecutor, the State argued that it might need to call the father to impeach the witness if she changed her story at trial.

The State also argued that counsel might obtain confidential information about the witness from his father that would give the defense an unfair advantage, and that if the jury learned that counsel’s father represented a State witness it would create an appearance of impropriety. At a hearing on the State’s motion, the father denied disclosing any confidential

information to defendant's counsel. And defendant formally waived any conflict of interest. The trial court granted the State's motion to disqualify defense counsel.

The Appellate Court held that defendant was improperly denied his right to counsel of choice. There was no serious potential for conflict here, certainly not enough to overcome the constitutional presumption in favor of defendant's right to counsel of choice. The State's concern about the exchange of confidential information was "soundly refuted" by the record where the father testified that he never made any confidential disclosures.

The State's other concern about the need to potentially impeach the witness was groundless since there was never any inconsistency in her testimony that needed impeachment. Additionally, even if some inconsistency did arise and the State needed to call the father to testify (something the court considered a remote chain of events), this would at most only create an appearance of impropriety, and this would be "a slender reed on which to justify disqualification of counsel." And the appearance of impropriety could have been easily cured by having the parties stipulate to the father's testimony.

The denial of a defendant's right to counsel of choice is a structural error not subject to harmless error review. The court thus reversed defendant's conviction and remanded for a new trial.

**People v. Schutz, 2017 IL App (4th) 140956** A *per se* conflict of interest occurs where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution, where defense counsel contemporaneously represents a prosecution witness, and where defense counsel is a former prosecutor who had been personally involved in the prosecution of the defendant. Where defense counsel has represented a State's witness, a *per se* conflict of interest exists only if a professional relationship between the attorney and the witness is contemporaneous with defense counsel's representation of the defendant. A contemporaneous relationship does not require simultaneous representation, however.

The court rejected the argument that defendant's first counsel had a *per se* conflict of interest because for approximately one month, she represented both defendant and defendant's cellmate, who became a witness against defendant and testified concerning defendant's statements while in jail. As a matter of first impression, the court concluded that a *per se* conflict of interest did not exist where the cellmate became a prosecution witness only when he signed his plea agreement, which occurred after counsel withdrew from defendant's case. In other words, the cellmate was not disclosed as a prosecution witness or expected to testify against defendant when counsel represented both parties. Because counsel had withdrawn from the representation of defendant before the cellmate entered a guilty plea requiring him to testify against the defendant, there was no *per se* conflict of interest.

Defense counsel should have informed the trial court that she had previously represented defendant and currently represented a prosecution witness, however, to place the court on notice of the possibility of a conflict and give defendant an opportunity to state any objections.

**People v. Poole, 2015 IL App (4th) 130847** 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.

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. Under these circumstances, the record does not show that defendant was adequately informed of the significance of the conflict.

**People v. Fountain, 2012 IL App (3d) 090558** 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.

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.

**People v. Gacho, 2012 IL App (1st) 091675** 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.

**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.

**People v. Woidtke**, 313 Ill.App.3d 399, 729 N.E.2d 506 (5th Dist. 2000) 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.

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. Hanson**, 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."

## **§14-6(b)(2)**

### **Representing Co-defendants**

#### **United States Supreme Court**

**Mickens v. Taylor**, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) 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.

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.

**Cuyler v. Sullivan**, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) **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").

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).



**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).

### Other Federal Courts

**Taylor v. Grounds**, 721 F. 3d 809 (7th Cir. 2013) 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. 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 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.

Three eyewitnesses to the shooting testified at a post-conviction evidentiary hearing 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 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.

**Griffin v. McVicar**, 84 F.3d 880 (7th Cir. 1996) 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.

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).

[U.S. v. Martin](#), 965 F.2d 839 (10th Cir. 1992) 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.

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).

### **Illinois Supreme Court**

[People v. Cole \(Campanelli\)](#), 2017 IL 120997 Requiring or permitting a single attorney to represent co-defendants does not *per se* violate the Sixth Amendment. However, because a possible conflict of interest is inherent in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that a potential conflict imperils his right to a fair trial.

[Rule 1.10 of the Illinois Rules of Professional Conduct](#) of 2010, which prohibits lawyers associated in a "firm" from knowingly representing a client when any member of the firm practicing alone would be prohibited from doing so by a conflict of interest, does not prohibit representation of co-defendants by separate assistant public defenders. First, the plain language of the definition of the term "firm" excludes public defender offices. Second, it must be assumed that when the Supreme Court adopted Rule 1.10(a), it was aware of and did not intend to invalidate existing Illinois precedent that a public defender's office is not a "firm" for purposes of conflict of interest law. Third, the court reiterated its precedent holding that the adversarial tendencies of lawyers within the public defender's office provide sufficient protection against the risk of a conflict of interest occurring between assistant public defenders representing co-defendants.

The court rejected the argument that the Public Defender of Cook County is the attorney for every case to which the office is appointed, so that a conflict of interest necessarily occurs even where different assistant public defenders represent co-defendants. The Public Defender herself does not provide representation for every defendant. Instead, the assistant assigned to a particular case represents the individual client. The fact that the Public Defender has supervisory authority over every assistant public defender does not, in and of itself, disqualify the entire office from representing co-defendants.

In specific circumstances an actual conflict of interest may exist where separate assistant public defenders represent co-defendants. Where counsel brings the possibility of such a conflict to the court's attention before trial, only the gist of a conflict need be presented to require the appointment of new counsel.

**People v. Nelson, 2017 IL 120198** Where a defendant first raises a conflict of interest issue after trial a defendant must demonstrate that an actual conflict of interest affected his counsel's performance. In order to establish this, a defendant must first demonstrate that some plausible alternative strategy might have been pursued. He need not show that it would have necessarily been successful, but only that it was "a viable alternative." Second, he must show that the alternative defense was inherently in conflict with or not undertaken due to his counsel's other loyalties.

Four women including defendant and co-defendant Hall had a confrontation with a man, Wilson, at an apartment. Wilson left but when Hall thought that he had stolen her cell phone, the four women went after him. As they were leaving the apartment, defendant grabbed a knife. Hall then took the knife from defendant.

When the women caught up with Wilson, he tackled one of them and all four started hitting and kicking him. Defendant saw Hall stab him with the knife. Defendant told Hall to stop and tried to grab the knife away. Wilson died from multiple stab and incision wounds.

Defendant and Hall were represented by attorneys from the same clinic in joint but severed bench trials. Defendant's counsel argued that she acted in self-defense because the women only attacked Wilson after he tackled one of them. The court found defendant guilty of first degree murder.

On appeal, defendant argued that her attorneys labored under an actual conflict of interest where there was a plausible alternative defense based on lack of accountability, but since this defense was hostile to Hall's defense, her attorneys could not pursue it and still maintain their loyalty to Hall. The Appellate Court rejected this argument, relying on the Illinois Supreme Court's decision in **Echols**, which held that the mere availability of an alternative strategy that would have helped defendant at the expense of a co-defendant does not create a conflict of interest so long as there is a viable joint defense.

The Supreme Court held that the categorical rule of **Echols** was no longer good law. The rule does not consider whether the interests of co-defendants are at odds in a case where there is a plausible alternative strategy that would help one client but hurt another. The Court thus overruled **Echols**. But the Court affirmed defendant's conviction finding that there was no plausible alternative strategy based on lack of accountability available in this case.

**People v. Taylor, 237 Ill.2d 356, 930 N.E.2d 959 (2010)** 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, 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.

**People v. Echols**, 74 Ill.2d 319, 385 N.E.2d 644 (1978) 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."

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.

### **Illinois Appellate Court**

**People v. Polk**, 2024 IL App (1st) 181933 Defendant argued that the trial court erred by failing to sever his case from that of his codefendants, particularly codefendant Dawson with whom he shared counsel and who defendant described as the most culpable and main target of the State's RICO investigation. The general rule is that jointly-charged defendants are to be jointly tried unless a separate trial is required to avoid prejudice. The decision whether to grant severance rests in the sound discretion of the trial court and thus is reviewed for an abuse of discretion.

One type of prejudice warranting severance is where the codefendants' defenses are so antagonistic that one cannot receive a fair trial if jointly tried. Generally, this standard is met either where one defendant protests his innocence while condemning the other or where the trial becomes a contest between codefendants rather than between the defendants and the State. Neither circumstance was present here.

Defendant argued on appeal that his best defense would have been to argue that the evidence only implicated Dawson but that he was denied that opportunity because his counsel labored under an actual conflict of interest in representing both of them. In response, the State noted that defendant had signed a conflict waiver. The appellate court was unswayed

by the waiver, though, because the trial court had simply accepted counsel's assertion that he had explained the potential conflict to defendant and Dawson. Counsel offered no details of that conversation, and the court failed to admonish defendant to ascertain whether his waiver of any conflict was knowing and voluntary. Accordingly, the court concluded that it could not find a valid conflict waiver.

Ultimately, though, the appellate court held that there was no actual conflict. Defendant's attorneys did not indicate that they would employ a different strategy if granted a severance. And, defendant was actually represented by two attorneys, including one who did not also represent Dawson and who was engaged specifically to mitigate any potential conflict. Further, while defendant argued that Dawson was more culpable, the appellate court found that the evidence against defendant was also strong. And given the nature of the case, where the defendants were charged as members of a single conspiracy, most of the evidence would have been the same whether the defendants were tried jointly or separately. Thus, the trial court did not abuse its discretion in denying defendant's severance motion.

**People v. Soto and Ayala, 2022 IL App (1st) 192484** The circuit court erred when it dismissed defendant's post-conviction petition at the second stage. The petition made a substantial showing of actual innocence and trial counsel's conflict of interest.

Co-defendants Soto and Ayala were tried jointly before a single jury and convicted of two murders, attempted murder, and conspiracy to commit murder. They were sentenced to natural life. The State alleged through its primary witness, Wally Cruz, that Ayala ordered a gang hit and that Cruz drove Soto, armed with a handgun, and Palomo, armed with a rifle, to a park where Soto and Palomo fired and killed two people and injured another.

Defendants filed successive petitions in 2015, 33 years after conviction and sentence. Therefore, a majority of the claims were time barred. While Ayala pointed out that he was in solitary confinement 23 hours a day from 1998 through 2012, this did not prevent him from filing several of his claims earlier. However, because the conflict of interest and actual innocence claims relied on new evidence, they were not barred by untimeliness, forfeiture or *res judicata*.

Defendants alleged that trial counsel had a *per se* conflict of interest because he represented Rodriguez, a 16 year-old who was identified by several eyewitnesses as the offender firing the handgun into the park. A *per se* conflict arises when the attorney had or has a tie to a person or entity that would benefit from a verdict unfavorable to the client. This occurs when 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 in the prosecution of the defendant.

Here, Rodriguez did not fit into the first category. **People v. Fields, 2012 IL 112438** (potential State witnesses not considered an "entity. . . assisting the prosecution.") But the second category does apply. Defense counsel represented Rodriguez after his arrest in the wake of the shooting, in October, 1991, while at the same time representing defendants. The representation overlapped by 19 days. The Appellate Court found this to be "contemporaneous representation." And while the State pointed out that Rodriguez never testified for the State, the Appellate Court found that representation of an alternate suspect and named State witness creates sufficient potential conflict so as to fall under the *per se* conflict rule.

The petitions also made a substantial showing of an actual conflict of interest. Notably, counsel never called as witnesses the three people who identified Rodriguez as the shooter. This decision could be a "specific defect" in counsel's strategy. Although the State



offered speculative justifications for the failure to call the witnesses, such as questioning their credibility, the stronger inference is that trial counsel felt some duty of loyalty to Rodriguez. Regardless, these questions are better resolved at an evidentiary hearing.

Finally, the petitions made a substantial showing of actual innocence. They included four affidavits from witnesses whom Cruz alleged were present at the gang meeting where Ayala ordered the hit. All of the witnesses attested that they were not present, and that they were arrested and threatened with prosecution and abuse if they would not admit to being present. These affidavits were newly discovered because one of the witnesses pleaded the fifth before the grand jury, rendering him unavailable, while the others described State coercion and fear of retaliation to explain why they did not come forward earlier. Two additional recantation affidavits from witnesses who did testify at trial were also newly discovered, even though Soto included the information in a prior petition. It would be unfair to attribute this prior knowledge to Ayala, and, regardless, the information was available to neither defendant at the time of trial. Finally, other witness affidavits were considered newly discovered because they implicated Rodriguez, and no amount of due diligence could have compelled their conflicted counsel to call these witnesses at trial.

The new evidence was sufficiently material and conclusive to warrant an evidentiary hearing. Witnesses who would dispute Cruz's account of the gang meeting where the shooting was supposedly planned, and his claim that the Soto fired the handgun, while at the same time offering multiple accounts of Rodriguez firing the handgun, would place the trial evidence in a different light and undermine the court's confidence in the judgment of guilt.

**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.

**People v. Reyes**, 251 Ill.App.3d 426, 622 N.E.2d 86 (2d Dist. 1993) 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.

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. 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. 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).

#### §14-6(c)

#### Conflict Between Current and Past Clients

#### Illinois Supreme Court

[People v. Rogers, 2021 IL 126163](#) Defendant was given a citation for DUI by a police officer, and, over the course of several months, charged with superceding DUI offenses by the state's attorney. The new charges alleged DUI under both the original statutory provision, and additional provisions. After his conviction, defendant argued on appeal that his attorney was ineffective for failing to move for dismissal on speedy-trial grounds, because his trial occurred more than 160 days beyond the date of the initial citation and the superceding charges were covered by compulsory joinder.

The Third District Appellate Court had reversed, rejecting the State's argument that no speedy trial violation occurred because, pursuant to statute, compulsory joinder applies only if the initial charges are brought by "the proper prosecuting officer." Disagreeing with its own decision in [People v. Kazenko, 2012 IL App \(3d\) 110529](#), the court instead followed a case from the Second District, [People v. Thomas, 2014 IL App \(2d\) 130660](#), which held that a police officer can be a "proper prosecuting officer" under the statute.

In the supreme court, the State first argued that defendant's ineffectiveness claim must fail because defendant had no right to effective assistance in a case for which his sentence was court supervision. The State cited [Scott v. Illinois, 440 U.S. 367 \(1979\)](#), which found no federal right to counsel in cases where imprisonment is not imposed. A majority of the court disagreed. Adopting defendant's argument, the majority held that **Scott** outlined the right to *appointment* of counsel, not the right to *effective* counsel. Here, defendant hired an attorney. Thus, the right to appointment of counsel is not at issue. The question is simply what type of representation is required once a criminal defendant has an attorney. The court concluded that the "right to the assistance of counsel, appointed or not, necessarily includes the right to effective counsel."

But counsel here was not ineffective. Defendant's case took place in the Third District. When appellate court opinions conflict, the circuit court is bound by the decisions of the

appellate court of the district in which it sits. Thus, had counsel moved to dismiss on speedy trial grounds, the outcome of the case would not have changed, as the trial court was bound to follow **Kazenko**. The majority remanded without resolving the conflict.

Two concurring justices chided the majority for failing to resolve the conflict. The concurrence would have followed **Kazenko**, which correctly interpreted **People v. Jackson**, 118 Ill. 2d 179 (1987). **Jackson** clearly held that compulsory joinder does not apply to any offenses that have been charged by the uniform citation and complaint form for traffic offenses, and contrary to **Thomas**, it did not allow for an exception for subsequent misdemeanor charges.

**People v. Yost**, 2021 IL 126187 The Illinois Supreme Court has consistently stated that the *per se* conflict of interest rule applies when a defense attorney has a relationship with the victim. In **People v. Hillenbrand**, 121 Ill. 2d 537 (1988), the court suggested that a past relationship with the victim that has ended prior to defendant's trial does not trigger the *per se* conflict rule. In **People v. Hernandez**, 231 Ill. 2d 134 (2008), and in subsequent cases, however, the court expressly stated that a *per se* conflict exists "when defense counsel has a prior or contemporaneous association with the victim."

Here, defendant discovered after trial that defense counsel represented the victim in a prior DUI case, several years before representing defendant in his trial for the victim's murder. Defendant alleged a *per se* conflict. The Appellate Court, citing **Hernandez**, agreed.

The Supreme Court reversed, finding the case more analogous to **Hillenbrand** than **Hernandez**. Although **Hernandez** did state that a prior relationship would trigger the rule, that case did not involve a prior relationship, but rather an ongoing relationship. And none of the cases cited in **Hernandez** supported the idea that a prior relationship would create a *per se* conflict. The court stated that it would "modify" its holding in **Hernandez** "to recognize a *per se* conflict based on defense counsel's representation of the victim only when that representation is contemporaneous with counsel's representation of the criminal defendant."

**People v. Green**, 2020 IL 125005 No *per se* conflict of interest exists when defendant's attorney previously represented the intended victim of defendant's crime, where defendant was not prosecuted for his act against the prior client.

Here, defendant opened fire on a car, intending to shoot the former client, but struck a different occupant of the car. He was charged with the murder of the decedent, but not charged with any crime against the former client. Defendant argued that since a *per se* conflict exists when the actual victim is a former client, and the same inherent conflict exists when the intended victim is a former client, the *per se* conflict rule should be expanded to include intended victims. The court conceded that the former client in this case would benefit from a conviction, but refused to expand the *per se* conflict rule to former clients. It held that the fact that an identical justification supported defendant's position was not a reason to expand the rule beyond the scope delineated in prior precedents.

**People v. Fields**, 2012 IL 112438 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.

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.

A prosecution witness is not 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."

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.

**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.

**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**, 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

**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). without risking that the arrangement would be ended and charges reinstated against the informant).

Illinois Appellate Court

**People v. Murphy, 2013 IL App (4th) 111128** 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 contemporaneous representation created a *per se* conflict of interest because defense counsel's performance may have been subliminally affected by the conflict. In particular, 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.

**People v. Cleveland, 2012 IL App (1st) 101631** 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.

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.

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 the victim at a preliminary hearing on a drug possession case. 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.

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.

**People v. Fountain**, 2012 IL App (3d) 090558 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.

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.

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.

**People v. Dopson**, 2011 IL App (4th) 100014 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. In return for a controlled buy and testimony against defendant, the State promised not to prosecute her for other drug charges for which she had been arrested. 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.

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. The attorney-client privilege continues even after formal representation ends, and therefore counsel could not 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.

## **§14-6(d)**

### **Conflict with Lawyer's Interests**

#### **§14-6(d)(1)**

##### **Financial Interests**

#### **Other Federal Courts**

**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 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).

#### **Illinois Supreme Court**

**People v. Peterson**, 2017 IL 120331 Under **People v. Gacy**, 125 Ill. 2d 117, 530 N.E.2d 1340 (1988), a *per se* conflict may arise if defense counsel enters into a book deal about the case during the course of the representation. The court found that there was no *per se* conflict of interest here, however, where defense counsel and defendant entered into a contract with a media company which was to provide publicity and appearances for defendant and defense counsel. A total of \$15,900 was paid into defense counsel's trust fund as a result of the contract. The money was used to pay counsel's fees and the costs of the defense. The contract ended some five months before trial.

The court distinguished **Gacy** on the ground that counsel's participation in the contract did not afford him a financial stake in the case that was directly adverse to defendant's interests. The court also noted that the record was unclear as to the precise terms of the contract, and that the proper forum to determine whether defense counsel violated any ethical rules was the Attorney Registration and Disciplinary Commission.

**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. 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.

### **Illinois Appellate Court**

**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. 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. 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.

### **§14-6(d)(2)**

#### **Non-financial Interests**

### **§14-6(d)(2)(a)**

#### **Generally**

### **Illinois Supreme Court**

**People v. Gonzalez**, 2019 IL App (1st) 152760 The trial court did not err when it allowed a conflicted attorney to represent defendant during several pre-trial hearings, including initial plea negotiations. Defense counsel had taken part in defendant's prior prosecution. After several months of deliberating, the State eventually included the conviction stemming from

that prosecution in a **Montgomery** motion. Defendant sought to waive the conflict this created, but the trial court found the waiver ineffectual and disqualified the attorney. Although the Appellate Court agreed with defendant that the disqualification should have come sooner, under these circumstances the situation was not clear cut until the filing of the motion and therefore the trial court did not abuse its discretion by not immediately disqualifying counsel. Moreover, defendant's argument that this was a *per se* conflict is irrelevant because defendant was not alleging ineffective assistance of counsel, but rather trial court error.

**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.

**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. 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. 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."

### **Illinois Appellate Court**

**People v. Young**, 2022 IL App (1st) 210534 Defendant's successive petition, which was dismissed at the second stage, did not make a substantial showing that his appellate counsel was ineffective for failing to challenge the sufficiency of evidence on direct appeal. Initially, the State argued the claim was *res judicata* and forfeited because defendant raised the same claim in his initial petition and did not raise it on appeal from the summary dismissal of that petition. Defendant, however, alleged that the failure to raise the issue stemmed from a conflict of interest, stating in an affidavit that he instructed his appellate post-conviction counsel to preserve this issue on appeal, but she responded that she would not allege ineffective assistance against defendant's direct appeal counsel because they were friends.

The appellate court first held that defendant was entitled to conflict-free counsel in post-conviction proceedings, despite the relaxed standards applicable to post-conviction counsel. And it would apply the same actual-conflict analysis to claims of post-conviction counsel conflicts as elsewhere. However, even accepting the allegations about the attorneys' friendship as true, a conflict exists only if the relationship caused a "specific defect" in post-conviction appellate counsel's strategy, tactics, or decision-making. In other words, defendant must show that the claim not pursued "would have been successful." Here, the evidence was sufficient to convict, so defendant could not show prejudice.

**People v. Treadwell**, 2022 IL App (1st) 191905 Defendant was deprived of reasonable assistance of post-conviction counsel where counsel failed to amend his petition to state a claim of ineffective assistance of appellate counsel in order to overcome *res judicata* concerns. On direct appeal, defendant raised an issue of ineffective assistance of trial counsel which alleged that counsel had neglected his case and failed to provide a vigorous defense because counsel was preoccupied with defending himself in pending ARDC proceedings. Defendant's conviction was affirmed. The amended post-conviction petition filed by counsel merely repeated the direct appeal claim. In defendant's *pro se* post-conviction pleadings, however, he had alleged that his trial counsel was actually "not allowed to practice law" at the time of his trial. Specifically, trial counsel's license had been suspended by the Illinois Supreme Court prior to defendant's trial and, while counsel had sought and obtained a stay of the suspension, he did so only with regard to his need to complete the representation of a client in another case, not defendant.

The appellate court agreed that defendant's *pro se* allegation of ineffective assistance was a different claim than that advanced on direct appeal and by post-conviction counsel. Post-conviction counsel should have amended the petition to allege that appellate counsel had been ineffective for failing to argue on direct appeal that trial counsel was *per se* ineffective because his law license had been suspended and he was not authorized to



represent defendant under the stay of that suspension. The appellate court did not resolve the ultimate question of whether trial counsel was qualified to represent defendant on the date in question, but it did hold that there is a cognizable claim concerning that issue which post-conviction counsel failed to present. The matter was remanded for new second-stage proceedings, including the appointment of new counsel and leave to amend the petition.

**People v. Guerrero**, 2018 IL App (3d) 170786 Following his guilty plea and sentencing, defendant sought to withdraw his plea, alleging ineffective assistance of plea counsel. New post-plea counsel was appointed. Because new post-plea counsel had represented the State at defendant's sentencing hearing, however, that attorney had a *per se* conflict of interest. The record failed to show any waiver of the conflict, so the matter was reversed and remanded for new post-plea proceedings with a new attorney.

**People v. Short**, 2014 IL App (1st) 121262 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.

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.

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.

**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.

#### **§14-6(d)(2)(b)**

#### **Client's Intent to Commit Perjury**

##### **United States Supreme Court**

**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.

##### **Illinois Supreme Court**

**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.

##### **Illinois Appellate Court**

**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."

**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. 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.

#### **§14-6(d)(2)(c)**

#### **Lawyers In Same Firm**

#### **Illinois Supreme Court**

**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. 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. Banks**, 121 Ill.2d 36, 520 N.E.2d 617 (1987) 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."

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. 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. 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. 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.

### **Illinois Appellate Court**

**People v. Hardin**, 353 Ill.App.3d 522, 818 N.E.2d 1246 (3d Dist. 2004) 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.

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. 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. 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.

**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. 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).

#### **§14-6(d)(2)(d)**

#### **Counsel Has Connection to Prosecution**

#### **Other Federal Courts**

**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.



## Illinois Supreme Court

**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. 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. 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. 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.

**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).

### Illinois Appellate Court

[People v. Nodine, 2024 IL App \(4th\) 230269](#) Defendant's attorney was charged in Woodford County with forgery in 2020 and pled guilty before Judge Feeney. She then began representing defendant in her murder case, also in Woodford County before Judge Feeney. Defendant was accused of deliberately driving into oncoming traffic. After defendant was convicted of murder, defense counsel won a motion for a new trial. Six days later, the State moved to revoke counsel's probation in her forgery case.

Defense counsel moved to withdraw from defendant's murder case, citing a breakdown in communication. Judge Feeney denied the motion. Counsel's motion did not mention – as she had in a previously withdrawn motion to substitute judge – her pending probation-revocation hearing in the same courtroom, with the same state's attorney's office. The record does not indicate that the judge knew a revocation petition had been filed in counsel's case. Defense counsel represented defendant on retrial and, defendant was again found guilty of murder. Given an opportunity to offer evidence in mitigation, defense counsel first declined, then provided a brief argument. After defendant received 30 years in prison, defense counsel did not move to reconsider.

The appellate court reversed and remanded for a new trial because defense counsel labored under a *per se* conflict of interest. A *per se* conflict exists when specific facts about the defense attorney's status creates a disabling conflict. If a *per se* conflict exists, a defendant does not have to establish her counsel's performance was affected by the conflict nor show she suffered actual prejudice.

Defense counsel had a *per se* conflict of interest because the same SAO was attempting to revoke her probation while simultaneously prosecuting her client. And while defendant did not have to show prejudice, the record demonstrates that the conflict did affect counsel's representation of her client. For example, counsel withdrew her motions to substitute judge, perhaps because following through with the motion could have negatively affected her own probation-revocation case before that same judge. She also failed to reveal the probation-revocation proceedings when moving to withdraw, apparently out of fear of being blamed for any continuances withdrawal would necessitate, despite stating that she believed the PD could better represent defendant. Finally, counsel failed to present mitigating evidence during sentencing, possibly to avoid aggravating either the judge or prosecutor.

The court also noted that defendant was on probation when she took on defendant's case. The appellate court did not decide whether that alone gave rise to a *per se* conflict. But it urged any attorneys faced with this situation – including the state's attorney – to inform the trial court, who should then admonish defendant and either obtain a knowing waiver or require defendant to use a different attorney.

**People v. Boswell, 2023 IL App (4th) 220754** The circuit court properly denied defendant's conflict claim after a third stage evidentiary hearing. Although Kim Campbell was the Chief Public Defender of McLean County at the time of defendant's trial, and was a first-chair assistant state's attorney at the time defendant was charged, the evidence failed to establish a *per se* or actual conflict of interest.

A *per se* conflict occurs when defense counsel has a contemporaneous association with the prosecution. Here, defendant presented evidence that Campbell, while observing defendant's trial in her role as Chief PD, commented to an investigator that she approved of, and took credit for writing, the prosecution's closing argument. But Campbell testified that she commented on the closing argument jokingly, because she had mentored the state's attorney. She denied taking credit for writing the closing argument. The trial prosecutor corroborated Campbell, testifying that the idea of Campbell helping her was "preposterous." The circuit court's decision to believe Campbell and the prosecutor over the investigator was not manifestly erroneous.

Nor did defendant establish an actual conflict, where Campbell testified that she was aware of a potential conflict due to her prior employment with the SA's office, and took affirmative steps to screen herself from the defense, having no involvement in the case and assigning the first-assistant PD to supervise the case.

**People v. Boswell, 2020 IL App (4th) 180165** Defendant's post-conviction petition alleged a conflict of interest and included an affidavit from an investigator with the McLean County Public Defender's office, claiming that Kim Campbell, the McLean County Public Defender, stated that she helped the prosecution write its closing argument in defendant's case. These allegations, taken as true at the second stage, made a substantial showing of a *per se* conflict of interest. Although Campbell did not represent defendant, and the conflict of one public defender is not necessarily imputed to other public defenders, Campbell's role was more unusual and egregious than the typical conflicts seen in public defender's offices. Campbell did not just have a relationship with the prosecution, she actively assisted the prosecution while simultaneously employing and supervising defendant's attorneys.

Further, the investigator's allegation that she told defendant's attorney about Campbell's statements, and that defense counsel did not inform the judge, made a substantial showing of an actual conflict of interest as well.

**People v. Rhodes, 2020 IL App (1st) 173119** While representing defendant in a murder case, defense counsel witnessed the defendant attack a sheriff's deputy, resulting in assault charges. Defense counsel moved to withdraw from the murder case, alleging that, as a potential witness against his client in a future assault case, he had a "contemporaneous association with the prosecution," and therefore labored under a *per se* conflict of interest. The trial court declined to find a conflict, counsel continued representing defendant, and defendant was convicted of murder.

The Appellate Court affirmed the finding of no *per se* conflict. An "association with the prosecution" does not arise merely because counsel might be called as a witness in a separate

unrelated criminal prosecution. The court did not believe that the possibility of being a witness in an unrelated matter would impact the attorney's professional obligations and loyalty to defendant during his murder trial.

**People v. Alexander**, 2019 IL App (4th) 170425 Defendant's public defender was formerly an Assistant State's Attorney and had previously prosecuted defendant in an unrelated case. In **People v. Fields**, 2012 IL 112438, the Supreme Court defined a *per se* conflict to include situations where defense counsel (1) has a prior or contemporaneous association with the victim, prosecution, or an entity assisting the prosecution, (2) contemporaneously represents a prosecution witness, and (3) was a former prosecutor who had been personally involved with the prosecution of defendant.

The Appellate Court construed the third category of *per se* conflict - a former prosecutor who had been personally involved with the prosecution of defendant - as meaning counsel was involved in prosecuting defendant *in the same criminal proceeding*. Accordingly, the Court declined to find a *per se* conflict here because defense counsel's prior prosecution of defendant was in an unrelated case and had occurred more than 10 years prior.

**People v. Gonzalez**, 2019 IL App (1st) 152760 The trial court did not err when it allowed a conflicted attorney to represent defendant during several pre-trial hearings, including initial plea negotiations. Defense counsel had taken part in defendant's prior prosecution. After several months of deliberating, the State eventually included the conviction stemming from that prosecution in a Montgomery motion. Defendant sought to waive the conflict this created, but the trial court found the waiver ineffectual and disqualified the attorney. Although the Appellate Court agreed with defendant that the disqualification should have come sooner, under these circumstances the situation was not clear cut until the filing of the motion and therefore the trial court did not abuse its discretion by not immediately disqualifying counsel. Moreover, defendant's argument that this was a *per se* conflict is irrelevant because defendant was not alleging ineffective assistance of counsel, but rather trial court error.

## §14-6(e)

### Conflicts Due to Third Parties

#### United States Supreme Court

**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).

#### Illinois Supreme Court

**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 operate 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. Moore**, 189 Ill.2d 521, 727 N.E.2d 348 (2000) 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.

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 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. 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 marital privilege.

### **Illinois Appellate Court**

**People v. Harris**, 2023 IL App (1st) 210754 The trial judge did not manifestly err at a **Krankel** hearing when he denied defendant's complaint of ineffective assistance of counsel predicated on counsel's failure to retain and call an expert in eyewitness identification. Even assuming counsel's performance was deficient, defendant failed to demonstrate prejudice. Defendant failed to present an affidavit from an eyewitness identification expert to support his claim and thus the court found his argument to be mere speculation in terms of what an expert would have said and whether it would have been helpful. Further, there was ample evidence against defendant. The eyewitness testimony at trial was corroborated by other evidence. Defendant admitted being present at the scene of the shooting. Further, video evidence showed defendant running away from the scene immediately after the shooting, and defendant fled in a vehicle which engaged in a high-speed chase with police. All of the evidence taken together was such that counsel's failure to call an eyewitness identification expert was not reasonably likely to have affected the outcome.

Additionally, trial counsel was not ineffective for failing to disclose as a potential conflict of interest that counsel was representing codefendant's counsel on an unrelated ARDC matter during the time of defendant's trial. Illinois recognizes only three categories of *per se* conflict, specifically 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) is a former prosecutor who had been personally involved with the prosecution of defendant. Counsel's representation of the attorney for the



co-defendant did not fit within any of these categories, and thus there was no *per se* conflict of interest.

Similarly, defendant failed to demonstrate that counsel had an actual conflict. Defendant alleged that counsel's representation of the co-defendant's attorney resulted in his failure to zealously pursue the co-defendant as an exculpatory witness. Whether to call a witness at trial is generally a matter of trial strategy. And, here, where the co-defendant drove the car which fled from the police at a high rate of speed, the court concluded that defendant had not overcome the presumption that counsel's decision here was proper strategy.

**People v. Carr**, 2020 IL App (1st) 171484 In a domestic violence case, the complainant paid for defendant's trial attorney, and signed the contract securing his representation. Defendant alleged in a post-conviction petition that this payment created a *per se* conflict of interest. At an evidentiary hearing, counsel acknowledged that the complainant paid for his services, and that the contract inadvertently referred to the complainant as his client. But he maintained that he took the money with the understanding that he would be representing defendant only.

The Appellate Court found "a prior or contemporaneous association with the victim," sufficient to create a *per se* conflict. A defendant does not have to prove that his attorney actually represented a complainant in order to show a conflict. The payment alone created a relationship with the victim. And defendant's knowledge of the payment did not constitute a knowing and affirmative waiver of his constitutional right to conflict-free counsel. The court noted that if a defense attorney wants to take payment from a complainant to represent defendant, the attorney should notify the trial court so that a valid waiver can be obtained from the defendant.

## **§14-6(f)**

### **Waiving Conflicts of Interest**

#### **United States Supreme Court**

**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).

#### **Illinois Supreme Court**

**People v. Ortega**, 209 Ill.2d 354, 808 N.E.2d 496 (2004) 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.

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.

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."

### **Illinois Appellate Court**

[\*\*People v. Carr\*\*, 2020 IL App \(1st\) 171484](#) In a domestic violence case, the complainant paid for defendant's trial attorney, and signed the contract securing his representation. Defendant alleged in a post-conviction petition that this payment created a *per se* conflict of interest. At an evidentiary hearing, counsel acknowledged that the complainant paid for his services, and that the contract inadvertently referred to the complainant as his client. But he maintained that he took the money with the understanding that he would be representing defendant only.

The Appellate Court found "a prior or contemporaneous association with the victim," sufficient to create a *per se* conflict. A defendant does not have to prove that his attorney

actually represented a complainant in order to show a conflict. The payment alone created a relationship with the victim. And defendant's knowledge of the payment did not constitute a knowing and affirmative waiver of his constitutional right to conflict-free counsel. The court noted that if a defense attorney wants to take payment from a complainant to represent defendant, the attorney should notify the trial court so that a valid waiver can be obtained from the defendant.

**People v. Acevedo, 2018 IL App (2d) 160562** Defendant's purported waiver of conflict-free counsel was ineffectual because the trial court failed to admonish him of its significance. "A defendant will not be deemed to have waived a conflict unless he is admonished as to the existence of the conflict and its significance." Here, the court advised defendant that his attorney had a conflict because he was contemporaneously representing a State witness in another matter, and that this might cause "issues that may or may not come up," but it never informed defendant why the conflict might impact counsel's ability to zealously represent him. For instance, the court should have told defendant that counsel might be reluctant to cross-examine the witness in a way that would be adversarial to her case but beneficial to defendant's. Absent such information, defendant could not make a knowing waiver, and a new trial was required.

**People v. Poole, 2015 IL App (4th) 130847** *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.

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.

**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.

## §14-6(g)

### Other Conflict Issues

#### Illinois Appellate Court

**People v. Hayes**, 2024 IL App (5th) 210368 Defendant asserted that the trial court erred in denying his motion for new trial which alleged that one of his attorneys operated under a conflict of interest where defendant had an ongoing romantic and sexual relationship with her at the time of the representation. The sixth amendment right to effective assistance of counsel includes the right to conflict-free representation. A conflict may be *per se*, meaning counsel's status alone creates a disabling conflict, or it may be actual, meaning the conflict had an actual adverse effect on counsel's performance.

Determining whether there is an actual conflict of interest requires a two-step analysis. Specifically, the court must determine if any conflict existed, and if so, whether the conflict had an adverse affect on counsel's performance. However, defendant is not required to show that the conflict actually contributed to the conviction; it is enough to prove that there were specific deficiencies in the representation.

Here, a conflict existed. There was no dispute that defendant and his attorney were engaged in a romantic and sexual relationship. That relationship began during her representation of him in a prior expungement proceeding. [Illinois Rules of Professional Conduct 1.8\(j\)](#) states, "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced." The comments to Rule 1.8 expand upon the potential problems where a lawyer and client are involved in a sexual relationship, including abuse of the client's trust by the lawyer, impairment of the lawyer's professional judgment, and the difficulty in predicting to what extent client confidences will be protected by attorney-client privilege. Additionally, Rule 1.7(a)(2) provides that a lawyer shall not represent a client where there is a concurrent conflict of interest, i.e. where there is a significant risk that the representation will be materially limited by the lawyer's personal interest. Here, the sexual relationship initially began during counsel's representation of defendant in a prior matter. While, it was not entirely clear whether they had re-engaged their on-again, off-again sexual relationship before or after she began representing him in the instant matter, the court found that, at a minimum, counsel violated the spirit of the rule.

As to whether the conflict had an adverse effect on counsel's performance, the court considered numerous text messages between defendant and counsel that had been introduced at the hearing on the motion for new trial. Those messages included counsel's own statements that she believed her emotional involvement might prevent her from providing adequate

representation for defendant. She also told defendant she thought his other attorney was stealing his money and that defendant should not trust that attorney's advice any further. If counsel actually believed those allegations to be true, the proper course would have been for her to address them with defendant's other counsel rather than actively undermining counsel's credibility and using her own leverage to insert herself into a position of representation.

The record also demonstrated that counsel's conflict had an adverse effect on her performance. For instance, her mishandling of the investigation into the background of a crucial witness left the defense unable to call that individual. She repeatedly improperly intervened in the case even prior to her representation, advising defendant to alter his trial strategy and baselessly accusing defendant's then-existing counsel of stealing his money. She admitted she had not been completely candid with defendant about her assessment of the case in order to protect his feelings. During trial she unilaterally altered the trial strategy, a decision which ultimately led to the presentation of unfavorable evidence against defendant. And, she concealed her relationship with defendant from co-counsel; he only learned about it after the trial. On these facts, an actual conflict of interest existed, and a new trial was required.

**People v. Zirko, 2021 IL App (1st) 162956** A defendant has the right to reasonable assistance of post-conviction counsel. Reasonable assistance includes the right to conflict-free representation. Whether an attorney labored under a conflict of interest while representing a defendant is a question of law subject to *de novo* review.

Here, defendant was represented by the same attorney at trial and during post-conviction proceedings in the trial court. That attorney also represented defendant on appeal, until the Appellate Court *sua sponte* raised a concern about whether he had a conflict of interest. In response to the Appellate Court's request for supplemental briefing on the conflict question, defendant requested and was granted new counsel on appeal.

New appellate counsel argued that post-conviction counsel labored under a conflict of interest and provided unreasonable assistance. The Appellate Court rejected defendant's request to create an additional category of *per se* conflicts of interest for situations where the same attorney represents defendant at trial and in post-conviction proceedings and alleges his own ineffectiveness at trial. The court agreed, however, that counsel here labored under an actual conflict of interest. The record demonstrated that counsel failed to support at least one post-conviction claim of ineffective assistance with necessary and available photographic evidence. The court could "conceive of no strategic reason" to raise such an issue and not support it with available evidence. Accordingly, the Appellate Court reversed the second-stage dismissal of defendant's petition and remanded for new second-stage proceedings with new counsel.

**People v. Alexander, 2019 IL App (4th) 170425** Defendant's public defender was formerly an Assistant State's Attorney and had previously prosecuted defendant in an unrelated case. In **People v. Fields, 2012 IL 112438**, the Supreme Court defined a *per se* conflict to include situations where defense counsel (1) has a prior or contemporaneous association with the victim, prosecution, or an entity assisting the prosecution, (2) contemporaneously represents a prosecution witness, and (3) was a former prosecutor who had been personally involved with the prosecution of defendant.

The Appellate Court construed the third category of *per se* conflict - a former prosecutor who had been personally involved with the prosecution of defendant - as meaning counsel was involved in prosecuting defendant *in the same criminal proceeding*. Accordingly,



the Court declined to find a *per se* conflict here because defense counsel's prior prosecution of defendant was in an unrelated case and had occurred more than 10 years prior.

**People v. Elkins**, 2019 IL App (1st) 161798 An attorney may not use the work product privilege to withhold his or her entire file from a former client. Where a defendant retains new counsel during criminal proceedings and signs a written release authorizing her trial file to be sent to successor counsel, prior counsel must turn over "undisputed" portions of that file. Counsel may still be able to withhold sensitive work product if the court determines it poses a substantial risk of physical harm, intimidation, annoyance, or embarrassment to any person or if the usefulness of disclosure is outweighed by any other factor. To do so, counsel must submit a privilege log, and defendant may then file a motion to compel asking the court to determine whether the withheld materials must be disclosed.

## §14-7

### Where Lawyer's Competency is Challenged

#### §14-7(a)

#### *Krankel* Proceedings

#### §14-7(a)(1)

#### Generally

### Illinois Supreme Court

**In re Jonathan T.**, 2022 IL 127222 After being adjudicated delinquent for multiple counts of aggravated criminal sexual assault, the minor underwent a sex offender evaluation, during which the evaluator asked "What kind of job is your lawyer doing?" The minor responded, "We don't talk. I'm never prepared for the stand. He does not answer calls." This exchange was included in the evaluator's final report.

The minor argued that the circuit court should have inquired into his complaints about counsel pursuant to **People v. Krankel**, 102 Ill. 2d 181 (1984). The Supreme Court agreed. The Court first confirmed that **Krankel** applies in delinquency proceedings. Like adult criminal defendants, juveniles facing delinquency proceedings have a constitutional right to effective assistance of counsel. But, unlike adult defendants, juveniles do not have the right to file a post-conviction petition and thus are without access to collateral review of their claims of ineffective assistance. Thus, due process requires application of the **Krankel** procedure in delinquency proceedings.

The Supreme Court also clarified that **Krankel** applies to retained counsel. A defendant has the right to the effective assistance of counsel, regardless of whether counsel is retained or appointed. And, the **Krankel** procedure is designed to protect that right. Thus there is no reason to limit it to appointed counsel. This was especially true in the instant case where the minor's family hired his attorney, and the minor's status as a juvenile with limited financial resources and limited experience in the justice system left him at a disadvantage with regard to his ability to simply discharge counsel and hire or request new counsel.

Finally, the Court concluded that the minor's statement to the evaluator was sufficient to trigger the court's duty to conduct a **Krankel** inquiry. The social investigation report, which included the sex offender evaluation, is similar to the pre-sentence investigation report (PSI) required in adult criminal proceedings. Inclusion of a claim of

ineffective assistance in a PSI is adequate to require a **Krankel** inquiry, and there is no reason to reach a different conclusion in the context of juvenile delinquency proceedings. The trial court should have inquired into the minor's complaint about counsel. Reversed and remanded with directions to conduct the required **Krankel** inquiry.

**People v. Jackson**, 2020 IL 124112 The trial court erred in allowing the State's adversarial participation at the **Krankel** hearing. Such error is not structural, however, and therefore automatic reversal is not required. Instead, the error can be found harmless. Here, despite the State's participation, the **Krankel** hearing still produced a neutral and objective record which demonstrated that defendant's ineffective assistance claim lacked merit. Thus, the error was harmless, and remand for the appointment of new counsel was not required.

**People v. Bates**, 2019 IL 124143 When defense counsel makes a post-trial admission, either implicitly or explicitly, to potentially ineffective assistance, a trial court has no obligation to conduct a preliminary inquiry pursuant to **Krankel** to determine if new counsel is required. The **Krankel** inquiry is triggered only by *pro se* claims of ineffective assistance of counsel, or by claims of ineffectiveness made by counsel at defendant's direction. The court explicitly overruled **People v. Williams**, 224 Ill. App. 3d 517 (1st Dist. 1992), and **People v. Hayes**, 229 Ill. App. 3d 55 (1st Dist. 1992).

**People v. Custer**, 2019 IL 123339 The Supreme Court refused to extend the procedures established in **Krankel** to post-conviction proceedings. Thus, when petitioner complained after the third-stage dismissal of his petition that his post-conviction attorney failed to call a witness, the circuit court was under no obligation to conduct a preliminary inquiry into whether new counsel was necessary to litigate the claim of unreasonable assistance. The limited right to reasonable assistance of post-conviction counsel did not warrant the expenditure of judicial resources that would be required to impose **Krankel** on post-conviction courts.

**People v. Ayres**, 2017 IL 120071 Following his guilty plea and the imposition of sentence, defendant mailed a *pro se* petition to withdraw guilty plea and vacate sentence alleging "ineffective assistance of counsel," but without including any supporting facts or explanation as to why counsel had been ineffective. The circuit court never considered or ruled on defendant's petition.

The Illinois Supreme Court, with three justices dissenting, held that defendant's express but bare allegation of ineffectiveness without any factual support or explanation was sufficient to trigger a **Krankel** inquiry. The claim need not include facts or specific examples since it is the purpose of the inquiry itself to give the defendant an opportunity to develop the underlying factual basis of the claim. Additionally, judicial economy is served by requiring a **Krankel** hearing since it will facilitate the trial court's full considerations of defendant's claims when the facts and circumstances are much clearer "in the minds of all involved," and thereby potentially limit issues on appeal.

The court rejected the State's argument that this would put an undue burden on trial courts to "minutely scrutinize" every *pro se* filing, noting that **Krankel** was limited to post-trial motions.

**People v. Jolly**, 2014 IL 117142 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.

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.”

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 court rejected the argument that the State’s participation in the **Krankel** hearing was harmless beyond a reasonable doubt. The appropriate remedy was to remand the cause for a new **Krankel** inquiry without the State’s adversarial participation.

**People v. Patrick**, 2011 IL 111666 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.

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.

**People v. Jocko**, 239 Ill.2d 87, 940 N.E.2d 59 (2010) 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.”

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."

**People v. Taylor**, 237 Ill.2d 68, 927 N.E.2d 1172 (2010) 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.

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 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."

**People v. Moore**, 207 Ill.2d 68, 797 N.E.2d 631 (2003) 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.

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.

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.

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).

### Illinois Appellate Court

**People v. Harvey**, 2025 IL App (4th) 230523 A trial court does not violate **Krankel** if it responds to a *pro se* motion alleging trial counsel's ineffectiveness by appointing a new attorney rather than conducting a preliminary inquiry. Here, defendant argued that the court skipped the required first step in the **Krankel** process by immediately appointing counsel upon the filing of defendant's *pro se* post-trial motion alleging counsel's ineffectiveness. The appellate court rejected this argument because the point of the initial inquiry is to determine whether a new attorney is required; a preliminary inquiry would result in either appointment of new counsel or a finding that the *pro se* motion lacked merit. A defendant who receives a new attorney, who pursues his claims of ineffectiveness, as was the case here, has no **Krankel** claims for appeal.

**People v. Boose**, 2025 IL App (4th) 231467 A jury found defendant guilty of murder. During deliberations, the trial court informed the parties that it was bothered by the fact that counsel did not move to redact a portion of defendant's videotaped interrogation, showing he requested an attorney, and that the interrogating officer responded by asking why defendant needed an attorney if he didn't commit the crime. The court decided that, in the event of a guilty verdict, it would poll the jury as to whether the request for counsel influenced the verdict. The jury issued its guilty verdict, and the court polled the jury. Each juror stated that the request for counsel did not affect his or her decision.

After the verdict, defendant alleged counsel's ineffectiveness, arguing that counsel failed to move to redact the portion of the videotaped interrogation showing he requested an attorney. The trial court found counsel's performance deficient, and appointed a new attorney



to file a post-trial motion. At the hearing on the motion, the trial court concluded that, while counsel performed unreasonably, defendant could not show prejudice.

On appeal, defendant argued that the trial court should have ordered a new trial once it determined that counsel performed unreasonably. The appellate court disagreed, holding that, at an adversarial evidentiary hearing conducted pursuant to **Krankel**, a defendant is entitled to relief only by establishing both prongs of the **Strickland** analysis. Here, the trial court did not err in finding a lack of prejudice. The appellate court first found, however, that the decision to poll the jury on this question was arguably improper. Rule 606(b) allows for three areas of inquiry during jury polling, aside from the typical polling to ensure unanimity. Nothing in the rule authorizes asking the jury whether a particular piece of admitted evidence contributed to its verdict. Moreover, the polling here was inadequate, as it could not reveal whether the improper evidence impacted the verdict on a subconscious level. Nevertheless, the appellate court found a lack of prejudice given the “plethora of eyewitness testimony, circumstantial evidence, and forensic evidence” proving defendant’s guilt.

**People v. Maury, 2025 IL App (4th) 220887** The appellate court held that where a defendant is appointed new counsel to represent him in post-trial proceedings pursuant to **People v. Krankel, 102 Ill. 2d 181 (1984)**, new counsel is not required to present all non-frivolous claims in order to provide objectively reasonable performance, disagreeing with **People v. Downs, 2017 IL App (2d) 121156-C**.

Rather, **Krankel** counsel’s performance is judged under the traditional standard for assessing claims of ineffective assistance of counsel, including the strong presumptions that counsel’s conduct was within the wide range of that which is reasonably professional and that the challenged action or inaction may have been the product of sound trial strategy. Under the traditional ineffective-assistance analysis, counsel’s decision not to present all of a defendant’s non-frivolous claims will only be deemed ineffective where counsel’s performance was deficient and defendant was prejudiced by that performance. Here, even assuming counsel performed deficiently, defendant could not meet the prejudice standard, and thus his claim of ineffective assistance of post-trial counsel was rejected.

**People v. Teen, 2023 IL App (5th) 190456** In ruling on defendant’s *pro se* post-trial motion alleging ineffective assistance of counsel, the trial court specifically identified two issues required further litigation, although defendant had raised other issues. The court appointed a new attorney who, while cross-examining a witness, asked a question about verdict forms, which were not mentioned in the *pro se* motion. The court warned counsel to stick to the two claims at issue. On appeal, defendant argued that the court erred in precluding counsel from raising the verdict form issue.

The trial court did not err when it limited the hearing to two claims. Nothing in **Krankel** requires a court to hold an open-ended hearing once it finds possible neglect on a certain claim. Nor did the court err when refused to hear a new claim raised by counsel during a **Krankel** hearing. Counsel has neither a duty nor a right to raise issues outside of what was contained in the post-trial motion or advanced for a **Krankel** hearing. Furthermore, counsel merely asked a question about the verdict forms during cross-examination, and made no other indication that he intended to raise an independent issue relating to the verdict forms.

**People v. Anderson, 2023 IL App (4th) 220357** Defendant entered a fully negotiated guilty plea and was sentenced to 30 months of probation. More than two years later, defendant’s

probation was revoked, and she was sentenced to four years of imprisonment. Following imposition of that prison sentence, defendant filed a *pro se* motion alleging ineffective assistance of plea counsel. The trial court initially appointed substitute counsel pursuant to **Krankel**, but subsequently struck defendant's *pro se* motion as untimely. The appellate court affirmed, concluding that the circuit court lacked jurisdiction to hold **Krankel** proceedings because defendant failed to file a motion within 30 days of the plea. Further, because the court lacked jurisdiction, its order appointing substitute counsel pursuant to **Krankel** was void, so the appellate court vacated that order.

**People v. Patton**, 2022 IL App (4th) 210561 A few days after defendant was convicted at a stipulated bench trial, the judge scheduled a hearing on the belief that he was required to admonish defendant regarding his right to testify but had failed to do so. At the hearing, defendant alleged that he had wanted to testify and he believed his testimony would have changed the outcome of his trial, but counsel failed to call him as a witness. The trial judge then recessed to chambers with the attorneys and then returned to the bench without additional comment on the matter and adjourned the proceedings. The issue was not further addressed on the record at any point. On appeal, defendant alleged that the trial court failed to conduct an adequate inquiry into this claim of ineffective assistance of counsel.

Where a defendant makes a *pro se* post-trial claim of ineffective assistance of counsel, either orally or in writing, the trial court must conduct a preliminary inquiry pursuant to **People v. Krankel**, 102 Ill. 2d 181 (1984). Generally, that inquiry should include some interchange between the court and trial counsel regarding the facts and circumstances of the allegedly ineffective representation. Whether the trial court conducted an adequate **Krankel** inquiry is a legal question subject to *de novo* review.

As the appellate court first noted, the trial court was not required to advise defendant of his right to testify or inquire whether he was knowingly waiving that right. Having done so appears to have triggered defendant's claim that he had wanted to testify. The court went on to find that because the trial judge abruptly ended the hearing, recessed to chambers, and then adjourned without further addressing the issue, the record was inadequate to fully assess the nature of defendant's claim. Ultimately, the court found that a preliminary **Krankel** inquiry was necessary, and the limited discussion that occurred here was inadequate to satisfy **Krankel**. The matter was remanded for a proper inquiry.

**People v. Daniel**, 2022 IL App (1st) 182604 Defendant filed a *pro se* post-trial motion which included allegations of ineffective assistance of counsel. At a post-trial hearing, however, defendant indicated that he wanted to withdraw his *pro se* pleading. The matter then proceeded solely on counsel's motion for new trial. Accordingly, the trial court did not err in not conducting a **Krankel** inquiry into defendant's claims about counsel. A trial court is not obligated to inquire into allegations of ineffective assistance of counsel where those claims are subsequently withdrawn in open court.

**People v. Palomera**, 2022 IL App (2d) 200631 The trial court erred when it failed to conduct a preliminary inquiry into defendant's post-trial *pro se* claims of ineffective assistance of counsel. Even though trial counsel withdrew and defendant retained a new attorney for post-trial motions, a trial court must still inquire into the *pro se* claims in order to comply with **Krankel**.

However, the Appellate Court found the error harmless. The *pro se* allegations involved two issues. The first issue was included in the new attorney's post-trial motion, and

was therefore fully litigated. The second claim, that defendant did not waive his right to a jury, was positively rebutted by the record.

**People v. Roberson, 2021 IL App (3d) 190212** The trial court failed to conduct an adequate **Krankel** inquiry. Defendant filed *pro se* post-trial and post-sentencing motions, both containing allegations of ineffective assistance of counsel. Instead of asking defendant about those claims, the court inquired only whether defendant wanted to proceed *pro se* or continue to be represented by counsel. And, the court did not ask any questions of counsel. Further, the appointment of new counsel to represent defendant post-sentencing did not cure the defect, where new counsel was not appointed for the purpose of investigating and presenting defendant's complaints about his original counsel. Instead, new counsel only pursued a challenge to the sentence that was imposed. Accordingly the Appellate Court remanded the matter to the trial court for a proper **Krankel** inquiry.

**People v. Sherman, 2020 IL App (1st) 172162** Defendant's pre-sentence investigation report contained a complaint about his attorney that should have triggered a **Krankel** inquiry. In a gun possession case, the defendant's guilt turned on constructive possession of a firearm that appeared to be in the possession of the passenger (it was found in the glove box, but an officer saw the passenger make furtive movements toward that glove box). Defendant did not testify at trial. In the PSI, defendant stated that his attorney did not discuss his potential testimony and that defendant wanted to testify that he did not know the passenger possessed the gun when he entered defendant's car. Although the complaint did not contain an explicit allegation of ineffectiveness, it sufficed to alert the court of the need to conduct an inquiry.

**People v. Kyles, 2020 IL App (2d) 180087** The need for a **Krankel** inquiry is not obviated just because defendant obtains new counsel after filing a complaint about his original counsel. A proper inquiry into defendant's *pro se* complaints is required both to weed out frivolous claims of ineffective assistance and to define the scope of new counsel's representation, specifically to determine whether new counsel will act as general counsel or as **Krankel** counsel for the purpose of advancing defendant's claims of ineffective assistance. Thus, the general appointment of new counsel does not eliminate the trial court's obligation to make a preliminary inquiry into the merits of the *pro se* claims.

Here, new counsel abandoned all of defendant's claims of ineffective assistance, including at least one non-frivolous claim. The Appellate Court reversed and remanded for the appointment of new counsel to investigate defendant's claims of ineffective assistance and either present any nonfrivolous claims for further proceedings or file a motion to withdraw supported by a reasonably specific explanation of why defendant's claims lack merit.

**People v. Craig, 2020 IL App (2d) 170679** Statements defendant made during the pre-sentencing investigation ("PSI") were sufficient to trigger a **Krankel** inquiry. Defendant stated that "his lawyer did not have" certain witnesses "come to court to testify on his behalf." This statement was a clear enough claim because it faulted counsel for not taking an action. It was of no consequence that defendant voiced his complaint to the probation department rather than directly to the judge, as PSI reports are created specifically for the judge. While a trial court is not required to comb all filings for potential claims of ineffective assistance, here the record was clear that the judge had reviewed the PSI containing defendant's complaint about counsel.

**People v. Schnoor**, 2019 IL App (4th) 170571 Defendant's *pro se* post-trial complaints about certain evidentiary rulings did not amount to a *pro se* claim of ineffectiveness sufficient to trigger a **Krankel** inquiry. The complaints never mentioned counsel, even if they were implicit complaints about a failure to object. Moreover, when defense counsel mentioned that defendant did lodge an ineffectiveness complaint, the trial court engaged in a brief exchange with counsel sufficient to establish that the claim lacked merit, allowed defendant to elaborate, and therefore complied with **Krankel**.

**People v. Downing**, 2019 IL App (1st) 170329 During preparation of the pre-sentence investigation report (PSI), defendant made several complaints about trial counsel's representation. At the sentencing hearing, defendant did not mention his complaints, but the State pointed to defendant's PSI statements about counsel as indicative of a lack of remorse. On appeal, defendant argued that the trial court erred in not conducting a **Krankel** inquiry into defendant's claims of ineffective assistance, and the Appellate Court agreed. Where the trial court is made aware in open court of ineffective assistance claims, a **Krankel** inquiry is required regardless of whether the claims are brought to the court's attention by defendant or the prosecutor. In reaching this conclusion, the Appellate Court specifically declined to decide whether inclusion of the claims in the PSI, alone, is enough to require such an inquiry.

**In re T.R.**, 2019 IL App (4th) 190051 A **Krankel** inquiry was required where the minor's mother raised an issue of ineffective assistance of counsel in a letter to the court. Minors are entitled to the effective assistance of counsel, and while juvenile proceedings are not equivalent to criminal proceedings, the Court concluded that it would be anomalous if **Krankel** did not apply in juvenile proceedings. Although the mother's letter was sent after the adjudicatory hearing but before the court had announced its ruling, it was determined to be a "post-trial" claim of ineffective assistance sufficient to trigger **Krankel**. And, because parents have rights under the Juvenile Court Act and are considered parties to the proceedings, the mother had standing to assert the claim.

Because the Court remanded for **Krankel** proceedings, it did not reach the minor's other claims of error. To avoid confusion in the event of a subsequent appeal, the Court specifically retained jurisdiction over the case pursuant to Supreme Court Rule 366(a)(5).

**People v Rhodes**, 2019 IL App (4th) 160917 After defense counsel's motion for new trial was denied and defendant was sentenced, counsel informed the court that defendant had given him a *pro se* motion for new trial which included a claim of ineffective assistance of counsel. The court told defendant that if he filed the motion it would be stricken because defendant was represented by counsel and had already had a motion for new trial heard and denied. The trial court should have conducted a **Krankel** inquiry into defendant's *pro se* post-trial motion because it contained a claim of ineffective assistance. Defendant's failure to actually file the motion was not fatal where the court told him it would be stricken if he did. The appellate court reversed and remanded for **Krankel** proceedings.

**People v. Reveles-Cordova**, 2019 IL App (3d) 160418 The trial court did not exceed the bounds of a proper **Krankel** inquiry by referencing **Strickland** and ruling that counsel was not ineffective. During the inquiry the court asked defendant specific questions about counsel's actions and defendant's complaints and did not find that counsel neglected defendant's case, thereby satisfying its obligations under **Krankel**.

However, the court erred in refusing to inquire into defendant's subsequent claims of ineffective assistance solely because defendant had already had a **Krankel** hearing. Following its recent decision in [People v. Horman, 2018 IL App \(3d\) 160423](#), the Appellate Court concluded that public policy considerations require the opportunity to raise additional claims of ineffective assistance of counsel.

[People v. Roddis, 2018 IL App \(4th\) 170605](#) The trial court errs when it reaches the merits of a defendant's *pro se* post-trial claim of ineffective assistance of counsel, without first deciding whether to appoint counsel. Here, following remand for a *Krankel* hearing, the trial court held a hearing at which defendant appeared *pro se*, and ruled that the ineffectiveness claims lacked merit. It then appointed counsel to handle the remaining post-trial proceedings. The Appellate Court held that the court misunderstood the purpose of a *Krankel* hearing by deciding the merits before deciding the question of whether the claims were sufficient to require appointment of new post-trial counsel. In the interests of judicial economy, the court remanded again with instructions to bypass the *Krankel* inquiry and appoint a new attorney to take whatever action he or she deems appropriate regarding the ineffectiveness claims.

[People v. Bell, 2018 IL App \(4th\) 151016](#) A **Krankel** motion does not negate a notice of appeal under Rule 606(b), and therefore the trial court's failure to dispose of the motion and require a new notice of appeal did not deprive the Appellate Court of jurisdiction. Reaching the merits of defendant's **Krankel** claim, the Appellate Court found that the motion triggered the need for a preliminary inquiry under [People v. Ayres, 2017 IL 120071](#), by making an express assertion of counsel's ineffectiveness.

[People v. Curry, 2018 IL App \(1st\) 153635](#) Defendant's post-trial allegation that counsel was ineffective for failing to file a motion to suppress was sufficient to trigger the need for a **Krankel** inquiry. The trial court's question to counsel, "Based on what?" and counsel's response, "Based on **Miranda versus Arizona**" was an inadequate preliminary inquiry. The court should have asked the defendant or counsel to elaborate.

[People v. Custer, 2018 IL App \(3d\) 160202](#) As a matter of first impression, the Appellate Court concluded that a "**Krankel**-like procedure" should apply to *pro se* complaints of unreasonable assistance of post-conviction counsel at the third stage of post-conviction proceedings. The fact that the right to counsel in post-conviction proceedings is statutory, rather than constitutional, does not defeat the usefulness of a **Krankel** inquiry in post-conviction proceedings. Such an inquiry allows the circuit court to appoint new counsel if warranted, develops a record for review, and limits issues on appeal.

Defendant claimed post-conviction counsel provided unreasonable assistance by failing to call a specific witness at the third-stage evidentiary hearing. At a hearing on the motion to reconsider, that same post-conviction counsel stood on defendant's motion, and the court denied it. The Appellate Court remanded for a **Krankel**-like inquiry to determine if new counsel should be appointed to represent defendant on his claim of unreasonable assistance of post-conviction counsel.

[People v. Darr, 2018 IL App \(3d\) 150562](#) Following trial and sentencing, defendant submitted a single *pro se* filing containing both a timely notice of appeal and allegations of ineffective assistance of trial counsel. The Appellate Court rejected the argument that defendant's *pro se* complaints about counsel should be construed as a timely post-trial motion



and that Rule 606(b) should apply to strike the notice of appeal and return jurisdiction to the trial court to consider the ineffectiveness claims. Relying on the statement in [People v. Patrick, 2011 IL 111666](#), that once a notice of appeal is filed “the trial court loses jurisdiction of the case and may not entertain a **Krankel** motion,” the Appellate Court refused defendant’s request to remand for a **Krankel** inquiry.

[People v. Peters, 2018 IL App \(2d\) 150650](#) Following denial of counsel’s motion for new trial, defendant filed a *pro se* motion alleging ineffective assistance of counsel. The prosecutor noted the motion’s filing, suggested that the court could assess counsel’s performance independently, and stated, “I believe that he did receive adequate representation.” The trial judge interrupted the prosecutor’s discussion of defendant’s claims without ruling on the motion. A **Krankel** hearing was held a week later. The prosecutor did not participate in that hearing, and defendant’s motion was denied by the court. The Appellate Court concluded that the prosecutor’s statements in court a week earlier amounted to *de minimis* participation and did not invalidate the **Krankel** hearing.

[People v. Fein, 2017 IL App \(1st\) 152091](#) The trial court failed to hold a sufficient preliminary inquiry into defendant’s *pro se* post-trial **Krankel** motion. Defendant, who was charged with armed robbery and convicted of the lesser-included offense of theft, alleged that trial counsel was ineffective for requesting the lesser-included offense instruction. Although defendant initially told the court that he could not argue his motion due to recent head surgery, once the court found defendant fit for sentencing it should have inquired into defendant’s claims. The Appellate Court remanded for a preliminary **Krankel** inquiry.

[People v. Branch, 2017 IL App \(5th\) 130220](#) At his sentencing hearing, defendant made a statement in allocution. The transcript of defendant’s statement stated that it was unintelligible and unable to be transcribed. The trial court thanked defendant for his statement and then imposed sentence, but made no inquiry into any claims of ineffective assistance of counsel. Approximately a year and a half later, defendant filed a letter addressed to the State Appellate Defender making numerous allegations of ineffective assistance of trial counsel. Defendant claimed this written statement was his statement in allocution which he read at sentencing.

The Appellate Court held that the trial court erred by not conducting an inquiry into defendant’s claims of ineffective assistance. The Appellate Court noted that defendant alleged that he told the trial court about his claims, but for “reasons not apparent, the court reporter was unable to transcribe defendant’s statement,” and thus the reviewing court was unable to see them. But once defendant brought his claims to the trial court’s attention, it was incumbent upon the trial court to conduct an inquiry into those claims and thus create a record for review. Had the court conducted such an inquiry here, the Appellate Court would have had a sufficient record to determine whether defendant made a sufficient showing of ineffectiveness.

[People v. Lobdell, 2017 IL App \(3d\) 150074](#) Where the defendant raises a *pro se* post-trial claim of ineffective assistance of counsel, the trial court must make a preliminary inquiry to examine the factual basis of the claim. If the allegations show possible neglect of the case, new counsel must be appointed to represent defendant in a full hearing on his *pro se* claims.

In order to trigger a preliminary inquiry, the defendant must clearly bring his or her claim to the court’s attention. The claim does not need to be supported by facts or specific examples, as the primary purpose of the preliminary inquiry is to give the defendant a chance

to flesh out the claim and allow the court to determine whether new counsel must be appointed.

Defendant made a sufficient allegation of ineffective assistance of counsel to trigger a preliminary examination. Defendant claimed in a letter that was written before sentencing that he had been arrested in violation of the Fourth and Fifth Amendments and that he did not know why his attorney had not raised these issues during trial. Defendant not only sent the letter to the trial court but also read the letter aloud at the sentencing hearing.

The Appellate Court concluded that although defendant did not use the exact phrase “ineffective assistance of counsel,” his allegations clearly raised an ineffective assistance of counsel issue that the circuit court should have addressed. The cause was remanded for the trial court to conduct an appropriate hearing.

**People v. Morgan**, 2017 IL App (2d) 150463 A trial court is not obligated to conduct a **Krankel** hearing when defendant makes his claims before trial. But the trial court is not precluded from addressing defendant’s pretrial claims, and regardless of whether a **Krankel** hearing is held before or after trial, the operative concern is whether the trial court conducted an adequate hearing.

Prior to trial, defendant made a motion to discharge his counsel alleging ineffective assistance. Under questioning by the court, defendant stated that his lawyer was not putting any effort into getting him a lower sentence. The court stated that he had observed defendant’s counsel and thought she was representing him “to the fullest of her abilities.” The court denied defendant’s motion and the case went to trial.

The Appellate Court held that although the trial court inquired into defendant’s claim of ineffective assistance, that inquiry was inadequate since it did not address the factual basis of defendant’s claim. The trial court asked defendant if there was anything specific counsel failed to do and confirmed that defendant believed counsel did not do enough to obtain a lower sentence. But the trial court stopped its inquiry too soon and failed to ask defendant how counsel failed to obtain a lower sentence. Instead, the trial court relied on its observations of counsel which were irrelevant since defendant’s claims were based on counsel’s out-of-court actions.

The case was remanded for further inquiry into defendant’s claims.

**People v. Murray**, 2017 IL App (3d) 150586 Under **People v. Krankel**, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), a post-trial claim of ineffective assistance of counsel does not automatically require that new counsel be appointed to proceed with the claim. Instead, the trial court must make a preliminary inquiry into the claim. If that inquiry reveals possible neglect of the case, new counsel must be appointed to pursue the claim at a full hearing.

The trial court’s determination that the defendant’s claim does not demonstrate possible neglect of the case will be reversed where that decision is manifestly erroneous. Manifest error is error which is plain, evident, and indisputable.

In this case, it was clear that defense counsel may have neglected the case. Defendant alleged that defense counsel told him that his mere presence in a hotel constituted residential burglary. Defense counsel implicitly admitted that before the guilty plea was entered, he told defendant that he committed residential burglary if he entered a hotel room, even though defendant claimed that his entry had been authorized. “Where . . . defense counsel affirmatively misinforms a defendant regarding the elements the State must prove to sustain a conviction, possible neglect . . . is evident.”

The trial court's denial of defendant's claim of ineffective assistance was reversed, and the cause was remanded with instructions to appoint new counsel and hold a full **Krankel** hearing.

**People v. Robinson**, 2017 IL App (1st) 161595 Where the trial court conducts a proper preliminary **Krankel** inquiry, the Appellate Court reviews the trial court's decision not to appoint new counsel under the manifest weight of the evidence standard.

Here, defendant complained that trial counsel failed to investigate a witness and failed to impeach the complainant by calling the investigating officers, whose police report suggested complainant made prior inconsistent statements. The Appellate Court found counsel had no duty to investigate the purported witness because defendant admitted that he had no contact information for the witness, his sister tried unsuccessfully to locate the witness already, and the witness, a possible co-offender, had no incentive to testify. Nor did counsel have a duty to investigate police witnesses based on a police report suggesting the complainant may have known the offenders, as counsel explained his strategic reason for not calling the officers and the report did not unambiguously reveal any information helpful to the defense. The trial court did not err in denying the **Krankel** motion.

**People v. Downs**, 2017 IL App (2d) 121156-C 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.

The trial court 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. 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 again, finding that defense counsel failed to assert nonfrivolous allegations of trial counsel's ineffectiveness.

Counsel appointed after a preliminary **Krankel** claim has been conducted is obligated to present defendant's nonfrivolous claims to the trial court. There is a distinction between a frivolous claim and a claim that is not frivolous but which is likely to be unsuccessful. A nonfrivolous claim is one which has at least an arguable basis in law or fact.

**Krankel** counsel did not provide adequate "representation" where he failed to present all nonfrivolous 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." Prejudice was presumed under **Cronic** because appointed counsel not only failed to present nonfrivolous issues but also explicitly argued against defendant's interests.

**Krankel** counsel must consult with defendant to determine the grounds for the 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.”

Where counsel appointed for the **Krankel** hearing believes that there are no nonfrivolous issues to argue, he or she must seek leave to withdraw and explain in a separate memorandum why there are no meritorious issues. Counsel may not argue at the **Krankel** hearing against the merits of defendant’s issues.

**People v. Mourning, 2016 IL App (4th) 140270** 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.

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.

**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.

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.

**People v. Jackson, 2016 IL App (1st) 133741** 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.

**People v. Shamhart**, 2016 IL App (5th) 130589 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.

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.

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.

**People v. Reed**, 2018 IL App (1st) 160609 When a defendant files a *pro se* post-trial motion alleging trial counsel's ineffectiveness, the trial court must make a preliminary inquiry into the basis for the claim. This rule applies even if trial counsel withdraws and the defendant hires a new attorney. Here, the Appellate Court remanded for a preliminary inquiry under **Krankel**, because the trial court took no action on defendant's *pro se* post-trial motion alleging trial counsel's ineffectiveness. Instead, the court's only response to the *pro se* motion was to allow trial counsel to withdraw. New counsel filed his own post-trial motion which did not raise defendant's claims, and therefore the *pro se* claims were never litigated.

**People v. Robinson**, 2015 IL App (1st) 130837 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.



Although the **Krankel** hearing in the present case occurred before the **Jolly** decision, **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.

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.

**People v. Washington, 2015 IL App (1st) 131023** 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 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.

**People v. Raney, 2014 IL App (4th) 130551** 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.

**People v. Boose, 2014 IL App (2d) 130810** 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.

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 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.

**People v. Flemming, 2015 IL App (1st) 111925-B** 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 the claims lack merit, it does not need to appoint new counsel. If the court finds that the claims show possible neglect, new counsel must be appointed to represent defendant on his claim of ineffectiveness.

Here, 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.

The Appellate Court disagreed. The questioning was conducted at the court's direction, was very brief, and directed solely at answering defendant's allegations. 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.

While 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.

**People v. Fields, 2013 IL App (2d) 120945** 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.

**People v. Fuller, 2013 IL App (3d) 110391** 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.

**People v. Buchanan, 2013 IL App (2d) 120447** 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.

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.

**People v. Gabrys, 2013 IL App (3d) 110912** 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.

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.

**People v. Willis, 2013 IL App (1st) 110233** 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 expected 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.

[People v. Mays](#), 2012 IL App (4th) 090840 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.

[People v. Dean](#), 2012 IL App (2d) 110505 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.

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.

**People v. McLaurin**, 2012 IL App (1st) 102943 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.

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.

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.

**People v. Remsik-Miller**, 2012 IL App (2d) 100921 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.

**People v. Whitaker**, 2012 IL App (4th) 110334 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."

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 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)).

Furthermore, the trial court was not required to inquire concerning claims which defendant raised in a letter to the trial judge. 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.

**People v. Washington**, 2012 IL App (2d) 101287 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. Cronin**, 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.

**People v. Tolefree**, 2011 IL App (1st) 100689 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.

**People v. Allen**, 409 Ill.App.3d 1058, 950 N.E.2d 1164 (4th Dist. 2011) 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.

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.

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.

**People v. Vargas**, 409 Ill.App.3d 790, 949 N.E.2d 238 (1st Dist. 2011) 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."

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.

**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.

**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.

**People v. Bomar**, 405 Ill.App.3d 139, 937 N.E.2d 1173 (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.

**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.

**People v. Jocko**, 389 Ill.App.3d 247, 906 N.E.2d 38 (1<sup>st</sup> Dist. 2009) 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.

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) 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. Rohlf**, 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. 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. 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").

**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."

## **§14-7(a)(2)**

### **New Counsel Required**

#### **Illinois Supreme Court**

**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).

#### **Illinois Appellate Court**

**People v. Alexander**, 2020 IL App (3d) 170829 The Appellate Court remanded for appointment of new counsel and the filing of new post-trial motions, where defendant's *pro se* post-trial claim of ineffectiveness showed possible neglect.

Prior to trial, the State had moved to bar the testimony of two witnesses who would testify that a third party, Ricky, admitted to committing the aggravated battery for which defendant was on trial. The court granted the State's motion, finding the testimony was hearsay. After his conviction, defendant filed a *pro se* post-trial motion alleging trial counsel's ineffectiveness for failing to seek admission of a recorded phone call in which Ricky admitted to the offense. Asked by the court if counsel was aware of this recording, counsel stated he was, but that he heard about it "late" and didn't want to ask for a continuance. The Appellate Court found potential neglect of the case and remanded for a hearing on whether counsel was ineffective for failing to move to admit the recording. Although not necessarily admissible, it could at least support an argument that the third-party admission was sufficiently reliable for use at trial, and therefore the defendant met the "potential neglect" standard.

The Appellate Court found further possible neglect in the counsel's failure to object to a video of the victim in the hospital. The video was introduced to show the victim's identification of defendant in a photo array presented by a detective. This identification had already been introduced through the testimony of both the victim and the detective, so it had little probative value. In the course of the video, a doctor entered and could be heard explaining to defendant the need for a catheter as a result of his having been shot in the penis, and that immediate action was required to avoid insertion of a metal rod to save his

urethra. Defendant's post-trial motion showed defense counsel potentially neglected his case by failing object to the video as substantially more prejudicial than probative under Rule 403.

**People v. Miller**, 2020 IL App (1st) 163304 When a defendant complained about his attorney at the post-trial motion stage, the trial court granted his request to proceed *pro se* to file new post-trial motions. The court also scheduled a **Krankel** hearing. While the trial court acted properly in admonishing defendant and allowing him to proceed *pro se* for post-trial motions, the court erred when it failed to inform defendant of his right to a new attorney for purposes of the **Krankel** hearing. Absent knowledge of his right to counsel for the **Krankel** hearing, defendant's waiver of counsel was not made knowingly and voluntarily. The Appellate Court remanded for further proceedings on the ineffectiveness claim.

**People v. Lawson**, 2019 IL App (4th) 180452 Trial court erred in refusing to appoint new counsel following a **Krankel** inquiry. Defendant challenged counsel's failure to call a known witness to impeach the State's key witness. Although not expressing an opinion on the ultimate merits of defendant's claim, the Appellate Court found that defendant's allegations could support a finding of ineffective assistance thereby requiring new counsel. The matter was remanded for further proceedings.

**People v. Wilson**, 2019 IL App (4th) 180214 After remand for a **Krankel** inquiry, the trial court discussed defendant's *pro se* claims of ineffective assistance of counsel with defendant and trial counsel, then decided the claims lacked merit. The Appellate Court held that this proceeding skipped the initial step of determining whether defendant's claims established "possible neglect" warranting appointment of a new attorney. The court remanded again, and in the interests of judicial economy, ordered appointment of new counsel to fully investigate defendant's claims of ineffectiveness.

**People v. Brown**, 2017 IL App (3d) 140921 Prior to sentencing, defendant sent a letter to the court stating that he wanted to appeal his conviction. One reason was that a "witness of mine was not evoked to the court." The court refused to consider defendant's letter because he was represented by counsel and it was premature.

At sentencing, in her oral motion to set aside the verdict, defense counsel adopted the claims in defendant's letter. She further stated that "I wouldn't know necessarily there's anything of substance in there," but there was an allegation about a witness that she believed was the result of "communication issues." Counsel explained that in preparation for trial she asked defendant if he had any witnesses he wanted to call. Defendant mentioned two cousins who were occurrence witnesses, but did so in a manner that led counsel to believe that there was only one witness and that she could not be located, so neither witness was called. Defendant believed both witnesses would be able to testify to his innocence, but counsel did not offer any explanation about their possible testimony.

The trial court found that miscommunication was not a proper basis to set aside a verdict and denied the motion. On appeal, defendant argued that his counsel had a *per se* and actual conflict of interest when she argued her own ineffectiveness. The Appellate Court noted that decisions are split as to whether counsel's allegation of her own ineffectiveness is a *per se* conflict of interest, but that it didn't need to reach that issue because under the facts of this case counsel had an actual conflict of interest.

Defense counsel's motion to set aside the verdict was premised on a single issue: her own ineffectiveness in failing to call witnesses. To prevail on this claim, counsel needed to

show that her performance was deficient and that but for that deficient performance there was a reasonable likelihood that the result of trial would have been different. To establish prejudice in such situations, a defendant must present affidavits showing what testimony the witnesses would provide. Without these affidavits, there is no way to know whether the missing testimony would have impacted the outcome of trial.

Counsel failed to make any reasonable effort with respect to either deficient performance or prejudice. Instead of arguing that her performance had been deficient, counsel placed the blame on miscommunication. And counsel failed to provide any affidavits about or even describe the cousins' expected testimony. Absent such evidence, the motion was fatally flawed. The court concluded that these clear and obvious defects in counsel's performance were attributable to the conflict of interest inherent in arguing her own ineffectiveness.

The court vacated the denial of defendant's post-trial motion and the cause was remanded for the appointment of conflict-free counsel.

**People v. Murray**, 2017 IL App (3d) 150586 Under **People v. Krankel**, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), a post-trial claim of ineffective assistance of counsel does not automatically require that new counsel be appointed to proceed with the claim. Instead, the trial court must make a preliminary inquiry into the claim. If that inquiry reveals possible neglect of the case, new counsel must be appointed to pursue the claim at a full hearing.

The trial court's determination that the defendant's claim does not demonstrate possible neglect of the case will be reversed where that decision is manifestly erroneous. Manifest error is error which is plain, evident, and indisputable.

The Appellate Court concluded that in this case, it was clear that defense counsel may have neglected the case. Defendant alleged that defense counsel told him that his mere presence in a hotel constituted residential burglary. Defense counsel implicitly admitted that before the guilty plea was entered, he told defendant that he committed residential burglary if he entered a hotel room, even though defendant claimed that his entry had been authorized. "Where . . . defense counsel affirmatively misinforms a defendant regarding the elements the State must prove to sustain a conviction, possible neglect . . . is evident."

The trial court's denial of defendant's claim of ineffective assistance was reversed, and the cause was remanded with instructions to appoint new counsel and hold a full **Krankel** hearing.

**People v. Demus**, 2016 IL App (1st) 140420 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.

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 cause was remanded for the appointment of new counsel and a hearing on defendant's *pro se* claim of ineffective assistance of counsel.

**People v. Downs**, 2016 IL App (2d) 121156-C 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.

Counsel appointed after a preliminary **Krankel** claim has been conducted is obligated to present defendant's nonfrivolous claims to the trial court. There is a distinction between a frivolous claim and a claim that is not frivolous but which is likely to be unsuccessful. A nonfrivolous claim is one which has at least an arguable basis in law or fact.

**Krankel** counsel did not provide adequate "representation" where he failed to present all nonfrivolous 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." In addition, the court found that prejudice was presumed under **United States v. Cronic** because appointed counsel not only failed to present nonfrivolous issues but also explicitly argued against defendant's interests. **Cronic** allows prejudice to be presumed where counsel's effectiveness falls to such levels as to amount to no representation at all.

The Appellate Court also stressed that **Krankel** counsel must consult with defendant to determine the grounds for the 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."

Where counsel appointed for the **Krankel** hearing believes that there are no nonfrivolous issues to argue, he or she must seek leave to withdraw and explain in a separate memorandum why there are no meritorious issues. Counsel may not argue at the **Krankel** hearing against the merits of defendant's issues.

The lower court's denial of the **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 nonfrivolous claims supported by the record or the investigation.

**People v. Yaworski**, 2014 IL App (2d) 130327 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.

**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

#### **§14-7(a)(3)**

#### **New Counsel Not Required**

#### **Illinois Supreme Court**

**People v. Jackson**, 2020 IL 124112 The trial court erred in allowing the State's adversarial participation at the **Krankel** hearing. Such error is not structural, however, and therefore automatic reversal is not required. Instead, the error can be found harmless. Here, despite the State's participation, the **Krankel** hearing still produced a neutral and objective record which demonstrated that defendant's ineffective assistance claim lacked merit. Thus, the error was harmless, and remand for the appointment of new counsel was not required.



**People v. Roddis**, 2020 IL 124352 A defendant should receive new conflict-free counsel if the preliminary **Krankel** inquiry establishes possible neglect of his case. The trial court is free, however, to conclude that the claim lacks legal or factual merit as part of the inquiry.

Here, when reviewing defendant's *pro se* post-trial claim of ineffective assistance of counsel, the trial court conducted a "pre-inquiry **Krankel** hearing" to determine if the allegations were founded, at which point the court would appoint separate counsel and proceed to a "full-blown" **Krankel** hearing. At the "pre-inquiry," defendant, in the presence of defense counsel and the State, elaborated on his allegations, and defense counsel responded. The trial court ruled that the allegations did not "establish" ineffective assistance of counsel. The Appellate Court reversed, finding the trial court prematurely determined whether defendant could establish his claim on the merits, as defendant need only have shown "possible neglect" to receive appointment of new counsel.

The Supreme Court reversed the Appellate Court and held that its prior **Krankel** precedents do not preclude the trial court from examining the merits of a defendant's claim before appointing new counsel. Citing **People v. Chapman**, 194 Ill. 2d 186 (2000), the court held that a trial court may appropriately find a defendant's claim lacks legal or factual merit on its face and decline to appoint counsel. Claims may lack merit for reasons previously enumerated in **People v. Johnson**, 159 Ill. 2d 97 (1994), where they are: (1) conclusory, (2) misleading, (3) legally immaterial, or (4) pertaining solely to an issue of trial strategy, and claims may lack merit for other reasons as well. Here, the defendant's claims were either unfounded or pertained to trial strategy, and while the trial court may have used improper terminology when it found defendant did not "establish" ineffectiveness, rather than show possible neglect, the result was the same.

**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).

**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).

### Illinois Appellate Court

**People v. Bobo**, 2020 IL App (1st) 182628 The hearing on defendant's **Krankel** motion spanned multiple dates but was still a preliminary inquiry, even where court sought presentation of additional evidence on the merits of defendant's claim. The trial judge is

permitted to consider the merits of a **Krankel** claim, and defendant was not entitled to new counsel to assist him at the **Krankel** hearing.

**People v. Custer**, 2020 IL App (3d) 160202-B After declining to extend the **Krankel** procedure to claims of unreasonable assistance of post-conviction counsel, the Supreme Court remanded to the Appellate Court for consideration of defendant's remaining issues. On remand, the Appellate Court concluded that defendant could not succeed on his claims that post-conviction counsel had a conflict of interest and failed to zealously argue defendant's petition. Post-conviction counsel's decision not to call a certain witness at the evidentiary hearing was a matter of strategy. Because the underlying claim of unreasonable assistance lacked merit, there was no need to remand the matter to inquire into whether post-conviction counsel had a conflict of interest. Even if counsel had a conflict, petitioner would not be able to demonstrate prejudice because the underlying claim of unreasonable assistance lacked merit.

**People v. Lobdell**, 2019 IL App (3d) 180385 At a *Krankel* hearing, defendant failed to show possible neglect from trial counsel's failure to file a motion to suppress statements obtained following defendant's warrantless arrest. The police had probable cause to arrest defendant where the complaining witness identified him in a photo array and said she had used defendant's phone to call her grandmother, a detail which was corroborated by telephone records. That fact that the police entered defendant's fenced-in backyard to arrest him, without a search warrant or consent, did not invalidate the arrest. Defendant was on parole and therefore had a diminished expectation of privacy in his home.

**People v. Jackson**, 2018 IL App (5th) 150274 The State improperly participated during the preliminary inquiry into the defendant's post-trial ineffectiveness claim, but the participation was harmless. The Appellate Court rejected the State's contention that its participation was merely *de minimis*, because the State made arguments against the appointment of a new attorney for nearly two pages of transcript. But the court, finding a split of authority, interpreted **People v. Jolly**, 2014 IL 117142, as allowing for harmless error review. It found the State's participation harmless in this case because the defendant was able to make an objective record of his claims prior to the State's participation, and because the State did not make any points not already made by defense counsel himself.

Moreover, the trial court did not err in refusing to appoint a new attorney because defendant's allegations regarding uncalled witnesses pertained to trial strategy, and counsel's failure to inquire into the number of matching alleles found by the DNA expert, and to use prison population studies showing multiple matching profiles, would not have changed the fact that the expert testified to a product rule number of 1 in 48,000.

**People v. Tolefree**, 2011 IL App (1st) 100689 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.

## **§14-7(b)**

### **Where Defendant Files an ARDC Complaint or Lawsuit**

#### **Illinois Appellate Court**

**People v. Treadwell, 2022 IL App (1st) 191905** Defendant was deprived of reasonable assistance of post-conviction counsel where counsel failed to amend his petition to state a claim of ineffective assistance of appellate counsel in order to overcome *res judicata* concerns. On direct appeal, defendant raised an issue of ineffective assistance of trial counsel which alleged that counsel had neglected his case and failed to provide a vigorous defense because counsel was preoccupied with defending himself in pending ARDC proceedings. Defendant's conviction was affirmed. The amended post-conviction petition filed by counsel merely repeated the direct appeal claim. In defendant's *pro se* post-conviction pleadings, however, he had alleged that his trial counsel was actually "not allowed to practice law" at the time of his trial. Specifically, trial counsel's license had been suspended by the Illinois Supreme Court prior to defendant's trial and, while counsel had sought and obtained a stay of the suspension, he did so only with regard to his need to complete the representation of a client in another case, not defendant.

The appellate court agreed that defendant's *pro se* allegation of ineffective assistance was a different claim than that advanced on direct appeal and by post-conviction counsel. Post-conviction counsel should have amended the petition to allege that appellate counsel had been ineffective for failing to argue on direct appeal that trial counsel was *per se* ineffective because his law license had been suspended and he was not authorized to represent defendant under the stay of that suspension. The appellate court did not resolve the ultimate question of whether trial counsel was qualified to represent defendant on the date in question, but it did hold that there is a cognizable claim concerning that issue which post-conviction counsel failed to present. The matter was remanded for new second-stage proceedings, including the appointment of new counsel and leave to amend the petition.

**People v. Gilbert, 2013 IL App (1st) 103055** 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.

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.

**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. 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.

**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.

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