Y. RIGHT TO COUNSEL

Y.1. Constitutional and statutory requirements (6th Amendment; Ind. Const Art. 1, 13)

TITLE: Adams v. State
INDEX NO.: Y.1.
CITE: (5th Dist., 3-26-98), Ind. App., 693 N.E.2d 107
SUBJECT: Right to counsel - representation by law student at sentencing
HOLDING: At sentencing hearing, D was represented by third-year law student from public defender's office who had not participated in trial, was unprepared & unfamiliar with case, & was unsupervised by attorney. In view of lack of any meaningful supervision by attorney from public defender's office over law student's representation & coupled with law student's total lack of familiarity with case, D was effectively unrepresented at sentencing hearing. Because such lack of representation was not product of D's volition, sentencing hearing was conducted in violation of D's Sixth Amendment right to counsel. Held, judgment reversed & remanded for new sentencing hearing.

TITLE: Halbert v. Michigan
INDEX NO.: Y.1.
CITE: 545 U.S. 605, 125 S. Ct. 2582; 162 L.Ed. 2d 552 (2005)
SUBJECT: Indigent Defense, Appeals
HOLDING: A state may not refuse to provide counsel to indigent offenders seeking leave of court to appeal after guilty pleas. In criminal proceedings, a state must provide counsel to indigent Ds in a first appeal as a matter of right. Douglas v. California, 372 U.S. 353 (1963). However, the federal constitution does not require a state to provide appointed counsel to a D seeking second-tier discretionary appellate review to a state's highest court. Ross v. Moffitt, 417 U.S. 600 (1974).

TITLE: Jackson v. State
INDEX NO.: Y.1.
CITE: (4th Dist. 10/25/82) Ind. App., 441 N.E.2d 29
SUBJECT: Right to counsel/self-representation - general principles
HOLDING: Indigent criminal D has right to representation by legal counsel. 6th Amend.; Ind. Const. Art. 1, Section 13; Gideon v. Wainwright (1963), 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799; Moore 401 N.E.2d 676. Correlative to right of representation is right of D to waive assistance of counsel & represent self. Faretta v. CA (1975), 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562; Russell 383 N.E.2d 309. Waiver of counsel must be made voluntarily, knowingly & intelligently. Johnson v. Zerbst (1938), 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461; Morgan, App., 417 N.E.2d 1154. Waiver may not be implied from silent record. Wallace, App., 361 N.E.2d 159. Tr. Ct. must advise D of right to assistance of counsel & disadvantages of self-representation in clear & unambiguous language. Mitchell, App., 417 N.E.2d 364; McDandal, App., 390 N.E.2d 216. Appointment of stand-by counsel is appropriate prophylactic device when D assumes burden of conducting own defense. German 373 N.E.2d 880. Here, D was made aware of right to counsel & thoroughly informed of consequences of self-representation. D had previous experience in criminal justice system. Tr. Ct. appointed stand-by counsel for D, thus obviating many disadvantages. D was acquitted of one charge. Held, D's waiver of counsel was voluntary, intelligent & knowing.

RELATED CASES: Hopper, 957 N.E.2d 613 (Ind. 2011) (when D pleads guilty pro se, there is no mandatory advisement regarding the pitfalls of self-representation that must be given; rather, whether an advisement is given will be one factor in considering the voluntariness of the waiver of counsel and the plea); Hofferth, App., 856 N.E.2d 137 (where judge forced D to go to trial without an attorney & over his objections, App. Ct. remanded for a new trial in which D's right to counsel is treated with greater concern & less disdain); Stroud, 809 N.E.2d 224 (even after its assertion, right to self-representation may be waived through conduct indicating that D is vacillating on issue or has abandoned request altogether; here, there was some evidence that D requested to proceed *pro se* only to create issue for appeal; thus D waived his right to represent himself); Sherwood, 717 N.E.2d 131 (where D was competent to stand trial; made knowing, intelligent & voluntary waiver of his right to counsel in timely & unequivocal manner; & because he was denied actual control of case presented to jury, Tr. Ct.'s imposition of hybrid representation violated Sixth Amendment).

TITLE: Martinez v. Court of Appeal of California, Fourth Appellate District

INDEX NO.: Y.1.

CITE: 528 U.S. 152, 120 S. Ct. 684, 145 L.Ed.2d 597 (2000)

SUBJECT: Self-representation, appeals

HOLDING: A criminal D has no constitutional right to self-representation on appeal. This case is distinguished from Faretta v. California, 422 U.S. 806, where the Court held that a criminal D has the constitutional right to proceed at trial without counsel when he voluntarily and intelligently decides to do so. The Sixth Amendment does not guarantee a right to an appeal, and the historical evidence does not support a constitutional right to self- representation at the appellate stage.

TITLE: Shively v. State

INDEX NO.: Y.1.

CITE: (2nd Dist., 09-02-09), 912 N.E.2d 427 (Ind. Ct. App 2009)

SUBJECT: Failure to appoint counsel - court lacked sufficient information to conclude D was not indigent

HOLDING: Tr. Ct. erred in not appointing an attorney to represent D at trial. Court's duty to appoint competent counsel arises at any stage of the proceedings when D's indigency causes him to be without the assistance of counsel. Moore v. State, 401 N.E.2d 676 (Ind. 1980). Although there is no specific financial guideline for determination of indigency, counsel must be appointed if a D cannot employ an attorney without imposing substantial hardship on himself or his family. An indigency determination cannot be made on a superficial examination of income and property ownership but must be based on as thorough an examination of D's total financial picture as is practical. Id.

Here, Tr. Ct. failed to give required careful consideration of D's financial situation in either of the pre-trial hearings in which it denied appointment of counsel. There was a rough estimate of D's current earnings, but no examination of D's fixed obligations, child support or debt payments. His financial situation appeared to deteriorate between the first and second indigency hearings. Finally, it is telling that D was appointed counsel after trial but before sentencing and was also found indigent for purposes of appeal, at which time Tr. Ct. conducted a proper, more thorough examination of D. Held, judgment reversed and remanded.

TITLE: Simmons v. Kapture
INDEX NO.: Y.1.
CITE: 474 F.3d 869 (6th Cir. 2007); vacated and remanded en banc by 516 F.3d 450
SUBJECT: Halbert v. Michigan did not establish new rule regarding appointed counsel right
HOLDING: The Sixth Circuit Court of Appeals held that Halbert v. Michigan, 545 U.S. 605 (2005), clarifying the right to appointed counsel on a discretionary appeal did not announce a "new" rule of criminal procedure and thus, under Teague v. Lane, 489 U.S. 288 (1988), the rule applies retroactively on collateral review.

Halbert held that "the Due Process and Equal Protection Clauses require the appointment of counsel for Ds, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeal." The case was prompted by Michigan's attempt to save money on counsel appointments by making first-level appeals discretionary in cases involving plea-based convictions and then denying counsel to Ds seeking leave to appeal such convictions. The Court held that Halbert merely applied the rule first established in Douglas v. California, 372 U.S. 353 (1963), that a state must provide appointed counsel for indigent Ds in a first-level appeal from a conviction. Therefore, Petitioner in this case, who argued that Michigan should have provided him appointed counsel to represent him in the appellate process, was entitled to relief. A dissent was entered arguing that Halbert announced a new rule.

See also Talley v. State, 2007 S.C. LEXIS 19 (decided January 22, 2007) holding that Alabama v. Shelton, 535 U.S. 654 (2002), which established that the constitutional right to counsel extends to a D who receives a suspended sentence that may result in the actual deprivation of his liberty, announced a new "watershed" rule of criminal procedure that applies retroactively to cases that were final when it was announced.

Y. RIGHT TO COUNSEL

Y.1. Constitutional and statutory requirements (6th Amendment; Ind. Const Art. 1, 13)

Y.1.b. Misdemeanor

TITLE: Alabama v. Shelton
INDEX NO.: Y.1.b.
CITE: 535 U.S. 654, 122 S. Ct. 1764, 152 L.Ed.2d 888 (2002)
SUBJECT: Right to counsel, suspended sentences
HOLDING: A suspended sentence that may result in the deprivation of D's liberty may not be imposed unless D is offered the assistance of counsel. Where the State provides no counsel to an indigent D, the Sixth Amendment does not permit activation of a suspended sentence upon D's violation of the terms of probation.

RELATED CASES: Gideon v. Wainwright, 372U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963) (Sixth Amendment guarantee of the right to counsel applies in state cases through the 14th Amendment, as well as in federal cases per Johnson v. Zerbst, 304 U.S. 458); Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L.Ed.2d 530 (1972)(defense counsel must be appointed to indigent D in any criminal case that actually leads to imprisonment, even for a brief period); Scott v. Illinois, 440 U.S. 367, 99 S. Ct. 1158, 59 L.Ed.2d 383 (1979) (counsel need not be provided in cases where fines but not imprisonment are imposed).

N.B. The Indiana Constitution also guarantees the right to counsel in misdemeanor cases. See Morgan v. State, 417 N.E.2d 1154.

TITLE: Argersinger v. Hamlin
INDEX NO.: Y.1.b.
CITE: 407 U.S. 25 (1972)
SUBJECT: Right to counsel -- misdemeanor; threat of imprisonment
HOLDING: Sixth Amendment to United States Constitution extends right to counsel beyond its common-law dimensions. Here, D was indigent & charged in Florida with carrying concealed weapon, which is punishable by imprisonment up to six months, $1,000.00 fine, or both. At bench trial, D was unrepresented by counsel. He was convicted & sentenced to serve ninety days in jail & brought habeas corpus action in Florida Supreme Ct. Motion alleged deprivation of D's right to counsel as he was indigent layman unable to properly raise & present good & sufficient defenses to charge for which he was convicted. Florida Supreme Ct. held that right to court- appointed counsel extends only to trials for non-petty offenses punishable by more than six months in prison.

U.S. Supreme Ct. held that, absent knowing & intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial, because problems associated with misdemeanor & petty offense often require presence of counsel to insure accused gets fair trial. In addition, prospect of imprisonment for however short time will seldom be viewed by accused as trivial or petty matter & may well result in quite serious repercussions affecting career & reputation. Baldwin, 399 U.S. 66. Held, discharge of writ of habeas corpus reversed.

RELATED CASES: Morgan, 417 N.E.2d 1154 (there is right to counsel under Ind. Const., even if charge does not result in imprisonment); Scott, 440 U.S. 367 (right to counsel in misdemeanor cases limited to cases where D actually sentenced to jail; central premise of Argersinger is that actual imprisonment is penalty different in kind from fines or mere threat of imprisonment; Sixth & Fourteenth Amendments to Constitution require only that no indigent criminal D be sentenced to term of imprisonment unless State has afforded him right to assistance of appointed counsel in his defense).

Y. RIGHT TO COUNSEL

Y.1. Constitutional and statutory requirements (6th Amendment; Ind. Const Art. 1, 13)

Y.1.c. Infraction

TITLE: Wirgau v. State
INDEX NO.: Y.1.c.
CITE: (4th Dist. 12/22/82) Ind. App., 443 N.E.2d 327
SUBJECT: Right to counsel - infraction
HOLDING: Tr. Ct. did not err in failing to advise D of full panoply of safeguards guaranteed every criminal D where D was charged with a traffic infraction rather than a misdemeanor traffic offense. Here, D was charged with operating an overweight vehicle on the IN Toll Road. He pled guilty & was fined $3,500. On appeal he contends the county Ct. should have advised him of the following rights before accepting his guilty plea: to counsel; to a trial; to face witnesses against him; to have compulsory process; to require state to prove its case; & not to be compelled to testify against himself. Ct. finds Ind. Code 34-4-32-1 thru 5 provides that infractions are civil proceedings & makes no provision for any criminal procedures. Held, no error.

Y. RIGHT TO COUNSEL

Y.1. Constitutional and statutory requirements (6th Amendment; Ind. Const Art. 1, 13)

Y.1.d. Juvenile (Ind. Code 31-6-7-2)

TITLE: A.M. v. State
INDEX NO.: Y.1.d.
CITE: (8/20/2018), 109 N.E.3d 1034 (Ind. Ct. App 2018)
SUBJECT: Juvenile IAC claim in post-adjudication proceeding governed by due process clause, not Strickland
HOLDING: In an issue of first impression, the Court ruled that the juvenile's claim that counsel was ineffective in a modification of disposition proceeding was governed by the Due Process Clause of the 14th Amendment, not the more stringent standard of Strickland v. Washington.

The juvenile ("A.M.") has a long history of delinquent adjudications and a legion of probation violations. Thus, at the State's request, the trial court modified his placement to the juvenile division of DOC. On appeal, A.M. argued his attorney was ineffective because, according to A.M., he made no effort to advocate for him. Indiana courts have not squarely addressed whether the two-pronged Strickland test or the due process test is the proper test to analyze the effectiveness of a juvenile's attorney during pre-adjudication and post-adjudication proceedings. Compare S.T. v. State, 764 N.E.2d 632, 634-35 (Ind. 2002) (Strickland governed claim that counsel was ineffective during adjudication proceeding). The seminal case In re Gault did not answer this question: "[W]e are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process." Id., 387 U.S. 1, 13-14 (1967).

Strickland requires a D to show deficient performance and prejudice. The due process standard is less exacting: "If counsel appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court, it is not necessary to judge his performance by rigorous standards." Jordan v. State, 60 N.E.3d 1062, 1068 (Ind. Ct. App. 2016). This less stringent standard has been applied to assess counsel's performance in probation revocation proceedings. Id. at 1069.

A modification of disposition proceeding is akin to a probation revocation proceeding. Accordingly, A.M.'s IAC claim is analyzed under the less stringent due process standard, and A.M's counsel satisfied that standard. Contrary to A.M.'s claim, counsel did promote A.M.'s interests. He negotiated a stipulation with the State to redact three allegations in support of modification; these allegations were that A.M. possessed an alcoholic beverage, consumed an alcoholic beverage on a school bus, and committed burglary. These alleged acts were not only violations of A.M.'s supervised probation rules but also criminal conduct that could have resulted in additional true findings. Even under Strickland, counsel was not ineffective. To the extent A.M. focuses on the result, "the harshest disposition available," as evidence of ineffective assistance, he presupposes that any client who receives the maximum sentence or harshest penalty allowed by law necessarily received ineffective assistance.

D also claims that counsel's closing statement shows that he abandoned A.M. Counsel said: "I am befuddled by the actions of [A.M.]. I think he's a good kid. I think he's got a bright future ahead of him. He's smart, has some real opportunities, but the path he's going down is leading him to prison and he's

just going to end up wallowing away there, probably spend most of his life there. You don't break into people's houses, you don't steal guns, don't follow the rules, get kicked out of school. You don't get an education and that's going to end up being his downfall. I think except for being kicked out of [school], he could have had an opportunity here. He could have been on home detention and shown everybody that he could do right. Instead he's going to go to the DOC, go to Logansport for an evaluation, do his six months, eight months or a year, as long as he does right, and hopefully will come back and have learned a lesson. I have a lot of hope for [A.M.]. I hope he understands that what's going to happen here is not a punishment but rather a chance to get a leg up in life and to try to do the right thing. I hope he does good, and when he comes back he can really grow and be a good kid." These remarks did not violate A.M.'s right to the effective assistance of counsel, whether under due process or Strickland. Under a due process analysis, counsel appeared at a procedurally fair modification hearing and negotiated a redaction of three allegations against A.M., all involving criminal conduct. Thus, A.M. has failed to show he was denied his constitutional right to counsel during his disposition modification proceeding. Held, judgment affirmed.

TITLE: D.H. v. State
INDEX NO.: Y.1.d.
CITE: (4th Dist., 11-25-97), Ind. App., 688 N.E.2d 221
SUBJECT: Right to counsel - juvenile proceedings
HOLDING: Tr. Ct.'s disposition was invalid where juvenile D had no attorney at disposition hearing & D had not waived his right to counsel. Juvenile is entitled to assistance of counsel at every stage of juvenile proceedings, including disposition hearing. Bridges, 299 N.E.2d 616. Record must show either that juvenile was represented by counsel or that juvenile waived representation. Adams, App., 411 N.E.2d 160. Juvenile's waiver of right to counsel must be freely & voluntarily given. M.R., App., 605 N.E.2d 204.

Here, record showed that public defender appeared for D's denial hearing. Record was devoid, however, of any showing that counsel appeared at D's disposition hearing or that he waived his right to counsel. Held, disposition reversed & remanded for new disposition hearing.

RELATED CASES: A.A.Q., 958 N.E.2d 808 (Ind. Ct. App 2011) (even though Tr. Ct.'s advisement fell below "better practices," juvenile and his parents knowingly and intelligently waived the juvenile's right to counsel); A.S., 923 N.E.2d 486 (Ind. Ct. App 2010); R.W., 901 N.E.2d 539 (Ind. Ct. App. 2009 (because juvenile and mother were not provided the opportunity for meaningful consultation before they waived his right to counsel at the initial hearing at which juvenile admitted allegations, juvenile was denied his right to counsel & his adjudication must be reversed); N.M., App., 791 N.E.2d 802 (D did not knowingly or voluntarily waive her right to counsel under Ind. Code 31-32-5-1, because neither she nor her mother was informed that counsel would be appointed to represent her if they were unable to afford counsel); J.W., App., 763 N.E.2d 464 (Juvenile Ct. erroneously conducted fact-finding hearing by allowing defense counsel to withdraw after Juvenile D informed Ct. that he wished to have counsel during hearing; D was never adequately advised of nature, extent, & importance of right to counsel & dangers of self-representation).

TITLE: J.G. v. State
INDEX NO.: Y.1.d.
CITE: (10/2/2017), 83 N.E.3d 1263 (Ind. Ct. App 2017)
SUBJECT: Juvenile had right to counsel at modification hearing
HOLDING: Where J.G was not represented by counsel and did not waive his right to counsel at the hearing to modify his disposition, the juvenile court erred by modifying J.G.'s disposition such that J.G. was made a ward of the Department of Correction. The State concedes J.G. was entitled to counsel at the hearing. Criminal Rule 25(B)(3)(a) states that "counsel for the child must be appointed . . . before convening any hearing in which the court may find facts (or the child may admit to facts) on the basis of which the court may impose . . . wardship of the child to the Department of Correction[.]" (Emphases added). Criminal Rule 25(C) provides that, following the appointment of counsel under subsection (B), any waiver of the right to counsel shall be made in open court, on the record and confirmed in writing, and in the presence of the child's attorney. Here, it is undisputed both that J.G. was not represented by counsel and that he did not waive his right to counsel. Held, judgment reversed and remanded for new modification hearing.

TITLE: Matter of E.P.
INDEX NO.: Y.1.d.
CITE: (5th Dist., 7-20-95), Ind. App., 653 N.E.2d 1026
SUBJECT: Right to counsel - indigent parents in CHINS proceedings
HOLDING: Indigent parent in CHINS proceeding may qualify for Ct.- appointed counsel under Ind. Code 34-1-1-3, which provides for appointment of counsel to persons who do not have "sufficient means to prosecute of defend action." Statute is not in irreconcilable conflict with Ind. Code 31-6-7-2(b), which provides discretionary right to appointment of counsel in juvenile Ct. proceeding regardless of financial status. In holding that statutes can be harmonized, Ct. noted that indigent parent may qualify for Ct.-appointed counsel under one statute but not the other. Here, record did not indicate that inquiry was made to determine parent's financial resources. On remand, if Tr. Ct. determines that parent does not have resources to hire private counsel, then counsel must be appointed for her & paid at public expense. Held, judgment affirmed & cause remanded.

RELATED CASES: G.P, 4 N.E.3d 1158 (Ind. 2014) (because mother was denied her statutory right to counsel during underlying CHINS proceedings, which directly flowed into termination of her parental rights and subsequent adoption proceedings, granting of DCS's petition to terminate mother's parental rights violated her right to due process).

Y. RIGHT TO COUNSEL

Y.1. Constitutional and statutory requirements (6th Amendment; Ind. Const Art. 1, 13)

Y.1.e. Other

TITLE: Harbison v. Bell
INDEX NO.: Y.1.e.
CITE: (04-01-09), U.S., 07-8521, 129 S. Ct. 1481 (2009)
SUBJECT: Right to federally appointed counsel for offenders seeking state clemency
HOLDING: Indigent death row inmates who failed in their attempts to obtain federal habeas corpus relief are entitled to federally provided counsel to pursue state clemency claims. Court interpreted 18 U.S.C. ' 3599 to authorize federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation. A certificate of appealability pursuant to 28 U.S.C. ' 2253(c)(1)(a) is not required to appeal an order denying a request for federally appointed counsel under ' 3599 because ' 2253(c)(1)(a) governs only final orders that dispose of a habeas corpus proceeding's merits. Held, Sixth Circuit Court of Appeals' opinion at 503 F.3d 566 reversed. Roberts, C.J., and Thomas, J., CONCURRING with separate opinions; Scalia, J., joined by Alito, J., CONCURRING IN PART AND DISSENTING IN PART, agreed that D is not required to obtain a certificate of appealability, but disagreed with majority's interpretation of statute to provide federally-appointed counsel to pursue state clemency.

TITLE: In Re Adoption of A.G.
INDEX NO.: Y.1.e.
CITE: (12/9/2016), 64 N.E.3d 1246 (Ind. Ct. App 2016)
SUBJECT: Right to counsel in adoption proceedings
HOLDING: The Tr. Ct. abused its discretion in allowing A.R.'s counsel to withdraw from an adoption proceeding. A.R. is the mother of A.G. and J.G. M.G. and his wife filed a petition to adopt the children, claiming M.G. is their biological father. After finding that A.R. was indigent, the Tr. Ct. appointed counsel for her. Counsel later moved to withdraw, claiming A.R. failed to communicate with him; the Tr. Ct. granted the request.

Those whose parental rights may be terminated, including parents in adoption proceedings, have the right to counsel. In re Adoption of G.W.B., 776 N.E.2d 952, 953-54 (Ind. Ct. App. 2002); Ind. Code § 31-35-1-12. Under Madison County Local Rule LR48-TR3.1-26 § B, an attorney's motion to withdraw will be granted if 1) another attorney simultaneously appears for the party, 2) the attorney provides satisfactory evidence that the party has discharged the attorney, or 3) the party agrees to the withdrawal. If at least one of the conditions of Section B is not fulfilled, Section C requires an attorney to give 21 days' written notice of his intent to withdraw. Because the motion to withdraw did not comply with either Section B or C of the local rule, the Tr. Ct. abused its discretion in granting the motion. See K.S. v. Marion Cnty. Dep't of Child Services, 917 N.E.2d 158, 164-65 (Ind. Ct. App. 2009).

TITLE: In re Marriage of Stariha
INDEX NO.: Y.1.e.
CITE: (1st Dist. 6/29/87) Ind. App., 509 N.E.2d 1117
SUBJECT: Right to counsel - contempt proceedings for failure to pay child support
HOLDING: Where possibility exists, that indigent D may be incarcerated for contempt for failure to pay child support, he/she has right to appointed counsel & to be informed of that right prior to commencement of contempt hearing. First step in determining right to appointed counsel is whether D may lose physical liberty if he/she loses litigation. Lassiter v. Dept. of Social Services (1981), 452 U.S. 18. Here, D was, in fact, incarcerated. Petitioner argues due process rights are not implicated because no state action is involved. State action may be found if state simply enforces activity which originates privately. Moose Lodge No. 107 v. Irvis (1972), 407 U.S. 163; Renforth 383 N.E.2d 368. Nexus must exist between governmental involvement & particular activity being challenged, or state must have "so far insinuated itself into a position of interdependence" with private institution that state has become "joint participant" in challenged activity. Here, there is definite nexus between petitioner's complaint for failure to pay child support & Tr. Ct.'s finding of contempt & incarceration of D. Held, D was entitled to appointed counsel.

TITLE: Johnson v. State
INDEX NO.: Y.1.e.
CITE: (4th Dist., 09-29-94), Ind. App., 640 N.E.2d 747
SUBJECT: Right to counsel - probation violation (PV)
HOLDING: Tr. Ct. erred in revoking D's probation when he was unrepresented by counsel, & Tr. Ct. failed to inquire as to whether he waived right to counsel or desired & qualified for appointed counsel. After D pled guilty & was placed on probation, petition for PV was filed. D's counsel withdrew his appearance before PV hearing, & D was unrepresented at all ensuing hearings, eventually having his probation revoked. While PV hearing is civil in nature, Ds are guaranteed certain due process rights, including right to counsel. In this case, D appeared in Ct. no less than 7 times without counsel (due to various modifications of probation terms). Tr. Ct. did not explore possibility of appointed counsel or D's indigency & failed to offer appointed counsel. It is judicial function to determine whether counsel is to be appointed at public expense, & Ds do not have to be totally without means to be entitled to such counsel. If D legitimately lacks resources to employ attorney without imposing substantial hardship on self, he should be appointed counsel. Here, record was completely devoid of attempt by any of judges presiding at hearings to ascertain D's indigency or obtain knowing waiver of counsel. Held, reversed & remanded for new hearing.

TITLE: Kennedy v. Wood
INDEX NO.: Y.1.e.
CITE: (4th Dist. 9/29/82) Ind. App., 439 N.E.2d 1367
SUBJECT: Right to counsel - paternity suit
HOLDING: Due process & fundamental fairness demand that counsel be appointed to indigents in paternity suits instituted under Ind. Code 12-1-6.1-1 through 20, Ind. Code 31-6-6.1-2(b) & 42 U.S.C. Sections 651-60.

TITLE: Martel v. Clair

INDEX NO.: Y.1.e.

CITE: (03-05-12), 132 S. Ct. 1276 (U.S. 2012)

SUBJECT: "Interests of justice" proper standard in requests for substitute counsel in capital habeas cases

HOLDING: In denying capital habeas petitioner's request for substitute counsel, the District Court used the correct standard, the "interests of justice" standard, already used in non-capital cases. See 18 § U.S.C. 3006A.

In 1987, Clair was convicted for the 1984 murder of Linda Rogers. He was sentenced to death. Between March and June of 2005, Clair twice sought substitute counsel, first to raise a claim of actual innocence, and second, to raise claims related to newly discovered evidence. The District Court denied the requests for substitute counsel and the petition for writ of habeas corpus.

Requests for substitute counsel in capital habeas cases should be granted where required by the "interests of justice," even though § 3599(e) does not specify the standard for such requests. However, before 1988, 18 § U.S.C. 3006A allowed substitution in both capital and non-capital habeas cases in the interests of justice. In 1988, Congress passed § 3599, which displaced § 3006A for those facing the death penalty and also enhanced rights of representation to capital Ds and habeas petitioners. Given this context, Congress's silence as to the proper standard for substituting counsel in a capital habeas case cannot be interpreted as a desire to make it more difficult for a capital petitioner to obtain substitute counsel than a non-capital petitioner. KAGAN, J. Cert. granted, Ninth Circuit reversed, District Court affirmed.

TITLE: Moore v. Moore
INDEX NO.: Y.1.e.
CITE: (6/13/2014), 11 N.E.3d 980 (Ind. Ct. App 2014)
SUBJECT: Erroneous denial of right to counsel - contempt hearing
HOLDING: Where the possibility exists that an indigent D may be incarcerated for contempt for failure to pay child support, he or she has a right to appointed counsel and to be informed of that right prior to commencement of the contempt hearing. In re Marriage of Stariha, 509 N.E.2d 1117 (Ind. Ct. App. 1987). This is so regardless of whether a private person or the State initiates the contempt proceedings. Marks v. Tolliver, 839 N.E.2d 703, 706 (Ind. Ct. App. 2005).

Here, Tr. Ct. erred by not determining whether Father was indigent and entitled to appointed counsel before holding a contempt hearing where his liberty was at stake. Father was held in contempt for failing to pay child support. He requested counsel before the hearing, but Tr. Ct. denied his request because any jail time would be suspended. Tr. Ct. imposed a 30-day suspended sentence, pending a compliance hearing, and told Father it would reconsider appointing counsel at the compliance hearing. Father appealed pro se and Mother did not file a brief.

Court held that even though Tr. Ct. suspended the sentence and indicated it would reconsider the issue of appointing counsel prior to the compliance hearing, Father clearly risked the possibility of losing his physical liberty as a result of Tr. Ct.'s contempt finding. Thus, if indigent, Father was entitled to have counsel represent him at that hearing, not just at the subsequent compliance hearing. Held, judgment reversed and remanded to determine whether Father was indigent, and if so, to appoint counsel for him at a new contempt hearing.

Y. RIGHT TO COUNSEL

Y.2. Scope of right/critical stages of the proceedings

TITLE: Barnett v. State

INDEX NO.: Y.2.

CITE: (8/25/2017), 83 N.E.3d 93 (Ind. Ct. App 2017)

SUBJECT: Lack of counsel at habitual amendment hearing did not violate right to counsel

HOLDING: D was not denied his Sixth Amendment right to counsel when his trial counsel did not appear at a hearing which added an habitual offender enhancement to charging information. D argued that, in the absence of counsel at the habitual offender hearing, he did not know to object to the untimely habitual offender charge, which resulted in waiver of that issue for appeal. But trial counsel could have objected to the inclusion of the habitual offender enhancement at any time up to and including trial. White v. State, 963 N.E.2d 511 (Ind. 2012). Accordingly, any waiver of D's challenge on appeal to habitual amendment was not attributable solely to trial counsel's absence at the habitual amendment hearing. Any error in trial counsel being absent from habitual amendment hearing was therefore harmless. Held, judgment affirmed.

TITLE: Gee v. State
INDEX NO.: Y.2.
CITE: (5/7/87) Ind., 508 N.E.2d 787
SUBJECT: D must request appointment of counsel
HOLDING: Tr. Ct. did not deny D his constitutional right to counsel. Here, D contends that because he filed an affidavit of indigency along with his pro se Motion to Correct Erroneous Sentence, Tr. Ct. had duty to appoint counsel. Ct. finds D was represented by counsel in direct appeal & PCR petition. D made no request for Tr. Ct. to appoint counsel in this case. D concedes he could have sought assistance of State Public Defender but chose not to do so. The appellate Ct. has no right to order Tr. Ct. to appoint counsel before demand is made in Tr. Ct. In Re Lawrence 224 N.E.2d 512. Ind. Code 34-1-1-3 provides for appointment of counsel due to economic status. Absent request for appointment, Tr. Ct. did not abuse its discretion in failing to appoint counsel. In re Johnson, App., 415 N.E.2d 108. Held, no error. DeBruler CONCURS IN RESULT without opinion.

TITLE: Staley v. State
INDEX NO.: Y.2.
CITE: (04-28-94), Ind., 633 N.E.2d 314
SUBJECT: No Right to Counsel in Selecting Special Judge
HOLDING: There was no 6th Amend. violation where D was denied opportunity to be represented by counsel during selection of special judge. Striking of judges occurred after State filed charges against D but prior to initial hearing. Ct. concluded that selection of special judge is not "critical stage" requiring presence of counsel. Ct. analyzed selection process & found it was not adversarial or fact-finding proceeding & did not constitute confrontation between D & State. Because no constitutional trial rights are threatened, selection process does not present high probability of substantial harm to unrepresented D. Ct. rejected argument that despite being given opportunity to strike judges, D was unable to comprehend significance of that opportunity & was later unable to obtain change of venue. Any risks associated with selecting judge who ultimately proves to be partial or biased can be cured during trial under protection of Due Process Clause. In declining to extend right to counsel into this new context, Ct. concluded that right to counsel is not generalized protection for all purposes, but safeguard of right to fair trial.

RELATED CASES: Taylor, 944 N.E.2d 84 (Ind. Ct. App 2011) (D failed to show that he was deprived of right to counsel during critical stage of proceedings where during pre-trial period he fired his attorney, unequivocally requested to proceed pro se, and, pursuant to his 11th hour request, was later appointed counsel for trial).

TITLE: Wright v. Van Patten

INDEX NO.: Y.2.

CITE: 128 S. Ct. 743, 169 L.Ed.2d 583 (2008)

SUBJECT: Counsel's hearing participation by speaker phone not clearly denial of counsel under federal habeas review

HOLDING: In *per curiam* decision, Majority reversed Seventh Circuit Court of Appeals and reinstated state court's denial of an ineffective assistance of counsel claim. Majority noted no decision of the Court squarely addressing whether trial counsel's participation by speaker phone during a guilty plea hearing should be treated as a "complete denial of counsel" on par with total absence. Neither could the majority point to a decision by the Court that clearly establishes that United States v. Cronic, 466 U.S. 648 (1984) should replace Strickland v. Washington, 466 U.S. 668 (1984) in this novel factual context. "Because our cases give no clear answer to the question presented, let alone one in [Petitioner's] favor, 'it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" Carey v. Musladin, 549 U.S. 70 (2006). Under the explicit terms of 28 U.S.C. ' 2254(d)(1), relief is unauthorized. Majority noted the merits of the telephone practice for presence in court is for "another day." Stevens, J., filed concurrence, noting that "regrettably, Cronic did not 'clearly establish' the full scope of the D's right to the presence of an attorney." The Court of Appeals "apparently read 'the presence of counsel' in Cronic to mean 'the presence of counsel *in open court*." Stevens believed this reading to be correct. However, the question in relation to habeas relief and "clearly established federal law" centers on whether the state court's narrower reading of that opinion is "objectively unreasonable."

RELATED CASES: Woods, 135 S. Ct. 1372 (U.S. Supreme Court 2015) (reversing federal 6th circuit, U.S. Sup. Ct. ruled Michigan state courts' conclusion that D was not denied right to counsel was not unreasonable application of United States v. Cronic, 466 U.S. 648 (1984) (prejudice is presumed if a D is denied counsel at a critical stage of a trial) because the Court has never applied Cronic to a situation where counsel was briefly absent during testimony about other Ds that was irrelevant to the D's theory of case).

Y. RIGHT TO COUNSEL

Y.2. Scope of right/critical stages of the proceedings

Y.2.b Initial Hearing

TITLE: Rothgery v. Gillespie County, Texas
INDEX NO.: Y.2.b.
CITE: 128 S. Ct. 2578 (2008)
SUBJECT: Right to counsel attaches at probable cause hearing, not when charges filed
HOLDING: Majority held a criminal D's initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel. Attachment does not also require that a prosecutor be aware of that initial proceeding or involved in its conduct. Petitioner brought an action under 42 U.S.C. §1983 after he was arrested as a felon in possession of a firearm based on erroneous information. He posted bond following the probable cause hearing but was rearrested and jailed when prosecutors filed charges against him. Petitioner's claim was made in relation to fact that if he had been appointed counsel after the probable cause hearing as he requested counsel could have prevented his re-arrest and jailing based on faulty information. Majority noted it has twice held that the right to counsel attaches at the initial appearance before a judicial officer at which a D is told of the formal accusation against him and restrictions are imposed on his liberty. Majority further noted that the overwhelming consensus conforms to the rule that the first formal proceeding is the point of attachment, with not only the federal government but 43 States taking the first step toward appointing counsel before, at, or just after initial appearance. Majority rejected Fifth Circuit's contention that the determining factor was that no prosecutor was aware of the hearing or involved in it. The most significant precedent, Michigan v. Jackson, 475 U.S. 625 (1986) and Brewer v. Williams, 430 U.S. 387 (1977), has never mentioned a prosecutor's involvement as a relevant fact, much less a controlling one. Roberts, C.J., filed a concurring opinion, in which Scalia, J., joined. Alito, J., filed a concurring opinion, in which Roberts, C.J., and Scalia, J., joined. Thomas, J., filed a dissenting opinion.

RELATED CASES: Taylor, 49 N.E.3d1019 (Ind. 2016) (Indiana right to counsel invites greater protection because it attaches earlier – upon arrest, rather than only when "formal proceedings have been initiated" as with federal right. See full review at Y.9.c.).

Y. RIGHT TO COUNSEL

Y.2. Scope of right/critical stages of the proceedings

Y.2.c. Lineups (see R.4.b)

TITLE: Hatcher v. State

INDEX NO.: Y.2.c.

CITE: (1/8/81), Ind., 414 N.E.2d 561

SUBJECT: Right to counsel -- pre-trial lineups

HOLDING: Sixth Amendment right to counsel attaches at or after time that adversary judicial proceedings have been initiated against accused; right to counsel encompasses right to have attorney present at pre-trial lineup identification procedure conducted at or after initiation of such criminal proceedings. Kirby, 406 U.S. 682. Here, D had been charged with crimes at time he was displayed in lineups and was not provided with counsel for proceedings. In addition, record does not disclose whether he had been previously advised of his right to such counsel. Held, conviction reversed, and cause remanded for new trial.

RELATED CASES: Bolkovac, 98 N.E.2d 250 (right to counsel in criminal prosecution is self- executing).

Y. RIGHT TO COUNSEL

Y.2. Scope of right/critical stages of the proceedings

Y.2.d. Interrogations (see I.3)

TITLE: Leonard v. State
INDEX NO.: Y.2.d.
CITE: (5/2/2017), 73 N.E.3d 155 (Ind. 2017)
SUBJECT: Right to counsel for charged case does not apply to future cases
HOLDING: Tr. Ct. did not abuse its discretion in admitting statements D made, while awaiting his double murder trial, to an officer posing as a hit man, where D asked the officer to kill a person who was going to testify for the State. These statements led to later charges for Conspiracy to Commit Murder. Even though D's right to counsel had attached once he was charged in the murder case, this right had not attached for future cases, including the Conspiracy case, so the procurement and use of the statements at his murder trial did not violate D's right to counsel.

D lived with his girlfriend in Richmond Hill, a neighborhood on the southeast side of Indianapolis. To collect on a home insurance policy, they triggered a massive natural gas explosion of their home, which damaged or destroyed dozens of homes in the neighborhood and killed their next door neighbors. While awaiting trial, D was placed in the same cell block as Robert Smith, a police informant. D discussed his case with Smith, and on one occasion, told Smith that he was worried about Mark Duckworth, a friend who was going to testify for the State. D told Smith he wanted Duckworth killed. Smith offered to put D in contact with a hit man named "Jay," who was actually Jeremy Godsave, an ATF Special Agent. D called Godsave twice, saying he wanted Duckworth killed. The State used these statements at trial.

On appeal, D argued that because he had been charged in the explosion case, his right to counsel had attached for future cases, including charges arising from his statements to Special Agent Godsave. However, the "Sixth Amendment right [to counsel] . . . is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced . . . . Accordingly . . . a D's statements regarding offenses for which he ha[s] not been charged [are] admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses." Texas v. Cobb, 532 U.S. 162, 167-68 (2001). "[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." Id. at 171.

Thus, D's phone calls to Special Agent Godsave were not protected by his Sixth Amendment right to counsel. Accordingly, the the Tr. Ct. did not abuse its discretion in admitting those statements. Held, judgment affirmed.

RELATED CASES: Leonard, 86 N.E.3d 406 (Ind. Ct. App 2017) (in conspiracy to commit murder prosecution, Tr. Ct. did not abuse its discretion in admitting recordings of D's jail phone calls with an undercover officer posing as a hitman, as right to counsel had not attached to murder-for-hire case was not inextricably intertwined with case for which D was incarcerated), Texas v. Cobb, US, 121 S. Ct. 1335, 149 L.Ed.2d 321 (D's right to counsel was not violated when State introduced statements he made while waiting in jail for his murder trial, where D asked a purported hit man to kill a State's witness, because

D's right to counsel had attached only as to his murder case, and not using the statements would unnecessarily frustrate the public's interest in investigating criminal activities; see full review, this section); Jewell, 957 N.E.2d 625 (Ind. 2011) (Article 1, Section 13 of the Indiana Constitution provides more protection than does Texas v. Cobb; under the Indiana Constitution, the right to counsel also attaches to police questioning regarding offenses which are inextricably intertwined with the charge on which counsel is already representing the D; reviewing court must examine and compare all the facts and circumstances - as known at the time of the investigation - related to the conduct, including the nature of the conduct, the identity of the persons involved (including the victim, if any), and the timing, motive and location of the crimes; D's crime for tattooing minor was not inextricably intertwined with crime of sexual misconduct with the same minor).

TITLE: Little v. State
INDEX NO.: Y.2.d.
CITE: (3/25/85), Ind., 475 N.E.2d 677
SUBJECT: Lineups - right to counsel; pre-indictment
HOLDING: Pretrial identification lineup did not violate D's 6th Amend right to counsel. No adversary judicial proceedings had been initiated against D. Bray 433 N.E.2d 310 (card at R.4.b). D contends that although he was not formally charged, he was a "prime suspect" based on earlier photo IDs by victims, & that lineup was no longer investigatory tool but was device to further his prosecution. Bruce 375 N.E.2d 1042 raised similar argument (that police purposefully deferred formal charges in order to undercut D's right to counsel). Ct. finds no basis for D's contentions. D also argues that lineup affected his right to fair trial, thus 6th Amend required counsel despite lack of formal charges, *citing* US v. Wade (1967), 388 U.S. 218, 87 S. Ct. 1926, 18 L.Ed.2d 1149. Ct. finds Wade explicitly qualified informal right to counsel to stages of prosecution. Wade requires determination of substantial prejudice in pretrial confrontation & ability of counsel to avoid such prejudice. There is no right to counsel when reconstruction of D's lineup (names recorded, victims' taped interviews re lineup & photograph of lineup) is available & no prejudicial or suggestive factors inherent in lineup. Held, conviction affirmed.

RELATED CASES: Randall, 474 N.E.2d 76 (at time of photo array D not charged with crime; no right to counsel); Gibbs, App., 444 N.E.2d 893 (informed consent statute, Ind. Code 9-4-4.5-4, repealed by Ind. Code 9-30- 6-7, requires that accused who demands to consult with counsel be advised of absence of right, and that failure to submit to breathalyzer on that basis will be construed as refusal).

Y. RIGHT TO COUNSEL

Y.2. Scope of right/critical stages of the proceedings

Y.2.e. Trial

TITLE: Boesel v. State
INDEX NO.: Y.2.e.
CITE: (1st Dist. 07/22/92), Ind. App., 596 N.E.2d 261
SUBJECT: Denial of assistance of counsel - trial in absentia
HOLDING: Where D was tried in absentia & his third appointed counsel was granted leave to withdraw after voir dire, he was denied constitutional right to counsel under Ind. & U. S. Constitutions. Two months after appointment, D's third counsel moved to withdraw because D did not keep appointments, but after hearing where D indicated family matter kept him from meeting, Ct. denied motion. Two weeks later, D failed to appear for trial, warrant was issued for his arrest, & counsel moved to withdraw again. Ct. denied motion to withdraw, & after jury selection, counsel moved for continuance. Ct. denied continuance but granted counsel's third motion to withdraw & trial proceeded without D or counsel. Ct. App. found Tr. Ct. abused discretion in allowing defense counsel to withdraw after jury was impaneled. Right to counsel is guaranteed by both U.S. & Ind. Constitutions, Graves, App., 503 N.E.2d 1258. Right extends to indigent Ds, & can be relinquished only by knowing, voluntary & intelligent waiver. D does not waive his right to counsel by failing to appear at trial, Carr, App., 591 N.E.2d 640. Ct. acknowledged Tr. Ct.'s frustration with D's apparent lack of cooperation with appointed counsel, & that withdrawal of counsel might have been permissible under Ind. Code 35-36-8-2(b)(3) but could not say that D knowingly waived counsel either by failure to appear at trial or failure to communicate with counsel.

TITLE: Kimball v. State
INDEX NO.: Y.2.e.
CITE: (2/28/85) Ind., 474 N.E.2d 982
SUBJECT: Right to counsel - trial; consultation
HOLDING: On petition to transfer. Second district erred in determining Tr. Ct. erred in denying continuance & ordering trial to begin with D represented by "somebody from PD office" when original PD had schedule conflict. Transfer granted & second district opinion (468 N.E.2d 242) vacated. Adequacy of time allowed for preparation is determined on case-by-case basis, considering totality of circumstances, including complexity of issues, necessity of interviewing witnesses/pretrial motions & whether D is able to assist in preparation. Marshall 438 N.E.2d 986; Jones, App., 371 N.E.2d 1314. Ind. S. Ct. finds half day continuance sufficient preparation time (state called only one witness; original PD made pretrial motions, received discovery & interviewed witness; PD at trial stated he had adequate time to prepare & vigorously cross-examined witness/victim). Held, D not deprived of effective assistance of counsel.

RELATED CASES: Abdul-Musawir, App., 483 N.E.2d 464 (Crim L 586; Tr. Ct. did not abuse discretion by denying continuance where public defender was reappointed on 12/4 (D had private counsel in interim) & trial was set for 12/7).

TITLE: Suits v. State
INDEX NO.: Y.2.e.
CITE: (2d Dist. 7/28/83) Ind. App., 451 N.E.2d 375
SUBJECT: Right to counsel - trial; continuance to secure counsel
HOLDING: Tr. Ct. abused discretion by denying D's motion for continuance to secure counsel made morning of trial, only 20 days after Ct. set trial date. Ungar v. Sarafite (1964), 376 U.S. 575, 84 S. Ct. 841, 11 L.Ed.2d 921; Fitzgerald 257 N.E.2d 305 (conviction reversed where Tr. Ct. forced D, who had made determined effort over one year period to not be tried, to trial; other means existed short of proceeding with trial). Here, D appeared by counsel 2/24 & moved for continuance of arraignment, which was granted. D failed to appear for arraignment on 3/10. On 3/12, D appeared without counsel & was arraigned on charges (misdemeanors) & advised of right to counsel. Trial was set for 3/30. On 3/30, D appeared without counsel & asked for continuance to secure counsel, detailing efforts he had made to obtain counsel. Tr. Ct. denied motion. Ct. finds D did not waive right to counsel by unreasonably delaying employing counsel of his choice or in repeatedly discharging retained counsel as occurred in Yager 437 N.E.2d 454; Vacendak 431 N.E.2d 100; Works 362 N.E.2d 144; & Hardy, App., 436 N.E.2d 837. Held, convictions reversed.

Y. RIGHT TO COUNSEL

Y.2. Scope of right/critical stages of the proceedings

Y.2.f. Sentencing

TITLE: Armstrong v. State
INDEX NO.: Y.2.f.
CITE: (09-01-10), 932 N.E.2d 1263 (Ind. Ct. App 2010)
SUBJECT: Lack of counsel at sentencing - harmless error
HOLDING: On appeal of denial of D's petition for post-conviction relief, D argued that he was denied counsel at his sentencing when his counsel was permitted to withdraw her appearance and Tr. Ct. insisted that the sentencing hearing proceed with no counsel representing D. Fact that D had hired counsel at one point in time does not support presumption that the D understood the pitfalls of self-representation. However, Court held it need not address whether D knowingly and intelligently relinquished his right to counsel, because any error that stemmed from D not being represented by counsel at his sentencing hearing was harmless beyond a reasonable doubt. Lack of counsel during D's sentencing hearing could not have contributed to his conviction, and sentence was defined by plea agreement. Tr. Ct. would be bound to impose the identical sentence. Held, denial of post-conviction relief affirmed.

TITLE: Guajardo v. State
INDEX NO.: Y.2.f.
CITE: (3d Dist. 9/25/89), Ind. App., 544 N.E.2d 174
SUBJECT: Right to counsel - sentencing
HOLDING: D was denied right to counsel at sentencing, but error is moot because sentence has been served. D pled guilty to robbery pursuant to plea agreement. At guilty plea hearing, D's counsel advised Tr. Ct. that D was being treated at Beatty Hospital as criminal sexual deviant, pursuant to order from another Tr. Ct. D's counsel requested that D continue to receive treatment rather than being committed to Department of Correction (DOC), & Tr. Ct. advised counsel that it would inquire into that possibility. D's counsel did not attend sentencing, although record shows that counsel had conferred with Tr. Ct. prior to hearing. Transcript of sentencing hearing is not available. D received mandatory sentence, which has been fully served. D now seeks post-conviction relief (PCR), alleging sentencing was invalid because he was not represented by counsel. Sentencing has been found to be "critical stage" at which D has right to counsel. Gardner v. Florida (1977), 430 U.S. 349, 97 S. Ct. 1197, 51 L.Ed.2d 393. Right to counsel includes right to have counsel at proceeding. Darmody 294 N.E.2d 835. When counsel is not present, Tr. Ct. has affirmative duty to demonstrate on record D's knowing & intelligent waiver. Here, transcript of sentencing hearing was not preserved, so that no record of waiver of counsel is available. However, only harm complained of is that absence of counsel may have contributed to D's losing opportunity to continue treatment at Beatty. D received mandatory sentence, which has been served. Error does not affect validity of conviction, & re-sentencing would serve no purpose. Held, error has been mooted; PCR denial upheld.

TITLE: Stamper v. State
INDEX NO.: Y.2.f.
CITE: (4th Dist., 5-24-04), Ind. App., 809 N.E.2d 352
SUBJECT: Right to counsel violation - request for assistance of counsel at sentencing
HOLDING: Tr. Ct. erred in denying D's request for appointment of attorney to represent him at his sentencing hearing. D waived his right to counsel at trial & pleaded guilty to receiving stolen property. Nine days prior to sentencing, D sent a letter to the judge asking that he be allowed to withdraw his plea & be appointed counsel. Tr. Ct. denied the request & imposed maximum three-year sentence. Applying five factors considered in Koehler v. State, 499 N.E.2d 196 (Ind. 1986), Ct. noted that this was the only time D had changed his mind, nothing indicated appointment of counsel would excessively delay proceedings, & record indicated D would likely be ineffective as his own attorney. D only argued for a remand as to sentencing, but Ct. noted that D did not waive any claim that his unrepresented waiver of counsel during the guilt phase was not "knowing, intelligent, & voluntary." Court's interpretation of Tumulty v. State, 666 N.E.2d 394 (Ind. 1996), would allow this issue to be argued through post-conviction relief, although Ct. could find no "practical reason why [D] should be prohibited from bringing such a claim now, or why we could not adequately review such a claim upon the record before us" other than for Tumulty's prohibition from attacking the validity of a guilty plea by direct appeal. Held, judgment reversed & remanded.

RELATED CASES: Henley, App., 855 N.E.2d 1018 (Appellate counsel was ineffective for failing to challenge summary denial of D's request that standby counsel deliver closing arguments; although Stamper was decided 5 years after counsel filed briefs in D's appeal, issue was significant & obvious, based on dicta in Dowell, App., 557 N.E.2d 1063).

Y. RIGHT TO COUNSEL

Y.2. Scope of right/critical stages of the proceedings

Y.2.g. Direct appeal

TITLE: State ex rel. Grecco v. Allen Circuit Court
INDEX NO.: Y.2.g.
CITE: (11/13/58), Ind., 153 N.E.2d 914
SUBJECT: Right to counsel -- direct appeals
HOLDING: Appeal to Indiana S. Ct. is matter of right, & so right to counsel at public expense extends to appeals. In addition, right for transcript at public expense is conditioned on showing (1) accused lacks sufficient means to produce transcript, (2) merits of question to be raised on appeal cannot be considered without transcript of evidence & (3) questions of error were presented to Tr. Ct. in motion for new trial that could be reviewed by Ct. on appeal. Held, alternative writ of mandamus made permanent, & relator granted time to file transcript & assignment of errors in appealing judgment of conviction.

TITLE: Gosha v. State
INDEX NO.: Y.2.g.
CITE: (5th Dist., 09-18-07), Ind. App., 873 N.E.2d 660
SUBJECT: Appeal from admitted probation revocation- no right to pauper attorney
HOLDING: Tr. Ct. did not abuse its discretion when it refused to appoint D pauper counsel for purposes of appeal from his admitted probation revocation. Following a judgment revoking probation of a D found to have violated the terms of his probation after a contested felony probation revocation proceeding, the judge shall immediately advise D that he is entitled to an appeal & pauper counsel, if necessary. Indiana Rule of Criminal Procedure 11. Here, after D admitted to probation violations, Tr. Ct. revoked probation & sentenced D. D then asked for pauper appellate counsel, which Tr. Ct. denied. Because Criminal Rule 11 only applies to contested felony probation revocation proceedings, there is no right to appellate pauper counsel when a D admits the probation violations. Held, judgment affirmed.

TITLE: In re I.B. and M.L.
INDEX NO.: Y.2.g.
CITE: (09-21-10), 933 N.E.2d. 1264 (Ind. 2010)
SUBJECT: Right to counsel to appeal parental termination - waiver
HOLDING: Although parents have a statutory right to appellate counsel to appeal an order terminating their parental rights (see Ind. Code 31-32-2-5), the right to appeal can be waived, and a parent's trial lawyer cannot pursue an appeal without the parent's authorization. Court of Appeals erroneously limited "proceeding" in statute to Tr. Ct. stage, i.e., time between commencement and entry of judgment on termination of parental rights determination. Statutes dictate that the right to counsel continues through all stages of the proceeding to terminate the parent-child relationship, including appeal.

When the parent does not appear at the termination of parental rights trial, is not present when the termination of parental rights order is issued, or has not had contact with counsel, the parent's trial lawyer has an obligation to contact and inform the client of the result of the termination proceeding. See Ind. Prof'l Conduct R. 1.3 and 1.4. At this point, the attorney can receive instructions with respect to the appeal. If the lawyer does not know the whereabouts of the parent, the lawyer must use due diligence to locate the client and if unable to do so, or unable to get clear instructions from the client with respect to an appeal, the lawyer should not file a notice of appeal. See Ind. Prof'l Conduct R. 1.3 cmt. 4. Should the parent resurface and seek to pursue an appeal after the period for filing a notice of appeal has closed, Indiana trial rules may provide a remedy in certain situations (see, e.g., Trial Rule 60(B)(8)).

Here, mother failed to appear at termination hearing and hearing regarding appointment of appellate counsel following the decision to terminate her parental rights. Her whereabouts were unknown. Due to Mother's own inaction, her counsel could not effectively or ethically represent that she wanted to file an appeal. On these facts, lawyer had no basis to file an appeal and Tr. Ct. was correct not to appoint appellate counsel for that purpose. Held, transfer granted, Court of Appeals' opinion at 923 N.E.2d 62 vacated, denial of motion to appoint appellate counsel affirmed.

Y. RIGHT TO COUNSEL

Y.2. Scope of right/critical stages of the proceedings

Y.2.i. Other

TITLE: Arrowood v. State
INDEX NO.: Y.2.i.
CITE: (8/18/2020), 152 N.E.3d 663 (Ind. Ct. App 2020)
SUBJECT: Defendant not denied right to counsel in community correction revocation hearing; more lenient due process standard applied
HOLDING: After the State filed a motion to revoke Defendant's placement in community corrections for a violation of its terms, the trial court conducted a hearing on the petition. Defendant did not appear in person but was represented by counsel. The trial court revoked Defendant's placement and ordered her to serve the balance of her sentence in incarceration. The Court of Appeals held that because the revocation of probation or community corrections placement is civil, not criminal, in nature, Article 1, section 13 of the Indiana Constitution is inapplicable. The Court declined to hold that the right to counsel at all criminal prosecutions extends to revocation hearings and instead held such proceedings are governed by principles of due process, *citing* Baum v. State, 533 N.E.3d 1200 (Ind. 1989). E.6.l.

TITLE: Black v. State
INDEX NO.: Y.2.i.
CITE: (7/7/2017), 79 N.E.3d 965 (Ind. Ct. App 2017)
SUBJECT: Denial of right to counsel at amendment of charges hearing - harmless error
HOLDING: D was denied the right to counsel during a critical stage of his Level 2 felony robbery and conspiracy case-- specifically, during a hearing on the State's amendments to the charging information which presented more severe and additional charges against D. The hearing was not an initial hearing, but rather a continuance of a proceeding that began over a year earlier, when original charges were filed against D. During this hearing, which followed a mistrial on original charges, D was confronted with the intricacies of the law and the advocacy of the prosecuting authorities. Thus, this hearing was a critical stage and D was entitled to the assistance of counsel during it. However, Court concluded that error was harmless because D had ample time and opportunity to be heard by filing an objection or motion to dismiss the amendments. He also had ample time and opportunity to prepare for and defend against the charges. Court rejected D's argument that Tr. Ct.'s approval of amendments was fundamental error, even though during second trial D was tried on different, more severe charges than the charges in his original trial. Held, judgment affirmed in part and reversed in part on other grounds.

TITLE: Callis v. State
INDEX NO: Y.2.i.
CITE: (4th Dist., 8-20-97), Ind. App., 684 N.E.2d 233
SUBJECT: Right to counsel - pre-indictment polygraph exam and interview
HOLDING: Excluding defense attorney from pre-indictment polygraph exam and post-polygraph interview did not violate D's Sixth Amendment right to counsel because pre-indictment polygraph exam and interview occurred prior to commencement of criminal proceeding. Sixth Amendment right to counsel attaches at any stage of prosecution where counsel's absence might derogate from accused's right to fair trial. Jones, 655 N.E.2d 49. According to Ind. Code 35-34-1-1, prosecution commences with filing of information or indictment. D relied on Greenlee, App., 477 N.E.2d 917, and Casada, App., 544 N.E.2d 189, which held polygraph examination was critical stage of proceeding. Ct. distinguished instant case by noting Greenlee concerned examination after criminal proceedings had been initiated and Casada did not distinguish between pre- and post-indictment examinations. Here, because D's examination and interview was given prior to filing of information, they were not critical states of proceeding, and D's Sixth Amendment right to counsel had not attached. Held, conviction affirmed.

RELATED CASES: Taylor, 49 N.E.3d1019 (Ind. 2016) (Indiana right to counsel invites greater protection because it attaches earlier – upon arrest, rather than only when "formal proceedings have been initiated" as with federal right. See full review at Y.9.c.); Wroe, 16 N.E.3d 462 (Ind. Ct. App 2014) (when D signed polygraph stipulation, 6th Amendment right to counsel had not attached because he was neither detained nor charged; to extent right to counsel under Indiana Constitution sometimes attaches before charges are filed, D waived right by signing stipulation, which contained clear provision regarding waiver of right to counsel); Caraway, App., 891 N.E.2d 122 (disagreeing with Kochersperger, infra, and holding that D's right to counsel attached immediately prior to detective's request to sign polygraph stipulation agreement; see full review at Y.2.i); Kochersperger, App., 725 N.E.2d 918 (Tr. Ct. properly denied motion to suppress evidence obtained through polygraph examination and post-testing interrogation; though not represented by counsel at time of examination, D was fully advised of his right to counsel prior to executing stipulation and knowingly and voluntarily waived such right by signing advice of rights form); Little, App., 694 N.E.2d 762 (D's confession to murder was voluntary, despite fact that Illinois contingent did not notify D's Ind. attorney before interviewing D about Illinois murder).

TITLE: Caraway v. State
INDEX NO.: Y.2.i.
CITE: (1st Dist., 07-31-08), Ind. App., 891 N.E.2d 122
SUBJECT: Right to counsel violation - pre-charge polygraph stipulation
HOLDING: Tr. Ct. erred in denying D's motion to suppress when D was not advised of his right to counsel prior to signing an Agreement to Take Polygraph and stipulation agreement. Because of questionable reliability of polygraph results, one of four prerequisites to admission of polygraph results is that prosecution, D, and defense counsel all sign a written stipulation providing for D's submission to examination and for subsequent admission at trial of the results. Owens v. State, 373 N.E.2d 913 (Ind. Ct. App 1978). Here, before D was arrested, arraigned or indicted, detective came to his home and advised him to sign a polygraph stipulation agreement. The agreement provided that any objection to the admission of the polygraph results, answers, questions, and examiner's qualifications were waived. The agreement did not include any Miranda warnings or any notice of right to counsel. Court held that D's right to counsel attached immediately prior to detective's request to sign the stipulation agreement. In so holding, Court declined to follow result reached in Kochersperger v. State, 725 N.E.2d 918 (Ind. Ct. App 2000), that the right to counsel cannot attach earlier than at the initiation of criminal proceedings. The absence of D's right to an attorney in this critical pre-charge stage derogated his right to a fair trial. Furthermore, as D was never informed of his right to counsel prior to stipulating the results of a polygraph examination, he could not have waived it. Held, denial of motion to suppress reversed. Robb, J., concurring in result on basis that D was not advised of and did not waive his right to counsel before signing stipulation, rather than on basis of Sixth Amendment.

RELATED CASES: Taylor, 49 N.E.3d1019 (Ind. 2016) (Indiana right to counsel invites greater protection because it attaches earlier – upon arrest, rather than only when "formal proceedings have been initiated" as with federal right. See full review at Y.9.c.)

TITLE: Davis v. Ayala
INDEX NO.: Y.2.i.
CITE: (6/18/2015), 135 S. Ct. 2187 (2015)
SUBJECT: Excluding lawyer from part of Batson hearing was harmless error
HOLDING: Any constitutional error that may have occurred by excluding D's attorney from part of a Batson hearing was harmless.

In the course of trying to rob a San Diego auto shop, D killed three people. During voir dire, he raised Batson challenges to seven of the State's peremptory strikes. The Tr. Ct. let the State offer its race-neutral explanations ex parte, accepting the State's claim that letting defense counsel participate in the Batson hearing would divulge the State's trial strategy. On direct review of D's three murder convictions, the California Supreme Court ruled the ex parte procedure was erroneous yet harmless. On habeas review, the Ninth Circuit reversed.

The California Supreme Court's determination that the error was harmless was an "adjudication on the merits," so the highly deferential standard for habeas actions applies here. See Harrington v. Richter, 562 U.S. 86, 103 (2011). D must show that the state court's rejection of his claim: (1) was contrary to or involved an unreasonable application of clearly established federal law, or (2) was based on an unreasonable determination of the facts. Similarly, he must show "actual prejudice," Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), where relief is proper only if a federal court has grave doubts about whether an error involving federal law had a "substantial and injurious effect or influence in determining the jury's verdict." O'Neal v. McAninch, 513 U.S. 432, 436 (1995).

D has not shown actual prejudice from the ex parte procedure. The record adequately supports the State's race-neutral explanations. D has not shown how the absence of his attorney during the Batson hearing affected the Tr. Ct.'s rulings on the State's peremptory strikes. Held, cert. granted, opinion of Ninth Circuit at 756 F.3d 656 reversed, and matter remanded.
Alito, J., joined by Roberts, C.J., and Scalia, Kennedy, and Thomas, JJ; Sotomayor dissenting, joined by Ginsburg, Breyer, and Kagan, JJ.

TITLE: Clark v. State
INDEX NO.: Y.2.i.
CITE: (1st Dist. 09/11/91), Ind. App., 577 N.E.2d 620
SUBJECT: Right to counsel - Hearing on Motion to Suppress Eyewitness ID
HOLDING: Hearing on motion to suppress eyewitness identification is critical stage of proceedings & Tr. Ct. committed error in proceeding with hearing without D's counsel present. D's motion was based on allegation of tainted identification due to improper out-of-Ct. identification procedures. D, his counsel, & prosecutor all appeared at time for hearing, but judge was delayed in another Ct. D's counsel had to leave for other Ct. appearance after waiting over an hour. When judge arrived, State requested opportunity to present its witnesses, & Ct. ordered proceedings to go forth, with provision that D's counsel could listen to tapes of hearing & cross-examine later if he chose to. Ct. App. found hearing offered opportunity for effective defense to be seized, & that if motion had been granted, as practical matter, further prosecution would have been precluded. Ct. also found hearing was critical stage in proceedings where D confronted both intricacies of law & advocacy of prosecutor. Therefore, D was denied constitutional right to counsel. Held, reversed & remanded for new trial.

TITLE: Cooks v. State
INDEX NO.: Y.2.i.
CITE: 240 S.W.3d 906 (Tex. Crim. App. 2007)
SUBJECT: Right to counsel: Filing of new trial motion is 'critical stage'
HOLDING: Texas Court of Criminal Appeals held the 30-day period in which a recently convicted D can file a motion for a new trial is a "critical stage" during which the D is constitutionally entitled to effective assistance of counsel in filing the motion. However, Court also held that a D must establish prejudice from the lack of effective assistance at that stage before he can obtain relief. In case, trial counsel filed a notice of appeal, which requested the appointment of appellate counsel. When appellate counsel was appointed, 10 days remained to file a new-trial motion, which did not occur, and appellate counsel filed a motion to abate the appeal and to file an out-of-time motion for a new trial. D argued appellate counsel did not have enough time to review and work on a new trial motion and thus D could not make a properly counseled decision. Court noted that while a motion for new trial is not always necessary to preserve issues for appeal, in some cases such a motion can be a necessary step to adduce facts that underlie the appeal but are not otherwise in the record. However, Court found that where a D was represented by counsel during trial, a rebuttable presumption exists that adequate representation continued during the period in which a new-trial motion could have been filed, and even if a D can rebut this presumption relief is not automatic. Court found the lack of time cited by appellate counsel to prepare a motion for new trial adequate to rebut the presumption but found harmless error because appellate counsel's motion to abate presented no facially plausible claims that could have been presented in a motion for new trial.

TITLE: Estrada v. State
INDEX NO.: Y.2.i.
CITE: 143 Idaho 558, 149 P.3d 833 (Idaho 2006)
SUBJECT: Psychosexual evaluation equals critical litigation stage
HOLDING: Idaho Supreme Court held a D has a Sixth Amendment right to be advised by counsel in association with psychosexual evaluation conducted following a guilty plea to determine his future dangerousness for sentencing purposes. Court ruled that a court-ordered psychosexual evaluation constitutes a critical stage of litigation at which the Sixth Amendment right to counsel applies. "It makes no sense," the Court wrote, "that a D would be entitled to counsel up through conviction or entry of a guilty plea, and would also be entitled to representation at sentencing, yet would not be entitled to advice of counsel in the interim period regarding a psychosexual evaluation." The Court distinguished a routine presentence investigation from a post-conviction psych evaluation assessing future dangerousness, noting that the latter is "more in-depth and personal, and includes an inquiry into the D's sexual history, with verification by polygraphy being highly recommended." A D is more likely to make self-incriminating statements during such an examination. Court went on to find that an attorney's failure to advise his client of this right constituted ineffective assistance of counsel under the standard of Strickland v. Washington, 466 U.S. 668 (1984).

TITLE: Gibbs v. State
INDEX NO.: Y.2.i.
CITE: (3rd Dist., 03-22-93), Ind. App., 610 N.E.2d 875
SUBJECT: Right to counsel - questioning regarding insanity defense
HOLDING: It was error for Tr. Ct. to question D, who had raised insanity defense, regarding his cooperation with Ct.-appointed psychologist, without counsel present. After D's arrest, he attempted suicide twice. He then filed notice of insanity & psychologist & psychiatrist were appointed. When D saw psychologist, he refused to answer any questions, & was then called into Tr. Ct. without defense counsel or prosecutor present. Ct. asked him whether he would also refuse to talk to psychiatrist, & when D said yes, Ct. withdrew his insanity defense. D subsequently filed motion to reinstate insanity defense, which was summarily denied, & then filed another motion to reinstate defense, along with petition for evaluation of competence. After first doctor's evaluation, D was ruled to be competent, & second examination did not appear in record. Tr. Ct. then denied second motion to reinstate insanity defense & D was convicted. Ct. found D was denied right to counsel at critical stage of proceedings, rejecting State's argument that hearing was only perfunctory administrative procedure not requiring counsel. D's substantive right to defense was affected, & there was no indication that he understood how judge's question would affect his insanity defense, or that he knowingly or intelligently waived right to counsel. While judge was neutral party to proceedings, D was still faced with intricacies of law, & it was clear that he could have benefitted from advice of counsel. Hearing was opportunity for effective defense to be seized or lost, & merits of D's sanity at time of crime were never addressed. Because D appeared before Ct. without aid of counsel, he could not have been expected to raise his competency as an issue, especially if he may have been unable to understand purpose of hearing. Held, conviction reversed.

TITLE: Gillie v. State
INDEX NO.: Y.2.i.
CITE: (7/9/84) Ind., 465 N.E.2d 1380
SUBJECT: Right to counsel - taking of hair & handwriting samples
HOLDING: Tr. Ct. did not err in admitting hair & handwriting samples. Here, D contends right to counsel & privilege against self-incrimination were violated. Right to counsel attaches at critical stages of criminal proceedings; counsel is not required for perfunctory administrative procedures such as taking of fingerprints & handwriting exemplars. Frances 316 N.E.2d 364. Taking of hair sample does not require counsel. Risk that absence of counsel might derogate D's right to fair trial is minimal. Hollars 286 N.E.2d 166. Held, no error.

RELATED CASES: Miller, App., 693 N.E.2d 602.

TITLE: Hood v. State
INDEX NO.: Y.2.i.
CITE: (11/27/89), Ind. App., 546 N.E.2d 847
SUBJECT: Right to counsel -- plea bargaining is critical stage
HOLDING: Accused has right to counsel at critical stages in judicial process and plea bargaining is critical stage. Gallarelli, 441 F.2d. 1402. Counsel or effective waiver of counsel is sine quo non of permissible plea bargaining. Grades, 398 F.2d 409. Ds advised by counsel and protected by other safeguards are presumptively capable of intelligent choices when confronted with prosecutorial persuasion. Conversely, uncounseled Ds are considered incapable of intelligent choices because of unequal bargaining strengths. Bordenkircher, 434 U.S. 357. Jailhouse conference between State and uncounseled D who has not knowingly, voluntarily, and intelligently waived his right to counsel is unfair. Furthermore, it is idle to speculate whether counsel could have, if present, worked out better deal. Consequently, Gallarelli court held that agreement made with uncounseled D irremediably infects all subsequent proceedings.

Here, State plea bargained with D, who was uncounseled, and made D's waiver of his right to counsel condition of plea agreement. Although it is not improper to threaten habitual offender charge to induce plea bargaining generally, threat here was made to uncounseled D who was required to proceed without assistance of counsel to avoid habitual offender charge. Held, conviction reversed, and cause remanded with instructions to vacate D's guilty plea.

RELATED CASES: Lafler, 132 S. Ct. 1376 (U.S. 2012) (failure to advise client about favorable plea deal constitutes ineffective assistance of counsel because plea negotiation is a critical stage of a criminal proceeding; see full review at Y.4.b); Lyles, App., 382 N.E.2d 991 (D's election whether to plead guilty or stand trial may not be intelligently or voluntarily made without consultation with counsel); Frye, 132 S. CT.1399 (U.S. 2012) (failure to advise client about favorable plea deal constitutes ineffective assistance of counsel because plea negotiation is a critical stage of a criminal proceeding; see full entry in this section).

TITLE: Jervis v. State
INDEX NO.: Y.2.i.
CITE: (4/7/2015), 28 N.E.3d 361 (Ind. Ct. App 2015)
SUBJECT: No IAC for failing to advise D to accept plea agreement
HOLDING: Trial counsel was not ineffective for failing to advise D to accept a plea agreement, which would have limited his sentence to forty years, but where after being tried and convicted to murder, he was sentenced to sixty years. Because D has always maintained his innocence, even at his post-conviction hearing, he cannot demonstrate that he would have accepted the plea had trial counsel recommended he do so. See Missouri v. Frye, 132 S. Ct. 1399 (2012) and Lafler v. Cooper, 132 S. Ct. 1376 (2012). Held, judgment affirmed.

TITLE: Lang v. State
INDEX NO.: Y.2.i.
CITE: (4/19/84) Ind., 461 N.E.2d 1110
SUBJECT: Right to counsel - presentence interview
HOLDING: D was not entitled to have counsel present at presentence interview. Presentence interview is not critical stage of prosecution. Burch 450 N.E.2d 528. Guilt determination has been concluded; statements D makes cannot be used to convict him of any crime. Irregularities in PSI report can be raised at final sentencing hearing. Held, no error.

TITLE: Missouri v. Frye

INDEX NO.: Y.2.i.

CITE: (03-21-12), 132 S. CT.1399 (U.S. 2012)

SUBJECT: Ineffective assistance for failure to communicate favorable plea offer; plea negotiations a critical state of criminal proceedings

HOLDING: Because plea negotiation is a critical stage of a criminal proceeding, defense attorneys have a duty to inform their clients about favorable plea offers. Failure to do so constitutes ineffective assistance of counsel under the 6th Amendment. Here, Frye's lawyer failed to tell him about a plea offer that included a sentence of 90 days or less. The offer expired, and Frye later pled guilty to a less favorable deal.

The 6th Amendment right to effective assistance of counsel extends to all critical states of a criminal proceeding. Montejo v. Louisiana, 566 U.S. 778, 786 (2009). The negotiation of a plea is a critical stage for purposes of claims related to effectiveness of counsel. Padilla v. Kentucky, 130 S. Ct. 1473 (2010). The Strickland two-part test governs ineffective assistance claims in the plea bargain context. Hill v. Lockhart, 477 U.S. 52 (1985).

Hill and Padilla differ because the attorneys in those cases gave bad legal advice. Here, Frye's counsel failed to communicate a plea offer, yet there is no right to a plea deal. See Weatheford v. Bursey, 429 U.S. 545, 561 (1977). Further, even though Frye lost favorable deal, he still had an opportunity for a "full and fair trial," or as he ultimately chose, a plea deal, albeit a less favorable one.

Nonetheless, because more than 90% of federal and state convictions are the result of guilty pleas, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." Plea negotiation, not the trial, is almost always the "critical point" for the D. "[P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel necessary to that the Sixth Amendment requires in the criminal process at criminal stages."

To establish prejudice, Frye must show that 1) he would have accepted the plea bargain, 2) there was a reasonable possibility that prosecutors would not have withdrawn the offer before trial, and 3) the Tr. Ct. would have accepted the deal. These factors shall be addressed on remand. KENNEDY, J., joined by BREYER, GINSBURG, KAGAN, and SOTOMAYOR, J.J.; SCALIA, J., DISSENTING, joined by ROBERTS, C.J., AND THOMAS and ALITO, J.J. Cert. granted Court of Appeal of Western District of Missouri affirmed.

RELATED CASES: Lafler, 132 S. Ct. 1376 (U.S. 2012) (failure to advise client about favorable plea deal constitutes ineffective assistance of counsel because plea negotiation is a critical stage of a criminal proceeding; see full review at Y.4.b).

TITLE: State v. Casiano
INDEX NO.: Y.2.i.
CITE: 282 Conn. 614, 922 A.2d 1065 (Conn. 2007)
SUBJECT: Statute provides indigents right to counsel for motion to correct illegal sentence
HOLDING: Connecticut Supreme Court held state statute that affords indigent Ds a right to have counsel appointed "in any criminal action" entitles an indigent offender to have a lawyer appointed to help determine whether he has a sound basis for filing a motion to correct an illegal sentence and, if so, to help him file such a motion and represent him in a direct appeal from its denial. Although the statute does not define "any criminal action, Court in Gipson v. Commissioner of Correction, 778 A.2d 121 (Conn. 2001), took a broad view of the term, saying that "any criminal action" includes all appeals, both discretionary and appeals as of right. In light of that opinion, Court found the language of the statute broad enough to include a motion to correct an illegal sentence and any direct appeal from a denial of that motion, noting that a motion to correct an illegal sentence is a "narrow exception" to the rule that a sentencing court no longer has jurisdiction to modify a sentence once it has begun to run. "The evidence nexus between a motion to correct an illegal sentence and the original sentencing hearing, coupled with the fact that a criminal D is constitutionally entitled to the assistance of counsel at that original hearing . . . provides strong support for the D's claim that a motion to correct an illegal sentence falls within the purview of 'any criminal action' for purposes" of the statute.

TITLE: Williams v. State
INDEX NO.: Y.2.i.
CITE: (6/6/90), Ind., 555 N.E.2d 133
SUBJECT: Right to counsel - psychiatric examination
HOLDING: Tr. Ct. properly found that D who pled insanity had no right to presence of counsel during Ct.-ordered psychiatric examinations. D was charged with murder & interposed insanity defense. Tr. Ct. ordered psychiatric exams by 2 disinterested doctors, as required by Ind. Code 35-36-2-2, & D requested Ct. order allowing counsel to be present during examinations. Tr. Ct. instead allowed examining doctors to decide whether defense counsel could be present, & one doctor refused to allow it. D argues on appeal that psychiatric examination following insanity plea is "critical stage" at which constitutional right to counsel arises. Manley, App., 410 N.E.2d 1338. Manley defines critical stage as part of proceeding where incrimination may occur or where opportunity for effective defense must be seized or be foregone. Manley followed US v. Anderson (3d Cir. 1972), 461 F.2d 739. However, the U.S. S. Ct. has taken a somewhat different path in defining critical stage, recognizing them as those stages where D is confronted, as at trial, by procedural intricacies, expert adversary, or both, in situation where results of confrontation might settle D's fate & reduce subsequent trial to mere formality. US v. Gouveia (1984), 467 U.S. 180, 104 S. Ct. 2292, 81 L.Ed.2d 146. [Other citations omitted.] Psychiatric examination involves no intricacies of law, & examining doctor is not adversary but disinterested expert. Held, denial of right to counsel at Ct.-ordered psychiatric examination was not error.

Y. RIGHT TO COUNSEL

Y.3. Indigency

TITLE: Poe v. State

INDEX NO.: Y.3.

CITE: (2/22/83) Ind., 445 N.E.2d 94

SUBJECT: Right to counsel - indigency; appointment; speedy trial rights

HOLDING: Appointment of counsel to D on 69th day of incarceration did not deny him opportunity to invoke CR4(B). Here, D requested pauper counsel 5/20/81. Tr. Ct. appointed attorney to determine D's equity in real estate & told D decision whether to appoint pauper counsel would be made after attorney reported to judge. Pauper counsel appointed 7/28/81. D analogizes Roberts, App., 358 N.E.2d 181 (D held in custody for 50 days before being charged or brought before Ct. was ordered discharged; it is implicit in CR 4(B) that accused would be given opportunity to request speedy trial). Ct. notes D filed pro se CR 4(B) motion on 6/30/81 & trial was held 9/2/81. Ct. does not find error in delay in appointment of counsel. Decision to appoint pauper counsel lies with Tr. Ct. (Thompson 267 N.E.2d 49) & ought not be hastily or superficially made (Moore 401 N.E.2d 676). Held, no error.

Y. RIGHT TO COUNSEL

Y.3. Indigency

Y.3.a. Standard

TITLE: Graves v. State
INDEX NO.: Y.3.a.
CITE: (1st Dist. 2/26/87) Ind. App., 503 N.E.2d 1258
SUBJECT: Indigency - standard; hearing
HOLDING: Tr. Ct. denied D right to counsel, where D was unemployed student attending school on loans & cousin posted bond for him. Here, hearings before Tr. Ct. are set forth in opinion to show Tr. Ct. neither adequately discharged its responsibility to determine D's indigency nor ensured that D's election to represent himself was knowing/voluntary/intelligent. In determining indigency, no specific monetary guidelines can be set but there are several factors which must be considered. Mitchell, App., 417 N.E.2d 364. D does not have to be totally without means. If D legitimately lacks financial resources to employ counsel without imposing substantial hardship upon him/her or family, counsel must be provided for D. Determination of indigency cannot be made on superficial examination of D's income & property. It must be based upon thorough examination of total financial situation, including balancing of assets against liabilities & consideration of disposable income/other available resources reasonably available to D after payment of fixed obligations. Fact that D was able to post bond is not determinative of non-indigency but is merely factor to consider in making determination. Mitchell. Tr. Ct. does not have unbridled discretion to grant or deny appointment of counsel. It cannot deny counsel to indigent D. Ct. concludes D was denied counsel merely because he posted bond with $250 (in fact posted by cousin). Ct. also rejects state's argument as "ludicrous" that D voluntarily elected to waive counsel & represent himself. Held, conviction of dealing in marijuana (Class A misdemeanor) reversed; remanded for new trial.

RELATED CASES: Hall, App., 826 N.E.2d 99 (record showed that D was indigent, thus Tr. Ct. abused its discretion when it found that he was partially able to pay costs associated with prosecuting his appeal).

TITLE: Redmond v. State
INDEX NO.: Y.3.a.
CITE: (2/10/88) Ind., 518 N.E.2d 1095
SUBJECT: Indigency determination
HOLDING: Tr. Ct. erred in refusing to appoint counsel to represent D on felony charges. D did not own automobile or real property. D's take-home pay decreased over 10 months before trial from $450 every 2 weeks to $300-$340. D paid $200 per month rent & supported wife & 2 children. Over 10-month period, D appeared in Ct. several times & clearly indicated he did not want to go to trial without counsel. He informed Tr. Ct. he wanted to employ counsel but was unable to raise $500-$2,000 fees he had been quoted. Trial judge suggested that D arrange time payments or borrow money to pay fee. Finally, D went to trial without counsel, was convicted & was sentenced to two 16-year sentences, to run concurrently. Although trial judge showed great patience & granted D several continuances to obtain counsel, likelihood that D could have done so was remote. D had no collateral to secure loan, & with prospect of long prison sentence, it is unlikely D could have arranged time payments. Indigency determination is within discretion of Tr. Ct., but record must show that Tr. Ct. gave careful consideration commensurate with right at stake. Moore 401 N.E.2d 676. D need not be totally without means. If he/she lacks financial resources to employ attorney without imposing substantial hardship on self or family, Tr. Ct. must appoint counsel. Id. Held, reversed & remanded for new trial.

RELATED CASES: Parish, 989 N.E.2d 831 (Ind. Ct. App 2013) (D should have been required to use the equity in his $130,000 home before being appointed counsel at public expense); Reese, 953 N.E.2d 1207 (Ind. Ct. App 2011) (Tr. Ct. erred in denying D's request for court-appointed counsel where it was apparent from the record that he lacked the resources to employ an attorney); Gilmore, 953 N.E.2d 583 (Ind. Ct. App 2011) (D's obstreperous conduct is not a proper consideration in the determination of whether D is indigent); Shively, 912 N.E.2d 427 (Ind. Ct. App 2009) (Tr. Ct. erroneously failed to give required careful consideration of D's financial situation in either of the pre-trial hearings in which it denied appointment of counsel); Bradford, App., 550/1353.

Y. RIGHT TO COUNSEL

Y.3. Indigency

Y.3.c. Recoupment

TITLE: Hendrix v. State
INDEX NO.: B.2.b.
CITE: (1993), Ind. App., 615 N.E.2d 483
SUBJECT: Application of bail to payment of appellate costs prohibited
HOLDING: Cash trial bond was improperly applied toward costs of D's appeal. When D has complied with terms of bond, D is entitled to return of money, less certain fees & costs of publicly paid representation for trial and sentencing. Ind. Code 35-33-8-3.1. D was admitted to bail by paying cash bond and appeared for all proceedings, including sentencing on April 16, 1992. Statute provides no authority for applying cash bond to future costs of public representation. According to ct., costs of appellate attorney's fees are properly determined after appeal is concluded, and there is no state or federal constitutional right to bail pending appeal. Therefore, 30-day time limit of statute and realities of appellate practice preclude application of bond money to public appellate representation. Ct. ordered to remit bail deposit to D.

RELATED CASES: Sandoval, 70 N.E.3d 889 (Ind. Ct. App 2017) (Tr. Ct. erred in holding the balance of D's bond in trust towards possible future appellate public defender fees).

TITLE: Newton v. State
INDEX NO.: Y.3.c.
CITE: (4th Dist. 3/29/84) Ind. App., 460 N.E.2d 1266
SUBJECT: Right to counsel - indigency; recoupment
HOLDING: Although Tr. Ct. should have conducted second indigency hearing before imposing fine ($300 plus costs, $100 of which was suspended if paid into county's fund for payment of pauper counsel), it was not fundamental error where D agreed to pay fine by a certain date & where D, even if indigent can be sued civilly for any unpaid amount (Ind. Code 35-1-44-8, now Ind. Code 35-38-1-18). Here, D who pled guilty brings direct appeal, challenging order to pay $100 to pauper counsel fund, arguing ruling denied her fundamental right to counsel. D's appeal is improper (PCR petition required in guilty plea challenges) & must be dismissed unless error is fundamental. Finding error not fundamental, Ct. notes indigency hearing would have prevented payment by certain date but would not have prevented collection. Ind. Code 35-1-44-8. Error, if any, in $100 payment to county's pauper counsel fund may require transfer of funds by county auditor to state common school fund. Ind. Const. Art. 8, Section 2. Held, appeal dismissed.

TITLE: Petty v. State
INDEX NO.: Y.3.c.
CITE: (1/11/89), Ind., 532 N.E.2d 610
SUBJECT: Recoupment - Court costs; Indigents
HOLDING: Order that indigent pay Ct. costs must expressly state that D cannot be jailed for failure to comply with order. Whitehead 511 N.E.2d 284. Tr. Ct.'s statement that it will not enforce payment of non-waivable fees qualifies as statement D will not be jailed for failure to pay. Affirmed.

RELATED CASES: Whedon, 765 N.E.2d 1276 (Ct. *overruled* cases declaring that sentencing orders must include prohibition against imprisonment for failure to pay fines or costs; D's financial resources should be determined at conclusion of his incarceration, not at time of sentencing); Cranor, App., 699 N.E.2d 284 (imposition of $1000 fine was erroneous because it failed to reflect D's indigency).

TITLE: Sandoval v. State
INDEX NO.: Y.3.c.
CITE: (2/24/2017), 70 N.E.3d 889 (Ind. Ct. App 2017)
SUBJECT: Judge may not hold bond money for future public defender fees
HOLDING: Trial court erred in holding the balance of Defendant's bond in trust towards possible future appellate public defender fees. See Hendrix v. State, 615 N.E.2d 483, 485 (Ind. Ct. App 1993). Court declined to find waiver because Defendant did not assent to this use of his bond, and a claim that trial court violated its statutory authority in imposing a sentence may be raised for the first time on appeal. Edsall v. State, 983 N.E.2d 200 (Ind. Ct. App 2013). Held, judgment reversed and remanded to return balance of Defendant's bond immediately.

Y. RIGHT TO COUNSEL

Y.4. Ineffective assistance of counsel (IAC)

TITLE: McGurk v. Stenberg

INDEX NO.: Y.4.

CITE: 163 F.3d 470 (8th cir. 1998)

SUBJECT: Ineffective Assistance of Counsel (IAC) -- Deficient Performance Resembling "Structural Error" Raises Presumption of Prejudice

HOLDING: Prejudice will be presumed where trial counsel fails to advise criminal D of right to jury trial. When counsel's deficient performance results in what would, in context of harmless-error analysis, be classified as "structural error," prejudice will be presumed.

TITLE: Pemberton v. State

INDEX NO.: Y.4.

CITE: (10/9/90), Ind., 560 N.E.2d 524

SUBJECT: Ineffective assistance of counsel (IAC) - failure to make trial objection to identification (ID) testimony

HOLDING: Where defense counsel filed motion to suppress ID testimony on grounds that pre-trial IDs were impermissibly suggestive, but failed to object to testimony at trial, & where this prejudiced D, counsel provided IAC. D was charged with robbery & confinement of victims in their home, & he & co-D were subjected to 2 impermissibly suggestive one-on-one show-ups with victims. (See Wethington 560 N.E.2d 496, card at R.2.b). D's counsel filed, & vigorously argued in support of motion to suppress ID testimony, which was denied. At trial, all 3 victims made in-Ct. ID of D, & also testified regarding pre-trial IDs, & D's counsel made no objection. On appeal, D argues that this failure to object at trial was IAC. Under 2-pronged standard of Strickland v. Washington (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674, D must make preliminary showing that performance of counsel was deficient & must then show that he was thereby prejudiced. Here, major issue at trial was ID, & there is no conceivable rational basis upon which to predicate decision not to object to ID testimony & preserve issue for appeal. As to prejudice, outcome of trial hinged on ID by victims. In appeal of co-D's conviction at separate trial, Ind. S. Ct. condemned manner in which pre-trial IDs were conducted (See Wethington, *supra*). Although Ind. S. Ct. found adequate independent basis to support in-Ct. ID of co-D, & consequently found testimony regarding pre-trial IDs to be harmless error, question was closer in D's case because victims had different opportunities to view D & co-D & were not as certain of pre-trial IDs of D. Held, reversed & remanded for new trial.

TITLE: Smith v. State
INDEX NO.: Y.4.
CITE: (12-29-97), Ind., 689 N.E.2d 1238
SUBJECT: Ineffective assistance of counsel (IAC) - failure to move to suppress statement
HOLDING: Trial counsel's tactical decision to explain D's confession rather than to move to suppress it or to object to it at trial did not constitute IAC within meaning of Sixth Amendment. Council's decision, as well as his overall performance at trial, was not constitutionally deficient, & fell within wide range of reasonable professional assistance. Counsel attempted to convince jury that at time D gave statement, he had legitimate reason to fear police, that he did in fact fear police, & that officers conducting interview badgered & intimidated him into confessing. In so doing, counsel called expert to testify as to D's limited mental capacity & susceptibility to pressure. Even if counsel's performance was constitutionally deficient, D could not establish prejudice because he failed to demonstrate that there was reasonable probability that challenging admissibility of confession on voluntariness grounds would have led to its exclusion & D's acquittal. Further, at sentencing hearing, D admitted that his confession had not been coerced, & that, consistent with his confession, he in fact committed offense. Held, transfer granted, Ct. App.' opinion at 673 N.E.2d 768 vacated, convictions affirmed.

RELATED CASES: Premo v. Moore, 131 S. Ct. 733 (a D who accepts a plea bargain on counsel's advice does not necessarily suffer prejudice when his counsel fails to seek suppression of evidence; deference to the state court's prejudice determination is significant, given the uncertainty inherent in plea negotiations).

TITLE: Weaver v. Massachusetts
INDEX NO.: Y.4.
CITE: (6/22/2017), 137 S. Ct. 1899 (2017)
SUBJECT: Must show prejudice for claim of IAC "structural error"
HOLDING: Even though violating a D's right to public trial is a "structural error," a D who raises this within a claim that counsel was ineffective must demonstrate prejudice, either that but for counsel's errors the result of the trial would have been different or that the trial was fundamentally unfair. Here, D does not demonstrate either. D's trial was set in a small courtroom that could not accommodate all potential jurors. Thus, an officer of the court excluded any member of the public who was not a potential juror, including D's mother and her minister. Defense counsel did not object or raise the issue on direct appeal. D was convicted of murder. Years later in a motion for new trial, D argued his lawyer was ineffective by failing to object to the courtroom closure. His motion was denied and was affirmed on appeal.

Barring D's family members from jury selection violated his right to public trial. See Presley v. Georgia, 558 U. S. 209 (2010). This error was not an individual error happening during the course of the trial, but a "structural error," one that affects "the entire framework" of a trial. See Arizona v. Fulminante, 499 U. S. 279, 310 (1991). Examples of strcutural error include abridging a D's right to represent himself or his right to choose his own lawyer. Because structural errors do not always impinge on fundamental fairness, the proper remedy depends on the context within which the claim was raised. If raised at trial or on direct appeal, a right-to-public trial claim usually results in automatic reversal. But where, as here, the issue is raised through an IAC claim, a D must establish prejudice, either by showing a reasonable probability that the result of the proceeding would have been different but for counsel's error or that counsel's error made the trial fundamentally unfair. See Strickland v. Washington, 466 U.S. 668, 694-96 (1984).

Although potential jurors might have behaved differently if D's family or the public been present during jury selection, D has offered no evidence to suggest a reasonable probability of a different outcome but for counsel's failure to object. He has also failed to show fundamental unfairness. His mother and her minister were indeed excluded during jury selection, but his trial was not conducted in secret; closure was limited to *voir dire*; and the courtroom remained open during the evidentiary phase of the trial. Furthermore, none of the potential harms from courtroom closure occurred here: misbehavior by the prosecutor, judge, or any other party. Held, *cert granted*, opinion at 54 N.E.3d 495 affirmed, and judgment affirmed. Kennedy, J., joined by Roberts, C.J., and Thomas, Ginsburg, Sotomayor, and Gorsuch, JJ; Thomas, J., concurring, joined by Gorsuch, J.; Alito, J., concurring, joined by Gorsuch, J.

RELATED CASES: Durden v. State, 99 N.E.3d 645 (Ind. 2018) (defective juror removal procedure was structural error, but since Defendant invited the error, he was not entitled to a new trial), McCoy v. Louisiana, 138 S. Ct. 1500 (2018) (counsel's concession of client's guilt in capital case was structural error, requiring no showing of prejudice).

Y. RIGHT TO COUNSEL

Y.4. Ineffective assistance of counsel (IAC)

Y.4.a. In general

TITLE: Atchley v. State
INDEX NO.: Y.4.a.
CITE: (10-26-93), 622 N.E.2d 502
SUBJECT: No ineffective assistance of counsel (IAC) - abandonment
HOLDING: Counsel's refusal to assist D in attempt to withdraw guilty plea did not constitute improper abandonment of client. When D advised he wanted to withdraw plea, attorney advised against it, & refused to assist in attempt. Attorney also appeared at hearing on motion & argued that it was against client's best interests to withdraw plea. Ct. found it could not say attorney abandons client when he refuses to go along with course of action he feels is not in client's best interests, & that attorney has duty to continue to represent client in what he perceives to be client's best interest. Ct. noted attorney stayed by client's side & attempted to represent him in manner he thought best & found there is no constitutional right to attorney who blindly follows client's instructions, McQueen v. Blackburn (5th Cir., 1985), 755 F.2d 1174, *cert. denied*. Because attorney did not abandon client, there was no IAC.

RELATED CASES: Donnegan, App., 889 N.E.2d 886 (appellate counsel was not ineffective for failing to file amended petition to transfer to Ind. S. Ct. anticipating Blakely's effect on Indiana sentences); Kendall, App., 886 N.E.2d 48 (appellate counsel was not ineffective for failing to anticipate the Indiana Supreme Court's decision in Smylie even after Blakely was decided; Riley, J., dissenting by *citing* to other appeals in which counsel raised Blakely prior to Smylie)

TITLE: Campbell v. State
INDEX NO.: Y.4.a.
CITE: (10/30/2014), 19 N.E.3d 271 (Ind. 2014)
SUBJECT: No IAC for not objecting to instruction on intent
HOLDING: Trial counsel was not ineffective for failing to object to Pattern Jury Instruction No. 9.05, even though it reflects confusion in the law about the State's burden of proof. Cf. Johnson v. State, 605 N.E.2d 762, 768 (Ind. Ct. App. 1992), *trans. denied* and Corley v. State, 663 N.E.2d 175, 177 (Ind. Ct. App. 1996). The instruction stated, "The instruction reads as follows: "A person engages in conduct 'intentionally' if, when he engages in conduct, it is his conscious objective to do so. If a person is charged with intentionally causing a result by his conduct, it must have been his conscious objective not only to engage in the conduct, but to cause the result."

The instruction could be improved by inserting the words "the State is required to prove" before the words "it must have been his conscious objective not only . . . ." However, the instruction adequately advised the jury of the State's heavy burden to prove intentional conduct and thus is a correct statement of law. Thus, trial counsel was not ineffective to failing to object to the instruction. Held, transfer granted and denial of post-conviction relief affirmed.

TITLE: Campbell v. State
INDEX NO.: Y.4.a.
CITE: (10/30/2014), 19 N.E.3d 271 (Ind. 2014)
SUBJECT: No IAC for not objecting to supplemental instruction
HOLDING: Trial counsel was not ineffective for failing to object to the reading of a supplemental instruction that defined "intent." Tr. Ct.s have been given "greater leeway to facilitate and assist jurors in the deliberative process, in order to avoid mistrials." Ronco v. State, 862 N.E. 257, 259 (Ind. 2007) (quoting Tincher v. Davidson, 762 N.E.2d 1221, 1224 (Ind. 2002); see also Jury Rule 28 and Ind. Code 34-36-1-6 (empowers a court to respond to a jury's desire "to be informed as to any point of law arising in the case.") None of the original instructions defined "intent," so the jury's request to know the definition of "intent" was properly understood to as a "desire to be informed as to [a] point of law arising in the case." Held, transfer granted and denial of post-conviction relief affirmed.

TITLE: Carter v. State
INDEX NO.: Y.4.a.
CITE: (8/25/87), Ind., 512 N.E.2d 158
SUBJECT: IAC - hybrid representation
HOLDING: D, who was granted hybrid representation & who defined public defender's responsibilities & had final say on all trial decisions, waived right to allege IAC. Correlative to 6th Amend. right to counsel is right to appear pro se, Faretta v. CA (1975), 422 U.S. 806; D who appears pro se, however, cannot assert 6th Amend. claim of IAC. Id. When D is represented by counsel, counsel has "power to make binding decisions of trial strategy in many areas." Id. Because this D substantially controlled his defense, obtaining discovery, filing pre-trial motions, arguing before Tr. Ct., &, more important, making trial decisions against advice of co-counsel, his form of representation was most like pro se with standby counsel. "Had counsel been a true advocate within the meaning of the 6th Amend., rather than a tool for implementing Carter's self-representation, Carter certainly would have been entitled to present this claim." Held, D who represents himself with standby counsel has waived his right to subsequently raise IAC.

RELATED CASES: Sherwood, 717 N.E.2d 131 (where D was competent to stand trial; made knowing, intelligent & voluntary waiver of his right to counsel in timely & unequivocal manner; & because he was denied actual control of case presented to jury, Tr. Ct.'s imposition of hybrid representation violated Sixth Amendment).

TITLE: Davidson v. State
INDEX NO.: Y.4.a.
CITE: (8/29/90), Ind., 558 N.E.2d 1077
SUBJECT: Ineffective assistance of counsel (IAC) - stipulation to admission of polygraph results
HOLDING: D's counsel did not render IAC in allowing D to stipulate to admission of polygraph results, such as to render them inadmissible. D's 14-month-old son drowned in bathtub one day after D, who was receiving AFDC benefits, purchased $20,000 life insurance policy on him. Funeral director arranged for lawyer to represent D in her attempt to collect insurance benefits. Lawyer went on to represent D throughout CHINS, grand jury, & coroner's inquest proceedings. As investigation continued, police came to suspect that D had also drowned 14-month-old daughter in bathtub about one year earlier, obtaining $5000 in insurance benefits. While represented by same counsel, D submitted to polygraph, stipulating that no charges would be filed if she passed, but that results would be admissible at trial if she failed. D failed, 2 murder charges were filed, together with death penalty request, & counsel withdrew. On appeal, D argues that results should not have been admitted because allowing her to submit to exam & stipulate to admission was IAC. At hearing on D's motion to suppress, D offered testimony of attorney/expert that, in his opinion, allowing D who was accused of 2 murders to submit to polygraph & stipulate to admission constituted IAC. However, D's counsel spent 35 minutes prior to polygraph explaining stipulation, waivers & certification of understanding, & advisement of rights. Throughout proceedings at which counsel represented her, D had maintained her innocence. In light of state's agreement not to pursue charges if D passed polygraph, counsel's failure to dissuade her from undergoing exam represents sound tactical decision. Held, convictions affirmed.

TITLE: Ferrer v. State
INDEX NO.: Y.4.a.
CITE: 718 So.2d 822 (Fla. Ct. App. 1998)
SUBJECT: Starting Jury Selection in Evening Denied D Fair Trial
HOLDING: Starting jury selection in D's trial at 7:30 p.m., when his attorney was tired and not performing at his usual level of competency, denied D a fair trial. Counsel objected to Court's order to begin jury selection at that time, stating that he had been working since 8 a.m., had been in court for 6 hours, and was tired. The Tr. Ct. denied counsel's motion to continue, and to strike the jury panel, its only stated reason for doing so being, "Because I say [so]." The appellate court noted from the record that during jury selection, which lasted one hour, defense counsel "was often unclear, sometimes abrasive and antagonistic...rambled and did not always seem to make sense." Given the circumstances -- objection by the defense, the absence of reasons for continuing so late, and a showing of some prejudice to the D, the appellate court finds that the Tr. Ct. abused its broad discretion, denying the D a fair trial.

TITLE: Nix v. Whiteside
INDEX NO.: Y.4.a.
CITE: 475 U.S. 157, 106 S. Ct. 988, 89 L.Ed.2d 123 (1986)
SUBJECT: IAC - attorney response to D's threat to commit perjury
HOLDING: To obtain relief on federal habeas corpus based upon ineffective assistance of counsel, D must establish both serious attorney error & prejudice. Strickland v. WA (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674. To show error, it must be established that assistance rendered by counsel was constitutionally deficient in that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by 6th Amend. To show prejudice, it must be established that claimed lapses in counsel's performance rendered trial unfair so as to undermine confidence in outcome of trial. Here, D advised his attorney that he intended to commit perjury. D's attorney advised D that perjurious testimony was not necessary to establish defense. D's attorney further advised that if D committed perjury, it would be attorney's duty to advise court, attorney would probably be allowed to impeach D's testimony & would withdraw from representation. D took stand & testified truthfully. Counsel's representation fell well within accepted standards of professional conduct & range of reasonable professional conduct acceptable under Strickland. Counsel's admonitions to D did not force D into impermissible choice between right to counsel & right to testify as he proposed because there is no permissible right to testify falsely. Nor has D established prejudice because he has no valid claim that confidence in result of his trial was diminished by his desisting from contemplated perjury. Blackmun, joined by Brennan, Marshall & Stevens, CONCURS IN JUDGMENT.

TITLE: U.S. v. Russell
INDEX NO.: Y.4.a.
CITE: 205 F.3d 768 (5th Cir. 2000)
SUBJECT: Attorney's Absence During Evidence Against Co-Conspirator Presumptively Ineffective
HOLDING: Conspiracy D was denied effective assistance of counsel by absence of his attorney during government's presentation of evidence against jointly tried co-conspirators. D's attorney became ill during trial, and Tr. Ct. allowed government to proceed with its case, but only against co-conspirators. Appellate Court finds presentation of evidence against co-conspirators to be critical stage of trial against D, and finds lawyer's absence during this stage presumptively prejudicial, despite fact that when lawyer returned, he "vigorously" represented D. The Court noted that "[a]s the government builds its case against any co- conspirator, the conspiracy is more clearly established, and all of the co-conspirators become more tightly linked."

TITLE: Terrell v. Morris
INDEX NO.: Y.4.a.
CITE: 493 U.S.1, 110 S. Ct. 4, 107 L.E.2d 1 (1989)
SUBJECT: Ineffective assistance of counsel - failure to raise on direct appeal, retroactivity
HOLDING: Per curiam. Court remands habeas appeal to court of appeals for determination of whether state rule barring consideration of IAC claim on collateral attack, if not raised on direct appeal, can be applied retroactively to petitioner's case. Here, state court ruled issue was defaulted on state collateral attack. Basis of holding was state court opinion issued after petitioner's appeal. On federal habeas corpus, district court reached merits of claim because only applicable procedural default rule postdated petitioner's conviction. On appeal, court of appeals held issue was not reviewable because petitioner failed to raise claim properly in state court. Held, remanded for determination of retroactivity. Rehnquist, joined by White, O'Conner, & Scalia, DISSENTS.

TITLE: Walker v. State
INDEX NO.: Y.4.a.
CITE: (12/16/82) Ind., 442 N.E.2d 696
SUBJECT: Ineffective assistance of counsel (IAC) - standard of review before Strickland
HOLDING: Presumption exists that counsel is competent; strong & convincing evidence is required to rebut presumption. Hollonquest 432 N.E.2d 37; Lindley 426 N.E.2d 398; Jones 387 N.E.2d 440. Incompetency of counsel determined by examining particular facts of each case; standard of review is mockery of justice test as modified by adequate legal representation standard. Darnell 435 N.E.2d 250; Crisp 394 N.E.2d 115. Deliberate choices made by counsel for some contemplated tactical or strategic reason do not establish IAC. Ct. will not speculate as to most advantageous strategy. Morris 409 N.E.2d 608; Hollon 398 N.E.2d 1273. Here, D claims attorneys failed to investigate adequately & present alibi defense. Attorney testified at hearing on MCE that D had never mentioned any alibi. Held, D has not shown he was denied adequate assistance of counsel.

TITLE: Williams v. State
INDEX NO.: Y.4.a.
CITE: (6/19/84) Ind., 464 N.E.2d 893
SUBJECT: Ineffective assistance of counsel (IAC) - waived on PCR if not raised on appeal
HOLDING: Failure to raise issue of IAC in direct appeal waives issue raised in PCR proceeding. Metcalf 451 N.E.2d 321. Ct. will consider waived issue only if error is fundamental (denied D fair trial). Mitchell 455 N.E.2d 1131. Here, D contends trial counsel was ineffective because he failed to subpoena alibi witness & failed to tender alibi instruction. Ct. finds D's allegations & proof at PCR hearing do not demonstrate fundamental error. Held, denial of PCR affirmed. DeBruler, CONCURRING IN RESULT, would hold that waiver of IAC issue is a defense which state must raise to PCR Ct. State did not raise defense, thus DeBruler cannot concur that waiver occurred.

RELATED CASES: Douglas 490 N.E.2d 270 (Crim L 998(13); D raised IAC on direct appeal & issue cannot be relitigated in PCR proceeding, *citing* Rinard 394 N.E.2d 160).

Y. RIGHT TO COUNSEL

Y.4. Ineffective assistance of counsel (IAC)

Y.4.b. IAC of trial counsel (Strickland v. Washington)

TITLE: A.M. v. State

INDEX NO.: Y.4.b.

CITE: (11-12-19), Ind., 134 N.E.3d 361

SUBJECT: Juvenile's ineffective assistance of counsel claim in delinquency proceedings governed by standard founded in the Fourteenth Amendment's due process clause

HOLDING: A court should evaluate a juvenile's claim of ineffective counsel in a delinquency disposition-modification hearing by using a due process standard. It should consider counsel's overall performance to determine if the child received a fundamentally fair hearing resulting in a disposition that served his best interests. Here, after a modification of probation hearing, juvenile A.M. was placed in the Department of Correction. He claimed his attorney failed to provide effective assistance of counsel during the modification hearing because his counsel expressed confusion at his deteriorating behavior instead of advocating for a placement other than the DOC. The Court rejected the application of the Sixth Amendment standard set out for evaluating ineffective-assistance-of-counsel claims set out in Strickland v. Washington, 466 U.S. 668 (1984), and instead applied the Fourteenth Amendment due process standard articulated in Baker v. Marion Cty. Office of Family and Children, 810 N.E.2d 1035 (Ind. 2004). In evaluating the claim of ineffective assistance of counsel, the Court focused its inquiry on whether it appeared that the juvenile received a fundamentally fair hearing where the facts demonstrate the court imposed an appropriate disposition considering the child's best interests.
In this case, Court concluded that the A.M.'s counsel helped ensure he received a fundamentally fair hearing where the court reached an accurate disposition that furthered A.M.'s best interests. Justice Slaughter concurred in the judgment with a separate opinion, indicating he would simply apply the standard set forth in Baum v. State, 533 N.E.2d 1200 (Ind. 1989).

TITLE: Banks v. State
INDEX NO.: Y.4.b.
CITE: (5th Dist., 04-15-08), Ind. App. 884 N.E.2d 362
SUBJECT: Claim of ineffective assistance of counsel (IAC) rejected - concession to lesser offense
HOLDING: A concession to a particular fact or charge without any indication of the client's consent to the strategy is deficient performance under Strickland. United States v. Holman, 314 F.3d 837 (7th Cir. 2002). Here, in felony murder prosecution, trial counsel's failure to consult with D regarding counsel's admission to crime of theft during opening statements constituted deficient performance. However, because D was not convicted of theft and presented no alternative strategy that could have changed the outcome of trial, he failed to show reasonable probability that, but for counsel's deficient performance, result of proceeding would have been different. Johnson v. State, 832 N.E.2d 985 (Ind. Ct. App 2005). D's allegation that his trial counsel "admitted" all the elements of felony murder during opening statement is unsupported by record. Court also rejected claim that trial counsel was ineffective for advising D to testify at trial. Court noted that D's testimony was only evidence from which jury could have concluded that D intended to participate in a theft rather than a robbery, thus it could not say that it was poor judgment for counsel to advise him to testify. Finally, it was not IAC to disclose to the State the existence and name of a witness against D who was unknown to State, where defense had previously intended to call this witness. Held, denial of post-conviction relief affirmed.

TITLE: Bell v. Cone
INDEX NO.: Y.4.b.
CITE: 543 U.S. 447, 122 S. Ct. 1843; 152 L. Ed. 2d 914 (2002)
SUBJECT: Sixth Amendment, ineffective assistance of counsel
HOLDING: Counsel's total failure to present evidence and waiving final argument in the penalty phase of this capital trial was not ineffective assistance of counsel under the two-part test of Strickland v. Washington, 446 U.S. 668 (1984), and was not a total abandonment of the client allowing a presumption of prejudice under U.S. v. Cronic, 466 U.S. 648(1984).

D was sentenced to death after counsel failed to put on any evidence in the penalty phase of his capital trial and waived closing argument. On federal habeas, the Sixth Circuit reversed D's sentence, holding that counsel's default was one for which prejudice should be presumed under U.S. v. Cronic. The U. S. Supreme Court reversed the Sixth Circuit, holding that the Strickland test (and not the Cronic test) applied, under which the D must prove (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

TITLE: Bobby v. Van Hook
INDEX NO.: Y.4.b.
CITE: (U.S.), (11-09-09), 130 S. Ct. 13
SUBJECT: Ineffective assistance of counsel - overreliance on ABA Standards
HOLDING: Per Curiam. The American Bar Association's Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases may not be treated as setting the standard of prevailing professional norms when a court is assessing a Sixth Amendment claim of ineffective assistance of counsel. Under standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), a convicted D seeking to establish ineffective assistance must first demonstrate that counsel's performance fell below an objective standard of reasonableness in light of prevailing professional norms. The next step is to establish that the deficient performance resulted in prejudice to the D. Here, Sixth Circuit erred in granting habeas relief to an Ohio death- row inmate on grounds that counsel for petitioner at his trial failed to satisfy the ABA standards for uncovering and presenting mitigating evidence. The ABA standards are only one source of information that courts can look to when determining the applicable professional norm. The sole standard is objective reasonableness, and any other yardstick is nothing but a guideline for assessing reasonableness. Held, Sixth Circuit Court of Appeals' opinion at 560 F.3d 523 vacated, grant of habeas relief reversed; Alito, J., CONCURRING to further distance himself from the ABA, which he described as "a private group with limited membership" whose views "do not necessarily reflect the views of the American bar as a whole.".

TITLE: Boria v. Keane
INDEX NO.: Y.4.b.
CITE: 83 F.3d 48 (2nd Cir. 1996)
SUBJECT: Effective Assistance of Counsel -- Failure to Try to Talk D Into Accepting Plea Bargain
HOLDING: Habeas petitioner who received 20-year sentence after going to trial on cocaine charge was denied effective assistance of counsel by attorney's failure to try to talk him out of rejecting plea bargain that would have resulted in 1 – 3-year sentence. Counsel testified that he believed petitioner had no chance of being acquitted; however, he claimed also to have believed that petitioner would never accept plea bargain because admitting guilt in front of children would cause him embarrassment. Court observes that prevailing professional norms require defense counsel to advise client fully on whether particular plea appears desirable. As to prejudice, court observes there would have been more than mere reasonable probability that had counsel advised petitioner and his father, who hired counsel regarding desirability of plea, family members would have persuaded petitioner to accept plea agreement and outcome would have been different. Although there is strong presumption of effectiveness where counsel makes strategic decisions, there was no strategic decision to make about whether to advise client to accept plea offer.

TITLE: Brewster v. State
INDEX NO.: Y.4.b.
CITE: (3rd Dist., 7-16-98), Ind. App., 697 N.E.2d 95
SUBJECT: Claim of ineffective assistance of counsel (IAC) - evidence not in record
HOLDING: Proper method for claiming IAC when evidence is not in record on appeal is to use procedure set forth in Hatton, 626 N.E.2d 442 & Davis, 368 N.E.2d 1149, to develop record for appeal. Davis/Hatton request terminates or suspends direct appeal so that post-conviction relief can be pursued in Tr. Ct. & is appropriate in circumstances where claim requires level of fact-finding not suitable for appellate Ct. Here, in appendix to his appellate brief, D submitted unsigned affidavit forms in support of alibi defense which trial counsel failed to present. D's claim of IAC was brought in incorrect forum & in inappropriate way. Held, conviction affirmed without prejudice to D's right to file petition for post-conviction relief pursuant to Davis/Hatton.

Note: But see July 1994 Defender for additional considerations when raising IAC on direct appeal.

RELATED CASES: Slusher, App., 823 N.E.2d 1219 (Ct. granted remand for Davis/Hatton procedure to develop claims of ineffective assistance of trial counsel).

TITLE: Burris v. State
INDEX NO.: Y.4.b.
CITE: (8/24/90), Ind., 558 N.E.2d 1067
SUBJECT: Ineffective assistance of counsel (IAC) - capital sentencing
HOLDING: Counsel's negative statements about D at close of guilt phase, inconsistent use of intoxication as mitigator, & failure to develop & present mitigating evidence constituted IAC warranting vacation of death sentence. During closing argument one of D's lawyers referred to D as a street person, said that D wasn't the best client he'd ever had, & admitted that he didn't even like D. He told jury only that if they found D guilty of murder, it would personally inconvenience him. Although this negative characterization was not sufficiently prejudicial to undermine finding of guilt, in light of overwhelming evidence, it was likely to linger in jurors' minds & prejudice sentencing recommendation. Further, trial counsel was inconsistent in use of intoxication as mitigator arguing that maybe intoxication was mitigating circumstance, maybe it wasn't. Counsel referred to D as an "insignificant, snively little street person." Record establishes that counsel failed to investigate mitigation or review D's records prior to penalty phase. U.S. S. Ct. has held that attorney who makes reasonable decision not to present evidence of client's exceptionally unhappy & unstable childhood after some investigation does not render IAC. Burger v. Kemp (1987), 483 U.S. 776, 107 S. Ct. 3114, 97 L.Ed.2d 638. Subsequently, 7th Circuit concluded that Burger v. Kemp does not compel finding of adequate assistance where failure to investigate mitigation was coupled with making of bizarre & prejudicial closing argument. Kubat v. Thieret (1989), 867 F.2d 351. Supreme Ct. here finds that D's counsel's performance fell below prevailing professional norms & prejudiced D, in light of evidence at PCR hearing that substantial mitigation was available. Cumulative effect of counsel's errors undermines reliability of sentencing decision. Held, death sentence set aside; remanded for new sentencing hearing.

TITLE: Butler v. State
INDEX NO: Y.4.b.
CITE: (5th Dist., 6-26-96), Ind. App., 668 N.E.2d 266
SUBJECT: Ineffective assistance of counsel - attorney not licensed to practice law in Indiana
HOLDING: Where attorney was not authorized to practice in Indiana & was not authorized to appear in instant case, he was per se incapable of providing Indiana criminal D with his constitutional right to effective assistance of counsel. Admission & Discipline Rule 3 provides that out-of-state attorney may practice in Indiana for temporary period, but only after petitioning Ct. & procuring assistance of local Indiana counsel. Counsel's failure to comply with disciplinary rule rendered him without authority to appear & represent D in this case, & absence of such authority strips away presumption of competence. D was not required to show prejudice. Held, convictions reversed, remanded for new trial.

RELATED CASES: Collins, 14 N.E.3d 80 (Ind. Ct. App 2014) (D was not deprived of his right to counsel where he was represented by certified legal intern at his guilty plea hearing; intern was supervised by a licensed attorney at all relevant times during his representation of D and he informed D of his legal intern status); Little, App., 819 N.E.2d 496 (D waived claim that he received IAC because D proceeded to trial with knowledge that defense counsel had failed to comply with Indiana Admission & Discipline Rule 3 & was unauthorized to practice law in Indiana; counsel's representation of D at a pre-trial hearing while counsel was suspended from Illinois bar did not amount to a *per se* violation of D's right to counsel under state & federal constitutions); Talley, App., 736 N.E.2d 766 (distinguishing Butler, Ct. noted that D was represented both by attorney from out-of-state & co-counsel who was licensed to practice in Indiana; also, out-of-state counsel filed motion to appear pro hac vice with Tr. Ct.); Cole v. U.S., 162 F.3d 957 (7th Cir. Ind. 1998) (counsel was not ineffective per se because counsel had not been admitted to practice in federal district in which D was tried); Anderson, 699 N.E.2d 257 (no authority or reason to expand Butler to require reversal based on conviction by unlicensed prosecutor).

TITLE: Conley v. State
INDEX NO.: Y.4.b.
CITE: (03/23/2022) 183 N.E.3d 276 (Ind.)
SUBJECT: Denial of PCR in juvenile LWOP case affirmed
HOLDING: This is a post-conviction relief (PCR) appeal challenging Defendant's life-without-parole sentence for a crime committed when he was seventeen and a half years old. The Court of Appeals had reversed the denial of PCR due to trial counsel's failure to present evidence of juvenile brain science and juveniles' lesser culpability when compared to adults. The Supreme Court held that the then-prevailing cases of Roper and Graham did not clearly apply to juvenile life without parole for a homicide offense. Moreover, the mitigation efforts focusing on Defendant's age and good character, and the trial court's acceptance of Defendant's youth as a mitigating factor, demonstrate that there was not a reasonable possibility of a different outcome had the relevant brain science been presented as mitigation.

Further, the Court rejected several more arguments that Defendant's trial counsels were ineffective. First, trial counsels were not ineffective for failing to call certain witnesses who knew Defendant. They in fact did call witnesses who knew Defendant and elicited testimony from the State's witnesses. Defendant failed to demonstrate how the additional witnesses would have developed new evidence. Second, trial counsels were not ineffective for failing to rebut certain testimony of Dr. Hawley. The evidence offered in rebuttal at the PCR hearing was: (1) only a small part of the horrific facts concerning the death, and (2) evidence proving a point that the State had conceded was unproven previously and not relied upon by the trial court in its sentencing decision. Third, they were not ineffective for failing to rebut the State's mental health evidence from Dr.'s Daum and Olive. They attempted to strike some of the opinions, successfully limited their opinions, as well as successfully limited the weight given to their testimony. And fourth, they were not ineffective for failing to investigate more. The affidavit submitted from the investigator at the PCR hearing did not aver that work was left undone. Moreover, the evidence of certain jail records offered at the PCR hearing was cumulative of evidence already presented.

Finally, the Supreme Court held that Defendant's arguments under Appellate Rule 7(B) were barred by res judicata. Unlike the defendant in Stidham v. State, 157 N.E.3d 1185 (Ind. 2020), whose sentence had been previously reviewed under the manifestly unreasonable standard, and prior to the SCOTUS evolution of "the way we evaluate juvenile offenders," Defendant had received appellate review of his sentence in 2012. Since then, the standards for reviewing sentences and how jurisprudence treats juveniles convicted of serious crimes has largely remained the same, thus there are no extraordinary circumstances which overcome the restraints of res judicata.

TITLE: Dando v. Yukins

INDEX NO.: Y.4.b.

CITE: 461 F.3d 791 (6th Cir. 2006)

SUBJECT: Counsel ineffective for not knowing expert funds available

HOLDING: The U.S. Court of Appeals for the Sixth Circuit held that a criminal defense attorney's refusal to investigate the validity of a duress defense based on battered woman's syndrome prior to advising his client to plead guilty can amount to ineffective assistance of counsel under the Sixth Amendment standard established in Strickland v. Washington, 466 U.S. 668 (1984). Based on this holding, the Court ordered habeus corpus relief for a state D who asked her lawyer to explore a duress defense to charges that she aided her boyfriend in a string of robberies but was rebuffed because counsel misunderstood the law regarding the availability of funds to hire an expert. Under Strickland, the Court found that the court-appointed attorney's performance fell below an objective standard of reasonableness, since his assertion that retaining an expert would be too costly "was flatly incorrect" under federal law based on Ake v. Oklahoma, 470 U.S. 68 (1985), which obligates states to provide funds for expert witnesses when a D demonstrates that their mental health will be an issue at trial. Although an attorney's strategic decisions generally are entitled to deference, that is not the case here, where counsel's actions "reflected a misunderstanding of the law." The Court also determined that the petitioner was prejudiced by counsel's failure to investigate a duress defense. Despite fact that battered woman's syndrome has never been admitted proving duress in Michigan, the theory of the syndrome is "not at odds" with the state law elements of duress. A dissent challenged the ruling based on Michigan's highest court limiting the admissibility of battered woman's syndrome evidence to explain behavior that would be incomprehensible to the average person.

TITLE: Dowdell v. State
INDEX NO.: Y.4.b.
CITE: (12-16-99), Ind., 720 N.E.2d 1146
SUBJECT: Ineffective assistance of counsel (IAC) - deficient performance; belated witness list
HOLDING: Post-conviction Ct. erred in finding that trial counsel's failure to file witness list or seek reconsideration of witness exclusion order did not constitute deficient performance. In motion for continuance, trial counsel stated that he had been given names of ten potential witnesses & addresses for four of them. Counsel could have filed witness list at that time but did not. In face of order to compel that explicitly mentioned exclusion as potential sanction, counsel filed no witness list & apparently did no independent investigation to find additional information about these witnesses. Rather, he sought continuance & then on morning of trial, filed belated witness list. In addition, after first trial ended in hung jury, counsel did not file written request for reconsideration of Tr. Ct.'s ruling on exclusion but rather raised issue orally on morning of second trial. Finally, counsel made no offer of proof to preserve any error in Tr. Ct.'s exclusion of witnesses.

Under these circumstances, Ct. concluded that counsel's actions were not product of trial strategy or tactics but rather were deficient performance. Post-conviction Ct.'s findings shed no light on whether there was reasonable probability that witnesses' testimony would have led to acquittal in light of other evidence at trial. Held, remanded to post-conviction Ct. to enter findings of fact & conclusions of law on prejudice prong of D's IAC claim.

RELATED CASES: S.T., 764 N.E.2d 632 (D was unnecessarily prejudiced by counsel's deficient performance in failing to object to State's motion to exclude belatedly disclosed defense witnesses).

TITLE: Eldridge v. State
INDEX NO.: Y.4.b.
CITE: (3d Dist. 11/13/91), Ind. App., 580 N.E.2d 726
SUBJECT: Ineffective Assistance of Counsel (IAC) - Evidentiary Objections
HOLDING: In incest trial it was not IAC for counsel to fail to object to evidence of D's prior sexual conduct & voucher testimony, or to fail to make offer to prove concerning evidence that alleged victim (AV) was angry at her mother because she knew of AV's sexual activity with boyfriend. Prior sexual misconduct consisted of evidence that when D was 7 years old, he digitally penetrated 4-year-old girl, that he asked 13-year-old girl to perform oral sex & have intercourse with him, & that he attempted to expose himself to daughter of sister of his stepfather (at unspecified age). Ct. found counsel may well have concluded acts were admissible under depraved sexual instinct, because remoteness does not affect admissibility, & therefore failure to object was not IAC. Ct. also found that failure to object to 3 witnesses testifying about what victim told them was not IAC, distinguishing Stone, App., 536 N.E.2d 534, because of the smaller number of witnesses. Lastly, Ct. found failure to make offer to prove concerning AV's reason for anger at her mother, was not IAC because such evidence would have been inadmissible on grounds of relevance, & possibly due to rape shield law. Held, conviction affirmed.

RELATED CASES: Perez, App., 728 N.E.2d 234 (failure to object to evidentiary harpoon could have been strategy & was not IAC); Williams, App., 658 N.E.2d 598 (no IAC for failure to object to state's use of alleged stereotype testimony describing drug dealers); Sims, App., 601 N.E.2d 344 (vouching testimony was not reversible error).

TITLE: Ellyson v. State
INDEX NO.: Y.4.b.
CITE: (4th Dist., 12-03-92), Ind. App., 603 N.E.2d 1369
SUBJECT: Ineffective Assistance of Counsel (IAC) found
HOLDING: Defense counsel's failure to lay proper foundations for possibly exculpatory evidence & prior inconsistent statements to impeach complaining witness, constituted IAC. D was convicted of burglary, rape, & battery, arising out of an alleged attack on estranged wife in home she was occupying. Wife had filed for divorce & obtained restraining order against D (which was not submitted into evidence). Wife testified to problems with D on three successive days. On evening of third day D allegedly returned to wife's home, struck & choked her, inserted a curling iron into her vagina, & raped her without ejaculating. Wife said that when he finished, she kicked him in gonads, ran into bathroom & locked door, & then burned her panties in a wood stove, bathed, douched, & washed curling iron to get rid of all reminders that he was there. Wife later reported incident to police & 2 rape kits were prepared, one of hair samples, & one of pubic hair combings, blood samples & vaginal smears. Hair samples were negative for D, & vaginal smears were negative as to intercourse, & they were not offered by State at trial. Wife was State's prosecuting witness & provided only direct evidence regarding events supporting conviction. At trial, counsel attempted to introduce two rape kits to show wife did not have intercourse that evening & that third party's pubic hair was found at scene but was unable to do so because he did not have necessary relevancy & authentication witnesses available to testify. He also attempted to impeach wife with testimony of prior inconsistent statements she had made to others but failed to lay predicate foundation by asking her whether she had, in fact, made statements on dates & times alleged. Ct. found both of these items of evidence were important to defense because wife provided only direct evidence of guilt, & that counsel's failure to take steps to make them admissible was not merely result of poor strategy or bad tactics but fell below professional norms. Ct. also found D was sufficiently prejudiced by errors because given evidence presented, any evidence tending to show wife had not had intercourse, D was not in her bed, or that wife was not credible, was important & might have created reasonable doubt as to guilt. Held, IAC found & cause reversed & remanded for new trial.

RELATED CASES: Hicks, App., 631 N.E.2d 499 (Counsel's failure to lay adequate foundation to admit witness' prior inconsistent statements was not IAC because witness was fully cross-examined regarding substance of prior statement & jury was alerted to inconsistencies).

TITLE: Glaser v. State
INDEX NO.: Y.4.b.
CITE: (2d Dist. 07/24/91), Ind. App., 575 N.E.2d 329
SUBJECT: Ineffective Assistance of Counsel (IAC) - failure to object to pretrial show-up
HOLDING: Where major issue at trial was identification (ID) of D, trial counsel's failure to move to suppress ID or object to its admission at trial, constituted IAC & was sufficiently prejudicial to require reversal. When victim arrived in parking lot he saw 3 men, & after entering restaurant he heard squeal of tires & saw his car being driven away. He chased car on foot & ran alongside driver's door for approximately 30 seconds. Driver lost control of car after short distance & victim ran to his car as driver jumped out & ran away. Victim described driver's general appearance & what he was wearing to police. Some unspecified time later, police told victim they possibly had suspect & took him to car matching description of other car in parking lot. Three men from car were all identified by victim & D was identified as driver of car. Victim also identified D at trial, without any objection. Ct. App. finds that counsel was ineffective for failing to object to possible tainted/impermissible ID. Ct. noted that whether their pretrial ID was impermissibly suggestive or whether there was independent basis for in-Ct. ID were questions to have been decided by Tr. Ct. based on totality of circumstances, & that counsel's failure to raise issue robbed D of possibly favorable ruling, *citing* similarity to Pemberton 560 N.E.2d 524. Omission was prejudicial because ID of D was central to case. Held, reversed & new trial ordered.

TITLE: Hale v. State

INDEX NO.: Y.4.b.

CITE: (6/9/2021), 171 N.E.3d 141 (Ind. Ct. App 2021)

SUBJECT: Trial and appellate counsel not ineffective for failing to challenge constitutionality of sentencing enhancement

HOLDING: Post-conviction relief petitioner argued that under Johnson v. United States, 576 U.S. 591 (2015) and Whatley v. Zatecky, 833 F. 3d 762 (7th Cir. 2016), his trial and appellate counsel were ineffective for failing to make a facial constitutional challenge to the sentencing enhancement provision of having manufactured drugs within 1000 feet of a youth program center. This enhancement doubled the Defendant's sentencing exposure. The Court of Appeals found no prejudice to Petitioner, stating that there may be a case where a facial constitutional challenge can be appropriately made under Johnson, supra, but here Petitioner could not show prejudice because a facial constitutional challenge would have faced several obstacles. The Whatley decision was an as applied challenge and the Court of Appeals determined Petitioner would not have standing to raise a facial unconstitutional challenge because the statute was not unconstitutionally vague as applied to him. Therefore, Petitioner could not show prejudice and trial counsel was not ineffective. Because there was no objection at trial, the issue was waived, and appellate counsel would have had to argue fundamental error. The Court of Appeals concluded the failure to make the facial constitutional challenge does not rise to fundamental error on appeal and therefore appellate counsel was likewise not ineffective.

TITLE: Hanks v. State
INDEX NO.: Y.4.b.
CITE: (3/16/2017), 71 N.E.3d 1178 (Ind. Ct. App 2017)
SUBJECT: Ineffective assistance of counsel (IAC) - failure to advise of judge's sentencing practices
HOLDING: After receiving the maximum 50-year sentence as a result of an open guilty plea to child molesting, Defendant filed a petition for post-conviction relief (PCR), arguing: 1) defense counsel was ineffective for failing to advise him of the judge's sentencing practices, but for which he would not have rejected the original 30-year plea offer, and 2) his plea was not knowingly, intelligently and voluntarily made because he did not know of judge's history of imposing maximum sentences in sex offender cases.

Where, as here, a claim of ineffective assistance is predicated on failure to advise of or act on local, extralegal idosyncrasies, a showing of deficient performance requires strong evidence that the local, extralegal idiosyncrasy rose to the level of governing professional norm. Premo v. Moore, 562 U.S. 115 (2011).

In affirming trial court's denial of Defendant's PCR petition, Court found he failed to carry his burden to show that counsel's failure to advise him of judge's sentencing practices fell short of the standard of reasonable competence prevailing in Clark County in 2001. However, trial court failed to resolve the issue of whether Defendant's plea was knowing, intelligent, and voluntary as required by PC Rule 1(6) (requiring post-conviction courts "to make specific findings of fact, and conclusions of law on all issues presented"). Thus, Defendant is entitled to be heard on whether he was misled by counsel's omission or improperly induced to accept the open plea offer on the incorrect understanding that the open offer was more favorable than the 30-year offer. Held, judgment affirmed in part, reversed and remanded for resolution of involuntary guilty plea claim.

TITLE: Hill v. Lockhart
INDEX NO.: Y.4.b.
CITE: 474 U.S. 52, 106 S. Ct. 366, 88 L.Ed.2d 203 (1985)
SUBJECT: IAC - guilty pleas
HOLDING: 2-part test enunciated in Strickland v. Washington (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 applies to challenges to guilty pleas based on IAC. First, D must show that counsel's representation fell below an objective standard of reasonableness. Second, D must show counsel's constitutionally ineffective performance affected outcome of plea process. To satisfy prejudice component, D must show that there is reasonable probability that, but for counsel's errors, D would not have pled guilty & would have insisted on going to trial. Here, counsel misinformed D as to parole eligibility date. D did not allege in habeas petition that had counsel correctly informed him, he would have insisted on going to trial. Nor did he allege special circumstances that might support conclusion that he placed particular emphasis on parole eligibility in deciding whether to plead guilty. Therefore, D's allegations are insufficient to satisfy "prejudice" requirement of Strickland. Held, denial of habeas petition without hearing, affirmed. White, joined by Stevens, CONCURS IN JUDGMENT.

RELATED CASES: Frye, 132 S. CT.1399 (U.S. 2012) (see full review this section).

TITLE: Humphrey v. State
INDEX NO.: Y.4.b.
CITE: (5/5/2017), 73 N.E.3d 677 (Ind. 2017)
SUBJECT: Ineffective assistance of counsel (IAC) - considering unsworn hearsay statement as substantive evidence
HOLDING: In murder prosecution, trial counsel was ineffective for: 1) allowing the jury to consider an unsworn hearsay statement identifying D as the shooter as substantive evidence against him, without objection; 2) not asking that the jury be correctly admonished or instructed that the State witness's unsworn statement could be considered only for impeachment; 3) failing to object to Tr. Ct.'s instruction stating in part that the jury "may...consider the out-of-court statements as evidence in determining the guilt or innocence of the D of the crime charged," and 4) erroneously telling the jury in closing argument that the prior inconsistent statement could be used in deciding whether D was guilty. Permitting as substantive evidence an otherwise impermissible unsworn statement claiming that D admitted to the murder was not a reasonable trial strategy based on the record.

D satisfied the prejudice prong of the Strickland test for IAC, because trial counsel's errors permitting the jury to consider the only evidence identifying D as the shooter in determining his guilt or innocence were sufficient to undermine the Court's confidence in the verdict. Court noted "there is simply no admissible evidence that [D] possessed a gun that evening, let alone that he shot [the victim]." Held, transfer granted, Court of Appeals' opinion at 56 N.E.3d 84 vacated, judgment reversed and remanded for new trial. Massa, J., joined by Slaughter, J., concurring, agreeing the relief majority granted is correct under the law and standard of review, but regretting the outcome of a man convicted of murder getting a new trial 22 years after the victim's death because of a "perfect storm of error by all involved."

TITLE: Isom v. State

INDEX NO.: Y.4.b.

CITE: (06/30/2021), 170 N.E.3d 623 (Ind. 2021)

SUBJECT: Denial of post-conviction relief affirmed in death penalty case, no ineffective assistance of counsel.

HOLDING: In assessing the ineffective assistance of counsel claims the Court found the post-conviction court did not err in denying relief under the standard established in Strickland v. Washington. In review of ineffective assistance of trial counsel claims the Court found trial counsel was not deficient in screening and selecting jurors. Defendant argued he was forced to accept jurors who should have been stuck for cause when prospective jurors discussed the case, that one juror indicated he could not be impartial, and that another gave an inaccurate response on her juror questionnaire. The post-conviction court found the seated jurors were not tainted and Defendant failed to show deficient performance or prejudice and the Indiana Supreme Court agreed. In the guilt phase Defendant argued testimony from a defense witness implicitly conceded Defendant's guilt and violated McCoy v. Louisiana, 18 S. Ct. 1500 (2018). However, the Indiana Supreme Court distinguished the implicit concession of guilt made by the witness in Defendant's case from McCoy where defense counsel made unambiguous concessions of guilt over the client's repeated and adamant objections. Here, Defendant alleged his counsel refused to properly present a plea offer to him, but the post-conviction court found that counsel addressed the State's plea offer in Defendant's presence on the record and again there was no basis for reversal under McCoy v. Louisiana. At the penalty phase Defendant argued his counsel was ineffective for failure to investigate and present mitigation, specific to jail records and a specific witness. However, the post-conviction court rejected the claim that the jail records and specific witness would have changed the jury's recommendation. Defendant argued his counsel was ineffective for failing to challenge penalty-phase jury instructions which caused the jury to consider only behavior defined as mental disease, mental defect, or intoxication. The post-conviction court found that taking the instructions as a whole the jury was advised to consider all facts it thought were mitigating and found no error and the Indiana Supreme Court agreed. Likewise, the Court found appellate counsel was not ineffective for failure to raise fundamental error challenges on direct appeal to specific instructions. The Justices found the Defendant's free-standing challenges to the post-conviction court's rulings, including denial of renewed motion for a competency hearing, Defendant's discovery request for the State's lethal injection protocol, and discovery request for juror-contact information waived. The Court also reviewed and denied the claim the post-conviction court erred in limiting the testimony of two expert witnesses and found Defendant's challenge to his petition's filing date waived. Ultimately, it concluded that because Defendant did not establish that the post-conviction court erred, he wasn't entitled to relief on any of the challenges. In summary the Supreme Court found trial counsel was not ineffective in all phases of Defendant's trial and specifically there were no errors in jury selection, guilt phase or penalty phase. Appellate counsel was not ineffective for failure to raise fundamental error challenges on direct appeal to specific instructions.

TITLE: Jackson v. Washington

INDEX NO.: Y.4.b.

CITE: 270 Va. 269, 619 S.E.2d 92 (Va. 2005)

SUBJECT: IAC - Failure to Object to Jury Trial in Jail Clothes

HOLDING: The Virginia S. Ct. has held that defense counsel's failure to object to his client's having to appear at jury trial in jail jumpsuit constituted IAC. D was forced to go to trial in jumpsuit after jail lost his civilian clothes, and defense counsel failed to object. Because the state's case was largely circumstantial, and D testified, offering an innocent explanation of his conduct, his credibility was critical. In assessing the prejudice from counsel's failure, the majority wrote that it would not independently reweigh the evidence or determine whether the D would have been a credible witness had he not appeared before the jury in jail clothes, but rather would evaluate the likely effect of his appearing in jail clothes "based on reason, principle, and common human experience," quoting Estelle v. Williams, 425 U.S. 501, 501 (1971).

TITLE: Kellett v. State
INDEX NO.: Y.4.b.
CITE: (4th Dist., 9-29-99, Ind. App., 716 N.E.2d 975
SUBJECT: Ineffective assistance of counsel - sentencing hearing
HOLDING: In prosecution for operating while intoxicated resulting in serious bodily injury, where D was ordered to pay approximately $141,000 in restitution, trial counsel's overall performance at sentencing hearing was below prevailing professional norms. As result, D was denied effective assistance of counsel at sentencing. D argued that ledger upon which amount of restitution order was based contained mathematical errors & duplicate medical charges. Counsel was ineffective because he: 1) failed to object to admission of ledger into evidence; 2) failed to adequately review ledger; & 3) failed to cross-examine victim's mother regarding accuracy & reliability of ledger. Counsel's actions prejudiced D because restitution order was not based on actual costs incurred by victim as of sentencing date as required by restitution statute. In addition, D was prejudiced because counsel did not preserve error for appeal. Held, reversed & remanded on sole issue of amount of restitution order.

RELATED CASES: Shane, App., 769 N.E.2d 1195 (defense counsel's failure to determine accuracy & reliability of damage estimates in presentence investigation report constituted IAC).

TITLE: Lafler v. Cooper
INDEX NO.: Y.4.b.
CITE: (03-21-12), 132 S. Ct. 1376 (U.S. 2012)
SUBJECT: Remedy for ineffective assistance of counsel in plea negotiations
HOLDING: Where D's conviction and sentence are worse than offer D rejected because of counsel's ineffectiveness, remedies range from enforcing original plea offer to no remedy, i.e., leaving intact conviction and sentence resulting from trial.

Cooper was accused of shooting a woman in her buttock, hip, and abdomen. He turned down a favorable plea offer because his attorney said he could not be convicted of assault with intent to murder because the victim was shot below the waist. Cooper was convicted at trial and received a sentence 3.5 time great than the sentence offered in the plea deal.

A Sixth Amendment remedy should "neutralize the taint" of a Sixth Amendment violation but not grant a windfall or "needlessly squander the considerable resources the State properly invested in the criminal prosecution" through another trial. United States v. Morrison, 449 U.S. 361, 365 (1981); United States v. Mechanik, 475 U.S. 66, 72 (1986).

If the sole advantage a D loses from counsel's ineffectiveness is a lesser sentence under a plea offer, a Tr. Ct. should hold a hearing to determine if, but for counsel's incorrect legal advice, the D would have accepted the offer. If so, the Tr. Ct. must decide if the D should receive the sentence in the plea offer, the sentence at trial, or something in between. If the plea was for less serious offenses, the proper remedy may be to require the prosecution to re-offer the plea. The Tr. Ct. would then have discretion to either vacate the convictions from trial and accept the plea or leave the convictions intact. In either situation, the Tr. Ct. should consider several factors, including the D's earlier willingness or unwillingness to accept responsibility for his actions. On remand, the State shall re-offer the plea. KENNEDY, J., joined by BREYER, GINSBURG, KAGAN and SOTMAYOR, J.J.; SCALIA, J., DISSENTING, joined fully by THOMAS, J., and ROBERTS, C.J. in part; ALITO, J., DISSENTING. Cert. granted, Sixth Circuit and District Court's granting writ of habeas corpus affirmed.

RELATED CASES: Frye, 132 S. CT.1399 (U.S. 2012) (Tr. Ct. has discretion for remedy for ineffective assistance in plea negotiations; see full entry in this section).

TITLE: Lawrence v. State
INDEX NO.: Y.4.b.
CITE: (7/2/84) Ind., 464 N.E.2d 1291
SUBJECT: Ineffective assistance of counsel (IAC) - standard; Strickland v. Washington adopted
HOLDING: Ind. S. Ct. adopts new test for analyzing IAC claims, set forth in Strickland v. Washington (1984), U.S., 104 S. Ct. 2052, 80 L.Ed.2d 674. Two-step analysis examines "performance component" & "prejudice component." Focus under first component is actual performance of attorney; counsel must have acted unreasonably to be deemed ineffective. However, strong presumption exists that counsel rendered adequate legal assistance. Second component focuses on prejudice to client resulting from attorney's unreasonable acts. To prove prejudice, D must show reasonable probability that but for unprofessional errors, result of proceeding would have been different. Ct. must consider totality of evidence on this question. Both components must be established in order to prove IAC. Ind. S. Ct. finds traditional test (mockery of justice modified by adequate legal representation) "actually very similar to" Strickland. Test is one of reasonableness; perfection is not required. As under traditional test, isolated mistakes, poor strategy or bad tactics do not necessarily amount to IAC. Hollon 398 N.E.2d 1273; Lowe 298 N.E.2d 421. Ct. examines D's 6 allegations of attorney error & finds neither individually nor in combination do errors demonstrate IAC. Held, no error. Pivarnik CONCURS IN RESULT without opinion.

RELATED CASES: Wiggins v. Smith, 539 U.S. 510, 526-27 (2003) (post-hoc rationalization of trial counsel's strategy is forbidden when assessing counsel's performance; and court cannot defer to trial counsel's strategic judgment without assessing the adequacy of investigations supporting that strategy); (Smith, 490 N.E.2d 300 (Crim L 641.13(6); Tr. counsel who properly raises issue at trial & *overruled* cannot be found IAC); Osborne, 481 N.E.2d 376 (Strickland prejudice component not satisfied where jury was instructed on issue which D argued defense counsel was IAC for failing to raise); Mato, 478 N.E.2d 57 (Crim L 641.13(7); IAC of both trial & appellate counsel are judged by same standard); Kruckeberg, 465 N.E.2d 1126 (prejudice component); Elliott, 465 N.E.2d 707.

TITLE: Lindsey v. State
INDEX NO.: Y.4.b.
CITE: (3/14/2017), 71 N.E.3d 428 (Ind. Ct. App 2017)
SUBJECT: Ineffective assistance of counsel - failing to enable defendant to accept a good plea agreement
HOLDING: Defendant received ineffective assistance of trial counsel, who advised him to reject a plea agreement with a 32-year sentence on the grounds that the most he could receive with an open guilty plea was 30 years; instead, Defendant received 40.

Defendant changed his mind about the plea agreement at the last minute because his trial counsel had assured him that his two crimes of confinement were part of a single episode of criminal conduct. The Court of Appeals upheld Defendant's maximum 40-year sentence on direct and post-conviction review, relying on the standard set forth in Segura v. State, 749 N.E.2d 496, 507 (Ind. 2001), to hold that Defendant was not prejudiced because he always intended to plead guilty.

In appealing to the U.S. Supreme Court, Defendant argued, and the State conceded, that he had been held to an incorrect standard. Under the correct standard, to show prejudice due from ineffective assistance during plea bargaining, he simply had to show that the end result would have been more favorable to him had he received the effective assistance of counsel. See Lafler v. Cooper, 566 U.S. 156 (2012) and Missouri v. Frye, 566 U.S. 133 (2012). The U.S. Supreme Court vacated the Court of Appeals decision and remanded the case.

On remand, Court of Appeals found Defendant was prejudiced by counsel's ineffective assistance. Defense counsel's advice that Defendant's two acts of confinement constituted one episode of criminal activity "fell below the standard of performance required of attorneys." Further, had Defendant known that 40 years was "in play," he would have elected to take the plea agreement. There was a reasonable probability that the prosecutor would have gone along with the agreement and that the judge would have accepted it. "Under these facts, we have little doubt that, but for trial counsel's ineffectiveness, [Defendant] would be serving a 32-year sentence today." Held, denial of PCR petition reversed and remanded with instructions to modify Defendant's sentence to 32 years.

TITLE: McCarty v. State
INDEX NO.: Y.4.b.
CITE: (4th Dist., 2-4-04), Ind. App., 802 N.E.2d 959
SUBJECT: Ineffective assistance of counsel (IAC) - failure to offer evidence of mental impairment & other mitigators at sentencing
HOLDING: In child molesting prosecution, D was denied effective assistance of counsel when his counsel failed at sentencing to offer evidence of D's mental impairment & other potential mitigating circumstances. D had an IQ of between 68 & 70 & pled guilty to two class A felonies with a cap of a 40-year executed sentence, which the Tr. Ct. imposed. Defense counsel's performance was deficient because he failed to present as mitigators: 1) D's mental disability; 2) D's own molestation as a child; 3) likelihood he could be successfully rehabilitated, & 4) fact his confession went beyond what victims had reported. In determining appropriate sentence, all circumstances of crime & background of offender should be considered, which requires possession of fullest information possible concerning D's life & characteristics. Thomas v. State, 562 N.E.2d 43 (Ind. Ct. App 1990). Had counsel met with D more than once in preparing for guilty plea & sentencing hearings, he might well have observed manifestations of his client's mental retardation & sought more detailed information regarding his family history, sexual victimization as teenager, & potential for successful rehabilitation.

D's counsel violated prevailing professional norms when he failed to interview D's family members, review Ct. file, obtain D's educational & mental health records, or consult with a mental health professional. Counsel should also have brought to Ct.'s attention D's "seriously troubled" family background. D was prejudiced by trial counsel's failure to investigate & present available mitigation evidence because it deprived sentencing Ct. of information it needed to make an informed decision & left the Ct. little to balance against aggravating circumstances.

Given subjectivity inherent in sentencing process, a reviewing Ct. is hard pressed to conclude there is a reasonable probability that Tr. Ct. would have imposed a lesser sentence had it been presented with additional mitigating evidence that trial counsel should have brought to light. However, Ct. "reluctantly" concluded there was a reasonable probability Tr. Ct. would have imposed a lesser sentence had it been fully informed of D's mental retardation & traumatic background. Given demonstrated unwillingness of trial & post-conviction Ct. to reconsider D's sentence in light of this information, Ct. exercised its jurisdiction under Article 7, Section 6 of Indiana Constitution & revised D's sentence to presumptive term of thirty years. Held, denial of post-conviction relief reversed & sentence revised to thirty years.

RELATED CASES: Witt, 938 N.E. 2d 1193 (Ind. Ct. App. 2010) (on appeal of denial of PCR after LWOP sentence following guilty plea to murder, Ct. rejected claim that counsel was ineffective for failing to adequately present claim of mental retardation); Long, App., 867 N.E.2d 606 (based on lack of evidence in record that trial counsel was aware that D suffered from mental problems, his performance did not fall below objective standard of reasonableness when he did not raise & present evidence of D's mental health problems in his defense).

TITLE: Messer v. State
INDEX NO.: Y.4.b.
CITE: (3d Dist. 6/30/87) Ind. App., 509 N.E.2d 249
SUBJECT: IAC - both prongs of Strickland proven
HOLDING: Tr. counsel's failure to prevent admission of damaging evidence of plea bargaining, & to object to prosecution's highly improper final argument constituted deficient performance. Because state's case was primarily circumstantial & dependent on jury's estimation of officer's & D's credibility, Ct. finds counsel's poor performance prejudiced D by undermining his credibility. Here, defense counsel elicited testimony from investigating officer that D had offered to plead guilty to lesser (uncharged) offense in exchange for giving information about other recent thefts. Counsel asked D on direct exam about prior convictions. On cross-exam, counsel did not object when D was asked questions re his juvenile record & about pending charges in another county. Excerpts from prosecutor's final argument (set forth in opinion) show attempt to convince jury to convict D for reasons other than his guilt of present charge. Prosecutor told jury D had been out of prison for 6 months, had prior offenses which proved propensity to commit present offense, & that jury would be subjected to public ridicule if they acquitted him. Ct. finds remarks highly improper, & if objected to, Tr. Ct. should have sustained objection & instructed jury to disregard comments. Held, conviction reversed.

RELATED CASES: Bowen, 680 N.E.2d 536 (although credibility was at issue, State's improper statement referring to D's prior misconduct did not substantially influence jury); Williams, App., 658 N.E.2d 598 (rejected D's reliance on Messer; testimony elicited from witness did not alter jury's determination of guilt).

TITLE: Miller v. Martin
INDEX NO.: Y.4.b.
CITE: 481 F.3d 468 (7th Cir. 2007)
SUBJECT: Attorney ineffective who stood mute in protest
HOLDING: Seventh Circuit Court of Appeals held that a criminal D was deprived of his Sixth Amendment right to the effective assistance of counsel when his attorney stood mute at sentencing in a misguided effort to keep his client out of more trouble for failing to appear at trial. Court acknowledged the well-established rule that defense counsel's strategic decisions are entitled to great deference, but it said to rule that "strategy" justified the attorney's tactic in this case "would be to make a mockery of the word."

The habeas corpus petitioner in this case was charged in Indiana state court but failed to appear for trial and was found guilty in absentia. At sentencing with petitioner now in custody, defense counsel announced that his client did not recognize the validity of the trial or the authority of the Tr. Ct. to proceed with the sentencing and did not speak for the rest of the hearing, with petitioner doing the same based on counsel advice. Court decided that the Indiana court's application of Strickland v. Washington, 466 U.S. 668 (1984) to petitioner's attorney's nonparticipation tactic satisfied the federal habeas statute's requirement that a state court decision constitute an "unreasonable application of [] clearly established federal law." 28 U.S.C. ' 2254.

[Ed. **Note:** This case overrules Miller v. State, 771 N.E.2d 1284 (Ind. Ct. App 2002).]

TITLE: Missouri v. Frye
INDEX NO.: Y.4.b.
CITE: (03-21-12), 132 S. CT.1399 (U.S. 2012)
SUBJECT: Ineffective assistance for failure to communicate favorable plea offer; plea negotiations a critical state of criminal proceedings
HOLDING: Because plea negotiation is a critical stage of a criminal proceeding, defense attorneys have a duty to inform their clients about favorable plea offers. Failure to do so constitutes ineffective assistance of counsel under the 6th Amendment. Here, Frye's lawyer failed to tell him about a plea offer that included a sentence of 90 days or less. The offer expired, and Frye later pled guilty to a less favorable deal.

The 6th Amendment right to effective assistance of counsel extends to all critical states of a criminal proceeding. Montejo v. Louisiana, 566 U.S. 778, 786 (2009). The negotiation of a plea is a critical stage for purposes of claims related to effectiveness of counsel. Padilla v. Kentucky, 130 S. Ct. 1473 (2010). The Strickland two-part test governs ineffective assistance claims in the plea bargain context. Hill v. Lockhart, 477 U.S. 52 (1985).

Hill and Padilla differ because the attorneys in those cases gave bad legal advice. Here, Frye's counsel failed to communicate a plea offer, yet there is no right to a plea deal. See Weatheford v. Bursey, 429 U.S. 545, 561 (1977). Further, even though Frye lost favorable deal, he still had an opportunity for a "full and fair trial," or as he ultimately chose, a plea deal, albeit a less favorable one.

Nonetheless, because more than 90% of federal and state convictions are the result of guilty pleas, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." Plea negotiation, not the trial, is almost always the "critical point" for the D. "[P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel necessary to that the Sixth Amendment requires in the criminal process at criminal stages."

To establish prejudice, Frye must show that 1) he would have accepted the plea bargain, 2) there was a reasonable possibility that prosecutors would not have withdrawn the offer before trial, and 3) the Tr. Ct. would have accepted the deal. These factors shall be addressed on remand.
KENNEDY, J., joined by BREYER, GINSBURG, KAGAN, and SOTOMAYOR, J.J.; SCALIA, J., DISSENTING, joined by ROBERTS, C.J., AND THOMAS and ALITO, J.J. Cert. granted Court of Appeal of Western District of Missouri affirmed.

RELATED CASES: Woods, 48 N.E.3d 374, (Ind. Ct. App 2015) (where D testified that trial attorney did not communicate a plea offer found in attorney's file after attorney had passed away and the circumstances of the case corroborated D's testimony, D proved that he was denied effective assistance of counsel; reversed and remanded to place D in same position as when prosecutor offered plea; May, J., dissenting); Burt v. Titlow, 134 S. Ct. 10 (2013) (trial counsel not ineffective where he advised D to withdraw guilty plea only after D insisted he was innocent); Lafler, 132 S. Ct. 1376 (U.S. 2012) (Tr. Ct. has discretion for remedy for ineffective assistance in plea negotiations; see full entry in this section).

TITLE: Montgomery v. State
INDEX NO.: Y.4.b.
CITE: (1st Dist., 3-22-04), Ind. App., 804 N.E.2d 1217
SUBJECT: Ineffective assistance of counsel (IAC) - failure to subpoena state witnesses
HOLDING: In arson prosecution, trial counsel was ineffective for failing to subpoena two State witnesses or requesting a continuance when he discovered the witnesses were not available. Witnesses were insurance investigators who concluded that a fire was set, but their opinions differed significantly from the State's fire expert, & one could not conclusively rule out an electrical fire consistent with the defense expert's testimony. In this "battle of the experts, corroborating expert testimony would have been particularly powerful," & thus its exclusion proved prejudicial. Ct. found that the reading of one expert's deposition testimony into record did not cure the prejudice from counsel's deficient performance. Further, while basing its decision on IAC, the Ct. admonished the prosecutor for having the experts present the day before the State rested & then informing them, they would not be needed & could leave without informing D, whose witness list included any listed State witnesses. Moreover, prosecutor did not ask the Ct. to release the witnesses from their subpoenas. Ct. distinguished this case from Wisehart v. State, 693 N.E.2d 23 (Ind. 1998), where prosecutor stated he would subpoena a witness but may not call witness & later did not have witness available for trial. Held, judgment reversed & remanded for a new trial on remaining charges.

RELATED CASES: Reid, 984 N.E.2d 1264 (Ind. Ct. App 2013) (failure to call expert regarding value of bracelet found at scene in order to infer bracelet was not D's did not prejudice D).

TITLE: Morris v. State
INDEX NO.: Y.4.b.
CITE: (5th Dist., 02-23-94), Ind. App., 628 N.E.2d 1256
SUBJECT: Ineffective Assistance of Counsel (IAC) - Failure to object to hearsay
HOLDING: In trial for criminal deviate conduct & child molesting, it was IAC to fail to object to hearsay that was inadmissible under Modesitt, 578 N.E.2d 649. At trial, police officer & mother of complaining witness (CW) were allowed to repeat multiple out-of-Ct. allegations of CW, without objection. Officer testified that CW talked about being forced to fondle D & forced oral sex. He also testified that CW was afraid she was pregnant, describing in detail progression of events. Testimony was very specific & is included in opinion. Another officer also testified in detail as to what CW told him, & CW's mother's statement about what CW told her was placed in evidence. Instead of examining CW, State read her previous statement to police & counsel agreed to procedure. Counsel did not object to testimony, but did cross-examine CW. Trial occurred after previously existing Patterson rule was abolished because it was being used to support admission of out-of-Ct. statements as substitute for in-Ct. testimony. Under Modesitt prior statement can be used as substantive evidence only if declarant testifies at trial, is subject to cross-exam concerning statement, & statement meets certain specifications. Here statements were admitted as substantive evidence, & CW was subject to cross-exam about them, but statements met none of additional specifications for admissibility. Therefore, proper objection to them would have been sustained. Inherent prejudice of this type of statement to Ds was explained in Modesitt. Prejudice here was even more obvious than that in Modesitt, because CW did not testify concerning her allegations, & D was convicted solely on basis of out-of-Ct. statements, due to counsel's failure to object. Held, reversed & remanded for new trial.

RELATED CASES: Benefield, 945 N.E.2d 791 (Ind. Ct. App 2011) (counsel's strategy of not objecting to hearsay because the state could have called custodian of records to admit hearsay which would have drawn more attention to a negative fact was reasonable); Stavropoulos, 678 N.E.2d 397 (in trial for sexual battery, trial counsel was not ineffective for failing to object to hearsay testimony from complaining witness's mother & police officer); Bannowsky, 677 N.E.2d 1032 (prejudice requiring reversal in Morris not shown here; counsel made tactical decision to use statement in attempt to impeach CW's credibility).

TITLE: Oberst v. State
INDEX NO: Y.4.b.
CITE: (11-03-10), 935 N.E.2d 1250 (Ind. Ct. App 2010)
SUBJECT: No right to effective assistance of counsel at police interview
HOLDING: D had no right to the effective assistance of counsel at the time he gave a statement to police in which he admitted to having sexual intercourse with complaining witness. D's attorney on an unrelated criminal matter happened to be at the sheriff's department on the day he went in to speak with detective, and attorney agreed to be present during interview. Two sexual misconduct with minor charges were filed against D approximately three weeks later. D argued that trial counsel was ineffective because counsel should have somehow stopped him from confessing during the interview. However, when D gave his statement to the police detective, criminal proceedings had not been initiated and therefore D had no right to counsel. "And because Oberst did not have the Sixth Amendment right to counsel during the...interview, it does not matter what trial counsel did or did not do during that interview. In other words, Oberst did not have the right to effective representation during that interview." Held, denial of post-conviction relief affirmed.

RELATED CASES: Rodenbush, 17 N.E.3d 934 (Ind. Ct. App 2014) (Oberst does not control; although D gave his statement to police before charges were filed against him, Tr. Ct. had conducted D's initial hearing, thus D had right to counsel at time he was advised by attorney to give statement to police).

TITLE: Padilla v. Kentucky
INDEX NO.: Y.4.b.
CITE: (03-31-10), 130 S. Ct. 1473, (U.S. 2010)
SUBJECT: Ineffective assistance of counsel - immigration consequences of plea
HOLDING: The Sixth Amendment requires criminal defense attorneys to advise their immigrant clients of the possible deportation consequences of a guilty plea. The risk of deportation must be considered an "integral part" of the possible penalty for noncitizen Ds. Drastic measure of deportation is now an inevitable consequence for a vast number of convicted immigrants and is "uniquely difficult to classify as either a direct or a collateral consequence." Thus, advice regarding deportation falls within the Sixth Amendment's right to counsel and is subject to the two-part test of Strickland v. Washington, 446 U.S. 668 (1984). Because immigration law can be complex, when the law is not succinct or straightforward, a criminal defense attorney need do no more than advice a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Here, D was indicted for trafficking in marijuana--an offense designated as an "aggravated felony" under the Immigration and Naturalization Act. Prior to entering a plea of guilty to that offense, D, a 40-year legal permanent U.S. resident, was incorrectly advised by his counsel that the plea would not affect his immigration status. Unfortunately, because the offense was an aggravated felony, D's deportation is mandatory. Court held that D's counsel was constitutionally deficient in assuring him that he would not be deported for his conviction and remanded to allow D the opportunity to meet the prejudice prong under Strickland. Held, Kentucky Supreme Court opinion at 253 S.W.3d 482 reversed and remanded. Alito, J, joined by Roberts, C.J., CONCURRING, believes that because criminal defense attorneys often lack expertise in immigration law, they should instead be expected to exhibit candor about their knowledge (or lack thereof) and to refer clients to more knowledgeable immigration specialists. Scalia, J., joined by Thomas, J, DISSENTING, argued that because the Sixth Amendment only grants a D the right to effective assistance of counsel for defense against a criminal prosecution, and not against "collateral consequences" of prosecution, issues at stake should be remedied through development of new and more targeted statutory provisions.

RELATED CASES: Torres v. Lynch, 136 S. Ct. 1619 (U.S. S. Ct. 2016) (a state offense is an "aggravated felony" for immigration purposes if it matches every element of federal offense except requirement of connection to interstate commerce); Carrillo, 982 N.E.2d 461 (Ind. Ct. App. 2013) (Guilty plea counsel did not render deficient performance for failing to ask D about his citizenship status where counsel had no reason to believe D was not a citizen); Chaidez, 133 S. Ct. 1103 (2013) (Padilla created new rule of criminal procedure and thus is not applied retroactively to cases already final on direct review; see Teague v. Lane); Kawashima v. Holder, 132 S. Ct. 1166 (2012) (filing false tax return under 26 U.S.C. § 7206 is a crime involving "fraud or deceit," thus qualifying it as an "aggravated felony," subjecting a person to deportation if loss to the government exceeds $10,000).

TITLE: Patterson v. State
INDEX NO.: Y.4.b.
CITE: (04-29-10), 926 N.E.2d 90 (Ind. Ct. App 2010)
SUBJECT: Change of Judge - IAC for failure to move for new judge
HOLDING: Trial counsel was ineffective by failing to move for a change judge where the judge had participated in the proceedings as a prosecuting attorney. A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the circumstance where judge served as a lawyer in the matter in controversy or served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding. Judicial Conduct Canon 2.11(A).

Here, in 1997, the judge was the prosecutor who signed the information charging D and participated in the probable cause hearing after which another deputy prosecutor took over the case. D pled guilty and while D's plea agreement was under advisement, D absconded and was returned ten years later. Although the information, the CCS and the transcript of the probable cause hearing all included the judge's name as the prosecutor, D's attorney failed to file a motion for change of judge. The judge, pursuant to the plea agreement which had a cap of ten years for a Class B felony, sentenced D to ten years. Had D moved for change of judge, Tr. Ct. would have had to grant the motion. Moreover, D was prejudiced because he was denied his right to have an impartial judge preside over his proceedings. The sentence was discretionary, and Tr. Ct. ordered the maximum sentence possible. Thus, D's case will be reset to the procedural posture it was in prior to the prosecutor becoming the judge, at which time D can move to withdraw his plea or the new judge can reject it. Held, judgment reversed and remanded with instructions to have the case assigned to a different judge.

TITLE: Pearson v. State
INDEX NO.: Y.4.b.
CITE: (1st Dist., 08-26-93), Ind. App., 619 N.E.2d 590
SUBJECT: Ineffective Assistance of Counsel (IAC) - Failure to move for discharge
HOLDING: It was IAC to fail to move for discharge under speedy trial rule, CR 4(C). Charges were filed against D on October 3, 1990, but he was not tried until October 8, 1992. On appeal State conceded that he was not brought to trial within year as required by CR 4(C), but argued that failure to file motion for discharge was matter of strategy, not IAC. Ct. rejected argument, finding that when options available are discharge versus delayed trial, it is not reasonable strategy to forego discharge. Tr. Ct. did not first schedule trial until after one-year period had already expired, thus relieving D of any duty to object to trial setting, Morrison (1990), 555 N.E.2d 458. Therefore, Ct. found necessary prejudice to D to constitute IAC, because if D's attorney had filed motion for discharge, Tr. Ct. would have had no option but to grant it.

RELATED CASES: Heyward, App., 769 N.E.2d 215 (neither trial nor appellate counsel were ineffective for failing to timely raise CR 4 objection); Attebury, App., 703 N.E.2d 175 (because there was no evidence in record to support or refute Tr. Ct.'s finding of congestion, Ct. remanded for D to pursue his claim of IAC via post-conviction relief).

TITLE: Porter v. McCollum
INDEX NO.: Y.4.b.
CITE: (U.S.), (11-30-09), 130 S. Ct. 447
SUBJECT: Post-combat stress disorder as a defense in capital cases
HOLDING: Per Curiam. Eleventh Circuit erred in rejecting district court's conclusion that D's counsel failed completely to adduce mitigation evidence relating to his lack of education, his mental health, his family background, and his battlefield service in Korean War and trauma arising from that experience. D was sentenced to death for murdering his former girlfriend and her boyfriend. He represented himself at trial, pleaded guilty and was appointed standby counsel for penalty phase. Counsel put on D's ex-wife as a witness and read an excerpt from a deposition but failed to put on any evidence related to D's mental health, family background, or his military service. The relevance of D's extensive combat experience "is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on [him]." Post-traumatic stress disorder is not uncommon among veterans returning from combat, and in D's case, a medical expert testified that his symptoms "would 'easily' warrant a diagnosis" of PTSD. Had jury heard about D's wartime experiences and other evidence about mental problems, it might well have refused to recommend a death sentence. Held, reversed and remanded for further proceedings.

TITLE: Rompilla v. Beard
INDEX NO.: Y.4.b.
CITE: 545 U.S. 374, 125 S. Ct. 2456; 162 L.Ed. 2d 360 (2005)
SUBJECT: Habeas corpus, ineffective assistance of counsel, death penalty, mitigation
HOLDING: Even when a capital D and his family members have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial's sentencing phase. Defense counsel's failure to review court records of the client's prior convictions was IAC where the state intended to use those records at the penalty phase.

On federal habeas, Rompilla claimed that trial counsel failed to conduct an adequate investigation of potentially mitigating evidence in preparation for the penalty phase of his capital murder trial. The D and his family had told defense counsel that little, or no mitigating evidence existed. However, it was obvious that the state intended to use the court records from the D's prior convictions as evidence of aggravating circumstances, and therefore defense counsel was deficient in failing to review the court records. The D was prejudiced by this failure because counsel would have discovered significant mitigating evidence if they had reviewed the records. See Strickland v. Washington, 466 U.S. 668 (1984).

RELATED CASES: Cullen v. Pinholster, 131 S. Ct. 1388 (2011) (on habeas review of state court decisions, federal courts may not consider new evidence developed at evidentiary hearing in federal court; see full review at Q.2).

TITLE: Rondeau v. State
INDEX NO.: Y.4.b.
CITE: (1/12/2016), 48 N.E.3d 907 (Ind. Ct. App 2016)
SUBJECT: Denial of PCR from murder conviction affirmed
HOLDING: In affirming denial of D's *pro se* petition for post-conviction relief from murder conviction, Court found no abuse of discretion in: 1) permitting the State to substitute its response to D's request for admissions; 2) permitting the State to belatedly file its proposed findings of fact and conclusions; and 3) denying D's requests to issue subpoenas for certain potential witnesses who were irrelevant to question of counsels' ineffectiveness.

Post-conviction court did not clearly err when it concluded that D did not receive ineffective assistance of trial or appellate counsel. D claimed trial counsel was inexperienced, had too large a caseload to properly defend the case and was insufficiently prepared for trial. However, D failed to show that 35 active cases was unreasonably large or that counsel's inexperience prejudiced him in any way. Trial counsel was also not ineffective for failing to obtain expert testimony to challenge one of State's witnesses re: defensive nature of victim's stab wounds, nor was he ineffective in failing to seek testing of numerous objects from crime scene for D's blood. Held, judgment affirmed.

TITLE: Rose v. State
INDEX NO.: Y.4.b.
CITE: (3rd Dist., 04-28-06), Ind. App., 846 N.E.2d 363
SUBJECT: Ineffective assistance of counsel - improper vouching testimony
HOLDING: In child molesting prosecution, trial counsel was ineffective for failure to object to examining physician's vouching testimony. Witness's testimony that he was "very convinced" by the way complaining witness (CW) described the incident to him was improper because no witness is competent to testify that another witness is or is not telling the truth. Stewart v. State, 555 N.E.2d 121 (Ind. 1990). Indiana Evidence Rule 704(b) provides that a witness may not offer an opinion concerning the truth or falsity of allegations or whether a witness has testified truthfully. (Ct.'s emphasis). In child molesting prosecutions, adult witnesses are allowed to state an opinion as to child's general competence & ability to understand the subject but are prohibited from making direct assertions as to their belief in child's testimony. Here, physician's testimony referred to CW's credibility & how convincing her allegations were at least eight times during his testimony. His testimony was not based on medical evidence but on his belief that CW was telling the truth.

In light of inconclusive medical evidence, physician's vouching testimony improperly bolstered CW's credibility & impinged upon province of jury to determine the witness's credibility. Because much of evidence supporting D's conviction is based on CW's allegations & testimony, D demonstrated that there is a reasonable probability that, but for counsel's failure to object to admission of physician's vouching testimony, result of trial would have been different. Held, conviction reversed & remanded.

RELATED CASES: Hinesley, 999 N.E.2d 975 (Ind. Ct. App 2013) (no IAC due to deliberate strategic choice to permit trier of fact to consider as substantive evidence hearsay statements and failure to object to improper vouching statements); Curtis, App., 905 N.E.2d 410 (although counsel should have objected to doctor's vouching of the truthfulness of the alleged child molesting victims, the one-word response to a single question in a record that exceeds on thousand pages did not prejudice D).

TITLE: Sharkey v. State
INDEX NO.: Y.4.b.
CITE: (10-15-96), Ind. App., 672 N.E.2d 937
SUBJECT: Ineffective assistance of counsel - failure to tender lesser included offense instructions
HOLDING: In murder prosecution, D was denied effective assistance of counsel as result of counsel's failure to tender jury instructions on involuntary manslaughter & reckless homicide. At trial, there was serious evidentiary dispute regarding element of intent to kill. Because intent element distinguishes murder from involuntary manslaughter & reckless homicide, it would have been reversible error for Tr. Ct. to refuse instructions on lesser included offenses had counsel tendered them. Counsel's error in failing to recognize validity of case law consistent with defense of lack of intent was prejudicial to D, because without lesser included offense instructions, Tr. Ct. presented jury with only two options - conviction for intentional killing or acquittal. Held, reversed & remanded; Kirsch, J., dissenting.

RELATED CASES: Brown, 24 N.E.3d 529 (Ind. Ct. App 2015) (In theft prosecution, trial counsel was not ineffective for failing to tender a jury instruction on lesser included offense of conversion; trial counsel employed a reasonable (though risky) all-or-nothing strategy in not requesting the instruction).

TITLE: Smith v. State
INDEX NO.: Y.4.b.
CITE: (8/24/87) Ind., 511 N.E.2d 1042
SUBJECT: IAC - accumulation of errors; systemic defects
HOLDING: Accumulation of errors, perhaps resulting from flaw in public defender (PD) system, mandates finding of IAC. D was charged with murder by stabbing. Six weeks before murder, the only eyewitness to the murder stabbed the victim several times with a knife during an argument, & trial counsel failed to present this to jury despite existence of police & hospital reports. Trial counsel also failed to point out discrepancies between eyewitness' testimony & pre-trial statement re amount of alcohol she consumed on night of murder; failed to object to hearsay testimony which was only other evidence placing D at scene of crime; failed to object to irrelevant testimony from eye-witness about prior conduct by D; failed to point out contradictions in police testimony at suppression hearing & trial as to which officer D confessed to; & failed to present alibi witnesses. Trial counsel had become PD few weeks before D's trial & resigned shortly thereafter. Reversal of D's conviction may have resulted more from flaws in PD system than in individual performance. Held, reversed & remanded with instructions to grant PCR petition, set aside conviction, & order new trial.

TITLE: Smith v. State
INDEX NO.: Y.4.b.
CITE: (12/13/89), Ind., 547 N.E.2d 817
SUBJECT: IAC - trial counsel; compilation of errors
HOLDING: Compilation of errors in guilt phase of D's murder trial constitutes IAC & requires reversal. D was convicted of murder & sentenced to death, & conviction & sentence were affirmed on direct appeal. Smith, 475 N.E.2d 1139. On PCR, D raises IAC claim, & state argues waiver. However, since PCR Ct. made no findings regarding state's allegation of waiver, Ind. S. Ct. must review ruling on merits. Young, 500 N.E.2d 735. D alleges several instances of substandard performance. One of 5 alibi witnesses was prevented from testifying because counsel failed to contact him until day before trial & did not include him in alibi notice. Although this witness' testimony would likely have been cumulative of other alibi witnesses, in IAC context, all errors will be reviewed & cumulative prejudice assessed. Williams, 508 N.E.2d 1264 (card at Y.4.b). Counsel did not tender alibi instructions, although D was entitled to them. Thomas, 510 N.E.2d 651. D further alleges that counsel did not properly prepare & conduct impeachment of state's key witness, Lee. Counsel did not interview Lee before trial, nor did he use available evidence to impeach him. Lee's trial testimony was inconsistent with prior statements, portraying D in much more brutal light. While Lee testified that D provided gun used to kill victim, another participant, Johnson, testified at his own guilty plea hearing 6 months earlier that Lee had obtained & brought gun. Counsel did not use this to impeach Lee. Counsel also did not use offered testimony of former cellmate of Lee that he had overheard Lee planning to fabricate testimony against D. Counsel believed this testimony to be inadmissible hearsay, although it was admissible under Patterson, 324 N.E.2d 482. Although counsel did not point out inconsistencies in attempt to impeach Lee, state on direct examination of Lee had presumably anticipated impeachment & attempted to reconcile conflicts. On cross-examination, counsel asked Lee how jury could be sure Lee was telling truth, since he had lied so many times. Lee responded that he had passed polygraph, & counsel simply went on questioning him. Where trial hinges on credibility, it is reversible error to deny motion for mistrial after damaging reference to polygraph results. Baker, 506 N.E.2d 817. Here, where counsel had access to Lee's polygraph results before trial, failure to move in limine to exclude references thereto, or to move at trial to prevent further reference, at least, clearly falls below standard of reasonably competent counsel. In fact, counsel invited answer by form of question. At close of state's evidence, counsel moved Tr. Ct. to strike Lee's testimony in its entirety, "by reason of some notes I have here from a seminar I recently attended." Counsel promised to provide authority the following day, but failed to do so, & merely renewed motion to strike as well as moving for judgment on evidence. Compilation of these errors rendered D's defense so anemic as to undermine confidence in verdict & require reversal of conviction.

NOTE: Counsel's failure to prepare for penalty phase of trial because jury verdict "came as a complete shock", standing alone, would have warranted reversal of the sentence.

TITLE: Stanley v. Bartley
INDEX NO.: Y.4.b.
CITE: 465 F.3d 810 (7th Cir. 2006)
SUBJECT: Failure to interview witnesses, IAC in murder case
HOLDING: The Seventh Circuit U.S. Court of Appeals held that the state courts' determination that Petitioner had effective assistance of counsel at his murder trial was an unreasonable application of the *Strickland* standard. To fail to interview any witnesses or prospective witnesses was a shocking dereliction of professional duty in a case in which the state's evidence, though sufficient to convict petitioner of murder beyond a reasonable doubt, was far from compelling. The Court noted that it was unlikely that the jury would have convicted petitioner had it not been for his sister's testimony. However, defense counsel did not cross-examine her at trial regarding the date of petitioner's confession or the date on which she had seen him with a gun, and the lawyer failed to object to a leading question by the prosecutor. With regard to the prosecution's key witness, if the lawyer had interviewed him before trial, he might have told the lawyer things that would have enabled effective cross-examination or might have thoroughly discredited him. Had the jury thought him a liar and possibly the murderer and Petitioner's sister an unreliable witness because of uncertainty about dates, petitioner might have been acquitted.

TITLE: State v. Classon
INDEX NO.: Y.4.b.
CITE: 935 P.2d 524 (Utah Ct. App. 1997)
SUBJECT: Ineffective Assistance of Counsel (IAC) -- No Attorney Assumes Lead Counsel Role
HOLDING: Defense attorneys' confusion over who was lead counsel and who represented which D in two-D case deprived Ds of 6th Amendment right to counsel, even though they cannot show that they were prejudiced by deficient performance. Two- pronged Strickland test, requiring D to show both deficient performance and prejudice, is not only means of demonstrating IAC. Some conduct, such as active representation of conflicting interests, is so egregious that it is presumed to result in prejudice. When counsel is requested, but no attorney accepts actual responsibility for preparation and defense of case, IAC results. Although it is possible for more than one lawyer to share responsibility simultaneously or sequentially, where no single lawyer or group of lawyers undertakes to represent interests of accused at all appropriate stages of proceedings, that failure constitutes IAC.

TITLE: State v. McDowell
INDEX NO.: Y.4.b.
CITE: 2004 WI 70, 681 N.W.2d 500 (Wis. 2004)
SUBJECT: "Narrative" Testimony - Level of Knowledge D Will Perjure Self
HOLDING: The Wisconsin Supreme Court holds that defense counsel must actually "know" client will commit perjury before it is proper to present client's testimony in narrative fashion. Client told counsel, "I'll say what I need [to] say to help myself out and if I have something untruthful I'll say that." Court holds this did not meet bright line test of actually knowledge client would lie on stand, and as a result, counsel's performance in resorting to narrative testimony was deficient. However, D here was not prejudiced.

TITLE: State v. Paredez
INDEX NO.: Y.4.b.
CITE: 136 N.M. 533, 101 P.3d 799 (N.M. 2004)
SUBJECT: Counsel has Duty to Advise of Specific Immigration Consequences of Plea
HOLDING: Where guilty plea would put client within statutorily class of deportable aliens, making deportation a near certainty, trial counsel was ineffective in advising client simply that guilty plea "could affect" his immigration status. The New Mexico supreme held that defense counsel has an affirmative duty to determine the immigration status of their clients, and if a client is a non-citizen, counsel must advise the client of the specific immigration consequences of pleading guilty, including whether deportation would be virtually certain. The Court outlined three potential types of ineffectiveness in this context: (1) misinforming the D that deportation will not be a consequence of plea when it is in fact a possibility; (2) advising the client that he "could" or "might" be deported when deportation is a virtual certainty; and (3) giving no advice to an alien D on the immigration consequences of a guilty plea. Cf., e.g., U.S. v. Couto, 311 F.3d 179 (2d Cir. 2002) (only affirmative misrepresentation amounts to IAC in this context).

TITLE: State v. Pearson

INDEX NO.: Y.4.b.

CITE: (06/30/2022), Ind. Ct. App., 191 N.E.3d 892

SUBJECT: Post-conviction court properly granted petition because defendant did not intelligently enter into plea agreement

HOLDING: The State appealed from an order granting Pearson's petition for post-conviction relief. The State charged Pearson with burglary on September 24, 2013, and Pearson entered into an agreement with the Frazier Law Firm that same month. His attorney, Ronald Frazier, never filed an appearance for Pearson. Frazier told Pearson that he needed to accept the State's plea offer and he would have the possibility of modifying his sentence after he served some time. No one from the Frazier Law Firm filed an appearance for Pearson until an associate filed an appearance on February 6, 2014, which was the same day the trial court held a pretrial conference, accepted the plea agreement, and sentenced Pearson. Pearson testified that the associate merely stated, “this is the plea agreement go ahead and sign here and here uh Judge is going to ask you some run of the mill questions and we’ll get this under way.” Frazier had claimed he couldn't attend Pearson's plea hearing because he was "opening a family branch of law." But despite that assertion, Frazier tendered an affidavit of resignation from the bar under Indiana Admission and Discipline 23(17), which requires an acknowledgment that "there is presently pending an investigation into or a proceeding involving allegations of misconduct and that [Frazier] could not successfully defend himself if prosecuted." The post-conviction court believed Pearson's testimony that he would not have relied on Frazier’s advice to plead guilty and would have sought new counsel if he had known Frazier was facing disciplinary actions and was potentially going to resign from the practice of law or be disbarred. The post-conviction court noted that the terms of the plea agreement were fixed and did not provide for a modification of sentence and found that “Frazier lied to Pearson, telling him that he could later petition to modify his sentence.” Held: post-conviction court's order affirmed.

TITLE: State v. Taylor
INDEX NO.: Y.4.b.
CITE: (2d Dist. 3/16/89), Ind., 535 N.E.2d 161
SUBJECT: Ineffective Assistance of Counsel (IAC) - guilty plea
HOLDING: PCR Ct.'s finding of IAC by trial counsel affirmed. Neither Tr. Ct. nor trial counsel advised D of range of penalties for murder. Counsel advised D his choice was 50 years or death. During guilty plea hearing, D stated that he understood range of penalties to be 60 years or death, or 50 years with plea agreement. Tr. Ct. did not correct this misunderstanding. Trial counsel also failed to interview witness who gave police statement inculpating D, but who now says he was forced to do so by police. Counsel also failed to interview alibi witness suggested by D. Finding that counsel's performance was deficient was not clearly erroneous. D must also show that, but for counsel's deficient performance, he would not have pled guilty. Burse 515 N.E.2d 1383, *citing* Hill v. Lockhart (1985), 474 U.S. 52, 100 S. Ct. 366, 88 L.Ed.2d 203 (card at Y.4.b). D testified he pled guilty because he felt he had no choice. He did not know that state's witness would have recanted statement, & he had no alibi evidence. Further, he believed that sentence offered through plea agreement was 10 years shorter than he could get at trial. Held, finding on both deficient performance & prejudice not clearly erroneous.

TITLE: State v. Young
INDEX NO.: Y.4.b.
CITE: 143 N.M. 1, 172 P.3d 138 (N.M. 2007)
SUBJECT: Right to counsel implicated by low pay to public defenders
HOLDING: New Mexico Supreme Court held the compensation offered to defense attorneys in a complicated capital case was so low that it deprived the accused of their Sixth Amendment right to counsel. The case involved multiple Ds in the murder of a prison guard during a riot. Due to conflicts, the public defender's office was required to contract with private attorneys to represent some of the Ds. Their initial contracts called for representation through trial for a flat fee of $46,500 for first-chair attorneys and $23,000 for second-chair attorneys. By all accounts, the case represented one of the most complicated murder prosecutions in the state's history. The legislature appropriated only half the amount sought by each capital defense team to cover the estimated costs of compensating counsel through the end of trial, and the attorneys refused to sign the new contracts, instead moving to withdraw because they could not provide constitutionally adequate representation. They provided evidence that the contract fees, when converted to an estimated hourly rate, would be less than they $73 per hour they pay in overhead. Tr. Ct. denied the motions to withdraw. Court affirmed the denial of the withdrawal motions but held that the inadequate compensation offered to capital counsel deprived their clients of their Sixth Amendment right to the effective assistance of counsel.

TITLE: Stevens v. State
INDEX NO.: Y.4.b.
CITE: (2nd Dist., 12-31-97), Ind. App., 689 N.E.2d 487
SUBJECT: Ineffective assistance of counsel - failing to request jury trial
HOLDING: Trial counsel's failure to preserve D's right to jury trial denied him effective assistance of counsel. In order to prove ineffective assistance of counsel, D must show that counsel's performance fell below objective standard of reasonableness under prevailing norms & that counsel's substandard performance denied D fair trial. D charged with misdemeanor may demand trial by jury not later than ten days before first scheduled trial date, & failure to do so constitutes waiver of his right. Crim. R. 22. Denial of right to jury trial necessarily affects D's substantial rights. Here, D chose to be tried by jury, he voiced his choice to counsel & counsel failed to file necessary jury trial request in Tr. Ct. D objected to violation of his fundamental constitutional right to jury trial before trial, during trial by refusing to testify, & at sentencing. Thus, by failing to timely file jury request, counsel was ineffective. Held, conviction reversed & remanded.

RELATED CASES: Pryor, 973 N.E.2d 629 (Ind. Ct. App, 08-29-12) (trial counsel's failure to preserve D's right to jury trial denied him effective assistance of counsel; failure to file timely demand for jury trial was a mistake and not a choice or strategy); Lewis, 929 N.E.2d 261 (Ind. Ct. App 2010) (prejudice is presumed where attorneys' error deprived D of his fundamental right to a jury trial).

TITLE: Tejeda v. Dubois

INDEX NO.: Y.4.b.

CITE: 142 F.3d 18 (1st Cir. 1998)

SUBJECT: Ineffective Assistance of Counsel (IAC) -- Trial Counsel's "Acrimonious" Relationship with Judge

HOLDING: Where acrimonious relationship between trial judge and defense counsel effectively prevented presentation of drug-trafficking D's only viable defense to jury, D was denied effective assistance of counsel. In face of testimony from five police officers regarding D's arrest for drug trafficking, D's only defense was "police fabrication." Defense counsel's efforts to expose police inconsistencies through cross- examination was made difficult, if not impossible, by judge's repeated sustaining of objections to this line of questioning. Judge further warned counsel not to present police fabrication defense based on D's word alone. Defense counsel attacked judge's integrity and was fined $300 for contempt. Counsel quit trying to cross-examine police officers. D and one other witness testified in support of police fabrication defense but judge explicitly prohibited defense counsel from arguing this theory to jury, and counsel complied. Court of Appeals finds that counsel failed to uncover and exploit significant inconsistencies in police officers' testimony. While refusing to assign fault to either judge or defense counsel, Court finds that relationship between the two resulted in IAC.

TITLE: U.S. v. Midgett
INDEX NO.: Y.4.b.
CITE: 342 F.3d 321 (4th Cir. 2003)
SUBJECT: Attorney's Disbelief in Client's Story Does Not Constitute Knowledge of Perjury
HOLDING: Attorney's disbelief in client's story did not justify refusal to present client's testimony absent client's clearly stated intention to commit perjury. D claimed that he was asleep in Co-D's car when a "mystery man" murdered victim. Although "mystery man" story lacked corroboration -- co-D said story was false, victim IDed D in court as assailant, and D sent victim a letter that might have been interpreted as a feeble apology -- D consistently claimed his story was true and never stated his intent to commit perjury. Counsel's duty to client was not dependent upon whether he personally believed D's story or how much corroboration existed. Absent D's clear statement of intent to commit perjury, Counsel had duty to put on D's testimony.

TITLE: Wesley v. State
INDEX NO.: Y.4.b.
CITE: (5-30-03), Ind., 788 N.E.2d 1247
SUBJECT: Claim of ineffective assistance of counsel (IAC) - failure to use psychiatric records for impeachment
HOLDING: In criminal confinement & battery prosecution, trial counsel was not ineffective for failing to obtain & use complaining witness's (cw's) psychiatric records, which showed history of delusional episodes & false reports of injury. Contending that CW injured herself & then fabricated or fantasized that he attacked her, D argued that records should have been discovered & used by trial counsel for purposes of impeachment. However, based on D's testimony alone, jury could conclude that D knowingly & intentionally battered & confined CW with deadly weapon. D did not explain how use of CW's psychiatric records to impeach CW on "her ability to realistically recall the facts she was testifying to" would tend to prove or disprove his state of mind. Nor did D explain how such impeachment would shed any light on his guilt or innocence. At best, CW's psychiatric records were only marginally relevant. Counsel's representation cannot be deemed to have fallen below objective standard of reasonableness by failing to obtain & use marginally relevant evidence. Held, transfer granted, Ct. App.' opinion at 753 N.E.2d 686 vacated, denial of post-conviction relief affirmed.

TITLE: Williams v. State
INDEX NO.: Y.4.b.
CITE: (6/18/87) Ind., 508 N.E.2d 1264
SUBJECT: IAC "clearly established by undisputed facts"
HOLDING: Tr. Ct. erred in denying D's PCR petition where counsel failed to interview state's witnesses, failed to subpoena D's alibi witnesses, failed to inform Tr. Ct. that alibi witnesses would not attend trial without provision of travel funds, & failed to indicate until morning of trial that D required public funds for depositions. Here, dispute existed as to actual representation (nonpayment of fees). Attorney missed some Ct. appearances. He was granted 1 continuance. Ten days before trial, counsel moved to withdraw. His motion was denied 5 days before trial. Motion was renewed on first day of trial. Attorney stated he was unprepared to represent D because D lacked money to finance proper investigation & defense. Counsel rested defense case without presenting any evidence, despite earlier notice of alibi. Perfunctory representation does not satisfy mandates of 6th Amend. Magley 335 N.E.2d 811. Ct. finds counsel's affirmative neglect particularly disturbing in light of D's potential sentence (70 years). In addition to substandard representation, Ct. finds record portrays breakdown in adversarial process which casts substantial doubt on reliability of D's trial. "Counsel was so ineffective as to deprive Williams of even an opportunity to present a defense..." Ct.'s underlying rationale is similar to cases holding due process violations where attorney had insufficient time to prepare defense, e.g., Sweet 117 N.E.2d 745. Ct. notes while each error of counsel individually may not be sufficient to prove ineffective representation, accumulation of such failures may amount to ineffective assistance. Shull, App., 421 N.E.2d 1. Ct. distinguishes present case from other cases that rejected IAC claims. Where mistakes & oversights mount to do substantial damage to the defense, IAC claim must prevail. Held, conviction reversed; cause remanded for new trial. Pivarnik CONCURS IN RESULT without opinion.

TITLE: Wilson v. State
INDEX NO.: Y.4.b.
CITE: (06/27/2019), Ind. Ct. App., 128 N.E.3d 492
SUBJECT: Trial and appellate counsel ineffective for failure to challenge juvenile de facto life sentence
HOLDING: Defendant received ineffective assistance of trial counsel when counsel's sentencing argument only took up two out of the 700 pages of the transcript, and there was no evidence admitted regarding Defendant's youth or characteristics, mental health, good character, or prospects of rehabilitation. Attorney presented no evidence on 16-year-old Defendant's behalf, resulting in a sentence of 181 years for murder and other crimes. There is a reasonable probability that, but for counsel's deficient performance, Defendant would have received a lesser sentence.

Court also held that Miller v. Alabama, 132 S. Ct. 2455 (2012), applies to sentences for juveniles that amount to a life sentence, regardless of the label applied by the trial court or the State. A sentencing hearing under Miller requires more than simply acknowledging the defendant's youth. It will likely include expert testimony, which would ideally cover both the attendant characteristics of youth in general and the particular youth and characteristics of the defendant being sentenced. Held, reversed and remanded for new sentencing hearing that complies with Miller.

TITLE: Woods v. State
INDEX NO.: Y.4.b.
CITE: (11-23-98), Ind., 701 N.E.2d 1208
SUBJECT: When to raise ineffective assistance of counsel (IAC) - waiver
HOLDING: Sixth Amendment claim of IAC, if not raised on direct appeal, may be presented for first time in post-conviction (P-C) proceedings irrespective of nature of issues claimed to support competence & prejudice prongs under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). However, if any claim of IAC is raised on direct appeal, issue will be foreclosed from collateral review, even if not visible on trial record. D must decide forum for adjudication of issue -- direct appeal or collateral review. Specific contentions supporting IAC claim, however, may not be divided between direct appeal & post-conviction proceedings. Claim of ineffective assistance of appellate counsel is not adequate back door to full adjudication of ineffectiveness of trial counsel. Held, denial of petition for post-conviction relief affirmed.

RELATED CASES: Peaver 937 N.E. 2d 896 (Ind. Ct. App. 2010) (D using Davis/Hatton procedure may not split his claims of IAC between his appeal and his petition for post-conviction relief; thus, if D raises IAC claims in petition for post-conviction relief, he cannot raise additional IAC claims on appeal); Jewell, 887 N.E.2d 939 (raising counsel's performance as fundamental error on appeal does not preclude IAC litigation on PCR); Wright, App., 881 N.E.2d 1018 (although failure to raise IAC of trial counsel on appeal will generally not constitute IAC of appellate counsel, here it was because appellate counsel raised trial counsel's ineffectiveness but did not include the instant error); Godby, App., 809 N.E.2d 480 (IAC issue was foreclosed to post-conviction petitioner who raised issue through motion to correct error after trial but did not raise it in direct appeal); Craig, App., 804 N.E.2d 170 (D's claim of IAC was barred by res judicata where he argued issue on direct appeal before Woods was decided); Hardy, App., 786 N.E.2d 783 (petitioner may not parcel out several claims of IAC between direct appeal & subsequent P-C proceeding, regardless of whether they arise under Strickland or Chronic); Seeley, App., 782 N.E.2d 1052 (Allen, 749 N.E.2d 1158 does not preclude claims of ineffective assistance of appellate counsel when claims of ineffective assistance of trial counsel are precluded); Davis, App., 775 N.E.2d 1182; McCary, 761 N.E.2d 389 (D's claim of ineffective assistance of trial counsel was barred by res judicata because he argued issue on direct appeal); Landis, 749 N.E.2d 1130 (if claim of IAC has been litigated on direct appeal, it is not available in P-C proceedings, irrespective of whether direct appeal preceded Woods decision); Ben-Yisrayl, 738 N.E.2d 253 (Ct. is precluded from determining trial counsel's performance upon ground other than that asserted on direct appeal); Perkins, App., 718 N.E.2d 790 (petition for relief from judgment under Ind. T.R. 60(B) is appropriate means by which to raise IAC claim in context of juvenile delinquency proceedings); Stafford, 714 N.E.2d 617 (remanded to P-C Ct. to consider claim of IAC which P-C Ct. originally held was waived due to appellate counsel's failure to raise issue on appeal).

TITLE: Woodson v. State
INDEX NO.: Y.4.b.
CITE: (02-23-12), 961 N.E.2d 1035 (Ind. Ct. App 2012)
SUBJECT: Ineffective assistance of counsel (IAC) - performance comparison between original & retrial attorneys; eyewitness identification
HOLDING: D did not receive IAC in retrial of murder and carrying handgun without a license charges, even though attorney did not defend the case in the same manner as did counsel on the first trial. D's first trial ended in a hung jury and a mistrial was declared. A different attorney represented D at the second trial where he was convicted. D alleged his second attorney was ineffective because his cross-examination of two eyewitnesses was not as thorough and did not impeach their credibility in matters the first attorney raised in the first trial. Court rejected this claim, finding that the State had additional crucial evidence in the second trial and juries are not "interchangeable machines but instead are made up of twelve unique individuals. There was nothing precluding the second jury from weighing the evidence differently than the first jury."

The Court also declined to find counsel ineffective for failing to hire an expert on eyewitness identification. Second attorney testified at PCR hearing that he did not pursue hiring an expert because of cost and his belief that, as private counsel, he could not seek public funds to pay for an expert. Even though Court is "very cognizant of the close scrutiny eyewitness identification in criminal cases has received in recent years...the present case is not a proper vehicle for...litigating the propriety of eyewitness identification evidence." Counsel was not ineffective because the law at the time of trial suggests that the expert's testimony would be inadmissible because it would not have been sufficiently helpful to the jury under Evidence Rule 702 (b). See Farris v. State, 818 N.E.2d 63 (Ind. Ct. App 2004). Held, denial of petition for post-conviction relief affirmed.

TITLE: Yarborough v. Gentry
INDEX NO.: Y.4.b.
CITE: 540 U.S. 1 (2003)
SUBJECT: IAC, closing argument, trial strategy
HOLDING: Per curiam. At trial for stabbing his girlfriend, the D testified that he had injured her accidentally during a dispute with a drug dealer. The victim testified at trial that she could not remember the details of the stabbing, but the state introduced her preliminary hearing testimony that the D had put his hand around her throat before stabbing her. Another witness claimed he had seen the stabbing through a window but testified at different times that the lighting was "pretty dark," "getting dark," or "wasn't that dark." Defense counsel's closing argument focused on the fact that juries are free to disbelieve one witness and believe another. Counsel did not specifically ask the jury for a verdict of not guilty.

The D argued ineffective assistance of counsel on direct appeal and was denied relief. On federal habeas the district court denied relief but the 9th Circuit reversed, noting that counsel had failed to discuss numerous potentially exculpatory pieces of evidence, including that the victim had used drugs on the day of the stabbing and on the day of the preliminary hearing, that the witness outside the window had not been able to see inside clearly, which was relevant to the intent issue, that the D's testimony was consistent to some extent with that of the outside witness, and that the victim's injuries were not consistent with her version of the stabbing.

The U.S. Supreme Court reversed the 9th Circuit. Although the Sixth Amendment guarantees criminal Ds the effective assistance of counsel, and that right is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the D (see Strickland v. Washington, 466 U.S. 668 (1984)), a federal court may not grant habeas relief from a state court's decision denying an IAC claim unless the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law..." The state court's decision was not objectively unreasonable, so habeas relief was barred by 28 U.S.C. s2254(d)(1).

Reviewer's **Note:** There are other signs in the opinion that defense counsel did not adequately prepare for trial. For example, the D testified that he had only one prior conviction. When the evidence showed that he had in fact been convicted several times, the D explained that he had been confused about whether a plea bargain counted as a conviction. Apparently, defense counsel never properly prepared the D to testify, even though the D's prior convictions included traditionally impeaching offenses (burglary and grand theft). It is not clear from the opinion, but some of the D's other convictions (battery on a peace officer and felon in possession of firearms) may have become admissible only when the D opened the door during his testimony.

Y. RIGHT TO COUNSEL

Y.4. Ineffective assistance of counsel (IAC)

Y.4.b.1. Performance

TITLE: Back v. State
INDEX NO.: Y.4.b.1.
CITE: (02/01/2021), 162 N.E.3d 1173 (Ind. Ct. App 2021)
SUBJECT: Denial of post-conviction relief affirmed
HOLDING: Trial counsel did not render ineffective assistance by failing to communicate the State's offer to plead guilty to Level 3 felony attempted aggravated battery. Defense counsel testified that he communicated the Level 3 felony attempted aggravated battery plea offer to Defendant and his family prior to Defendant signing the final plea, but Defendant had consistently indicated he would not admit he intended to harm his ex-girlfriend, something the Level 3 offer would require him to do. The Court of Appeals noted it cannot reweigh evidence or witness credibility and found no error. Further, the post-conviction court had the authority to correct the transcript of the guilty plea hearing and ensured the preservation of an accurate record in doing so. The transcript contained a clerical error inserting the word "not" into the factual basis, which was in conflict with what the prosecutor actually said in the recording. Held, denial of post-conviction relief affirmed.

TITLE: Bethel v. State
INDEX NO.: Y.4.b.1.
CITE: (10/16/2018), 110 N.E.3d 444 (Ind. Ct. App 2018)
SUBJECT: Ineffective assistance of counsel (IAC) claim - use of unsuccessful defense strategy
HOLDING: In appeal of denial of D's successive petition for post-conviction relief from robbery and attempted murder convictions, D argued that trial counsel rendered ineffective assistance by presenting evidence and argument in support of a defense of duress even though that defense was legally unavailable in his case. But defense counsel did not raise duress defense to "excuse otherwise criminal acts" because the attorney did not concede that D had committed any criminal acts in the first place. Instead, counsel's strategy was to challenge the evidence supporting the State's case, arguing that D was not guilty of any charges as a principal actor because Codefendant committed all offenses and coerced D to accompany him on the crime spree under the threat of death. This "mere presence" strategy was reasonable due to the extensive evidence placing D at the scenes of the crimes. Pursuing a different strategy of challenging on-site identifications of D by witnesses would not have been a stronger or more effective strategy than the one counsel chose, because post-arrest show-up process was not unduly suggestive. Thus, D failed to demonstrate that the post-conviction court erred in denying his successive petition for postconviction relief. Held, judgment affirmed.

TITLE: Bradbury v. State

INDEX NO.: Y.4.b.1.

CITE: (10/1/2021), 177 N.E.3d 608 (Ind. 2021)

SUBJECT: Ineffective assistance of counsel claim rejected - stipulating to disputed element of crime and failing to seek lesser included offense instruction

HOLDING: In murder prosecution, trial counsel was not ineffective for failing to request a jury instruction on the lesser-included offense of reckless homicide and in stipulating to the fact that the co-defendant had been convicted of murder as the principal, thus conceding that co-defendant had the requisite intent to kill. 15-year-old Defendant was charged as an adult and convicted of murder as an accomplice with a gang enhancement after his 19-year-old friend shot and killed a toddler while opening fire on a rival during a gang dispute. Counsel indicated that he entered into the stipulation because he believed the jury was less likely to convict Defendant if it knew "justice had been done to the actual shooter." Also, Defendant had initially confessed that he was the shooter and the stipulation served to show that it was a false confession. The stipulation did not relieve the State of the burden to prove Defendant's intent. And even if defense counsel had not agreed to the stipulation, there was enough evidence to prove co-defendant's intent to kill the intended victim. A 3-2 majority of the Indiana Supreme Court also concluded that counsel made a reasonable strategic decision under the circumstances not to seek a lesser-included offense instruction and pursue an all-or-nothing trial strategy. Defendant's theory of the case was that the State did not sufficiently prove his intent and that the shooting was a rogue action by co-defendant that Defendant did not join or have any knowledge. Held, transfer granted, Court of Appeals opinion at 160 N.E.3d 256 vacated, denial of post-conviction relief affirmed. Massa, J., joined by Slaughter, J., concurring to express his belief that defense counsel's performance here was "extraordinarily effective" and "something to compliment, not second-guess," even if it failed to result in an acquittal. Goff, J., joined by Rush, C.J., dissenting, would find counsel's performance deficient because he failed in his duty to consult with Defendant on whether to request a lesser-included instruction, and counsel testified that his failure to request such an instruction was not a strategic decision. This deficient performance resulted in prejudice to Defendant given the conflicting evidence "that would have likely created a serious enough dispute over Bradbury's culpability as an accomplice for the court to have given the instruction."

RELATED CASES: Coleman, 196 N.E.3d 731 (Ind. Ct. App. 2022) (trial council's decision not to tender a lesser-included offense jury instruction for Level 5 felony robbery or Level 4 felony robbery of a pharmacy as lesser included offenses to his Level 3 felony attempted armed robbery charge was consistent with a reasonable trial strategy)

TITLE: Buck v. Davis
INDEX NO.: Y.4.b.1
CITE: (2/22/2017), 137 S. Ct. 759 (S. Ct. 2017)
SUBJECT: IAC by eliciting testimony about future dangerousness based on race
HOLDING: Defendant received ineffective assistance during the capital sentencing phase where counsel elicited testimony that, as an African American, Defendant was more likely to commit future violent acts.

Defendant murdered his ex-girlfriend and one of her friends. During the sentencing phase, his attorney called a psychologist to offer his opinion about Defendant's future dangerousness. Texas allows the death penalty only if a jury unanimously finds beyond a reasonable doubt that a defendant is likely to commit future violent acts. While the psychologist ultimately concluded that Defendant was unlikely to commit violent acts, he did testify that Defendant was more likely to commit violent acts because he is African American. The prosecutor highlighted this testimony during his summation. The psychologist's written report, which made the same observation, was admitted as evidence and was later reviewed by the jury during deliberations. The jury returned a sentence of death.

Even though counsel knew the psychologist's report stated that Defendant's race predisposed him to violent conduct, and that this was the principal point of dispute in the penalty phase, he nonetheless called the psychologist to the stand and specifically elicited testimony about the connection between race and violence. No competent defense attorney would do this. See Buck v. Thaler, 565 U. S. 1022 (2011). As to prejudice, the impact of the testimony about Defendant's race was not "de minimis," as the District Court had found. See Strickland v. Washington, 466 U. S. 668, 694 (1984). To the contrary, absent this testimony, it is reasonably probable that at least one juror would have harbored a reasonable doubt on the question of Defendant's dangerousness. "Some toxins can be deadly in small doses." Held, cert. granted, Fifth Circuit ruling at 623 Fed. Appx. 688, reversed and remanded, and judgment reversed. Roberts, C.J., joined by Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ., Thomas J., dissenting, joined by Alito, J.

TITLE: Burger v. Kemp
INDEX NO.: Y.4.b.1.
CITE: 483 U.S. 776, 107 S. Ct. 3114, 97 L.Ed.2d 638 (1987)
SUBJECT: Failure to develop/present/investigate mitigation evidence in capital sentencing phase
HOLDING: Failure to present & fully investigate mitigation evidence under facts presented here at capital sentencing hearing is not ineffective assistance of counsel (IAC). In addressing claims of IAC, Court addresses "not what is prudent or appropriate, but only what is constitutionally compelled." U.S. v. Cronic, (1984), 466 U.S. 648, 665 n. 38, 104 S. Ct. 2039, 2050, 80 L.Ed.2d 657. "[S]trategic choices made after less than complete investigation is reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. Strickland v. Washington, (1984), 466 U.S. 668, 690-91, 104 S. Ct. 2052, 2065-66, 80 L.Ed.2d 674. Here, D's counsel presented no evidence in mitigation at D's capital sentencing hearing. Court finds council's decision not to mount an all-out investigation into D's background in search of mitigating circumstances was supported by reasonable professional judgment. Attorney spoke with witnesses who could provide information about D's background, but also could testify to material harmful to D which was not otherwise in record. Thus, there was reasonable basis for attorney's strategic decision that explanation of D's history would not have minimized the risk of death penalty. Held, counsel's failure to conduct more extensive investigation did not render representation constitutionally ineffective. Blackmun, joined by Brennan, Marshall, & Powell, DISSENTS.

TITLE: Christian v. State
INDEX NO.: Y.4.b.1.
CITE: (2nd Dist.; 5-10-99), Ind. App., 712 N.E.2d 4
SUBJECT: Ineffective assistance of trial counsel (IAC) - concession to elements of crime
HOLDING: Where defense counsel conceded that there was penetration in rape case despite D's testimony that there was no penetration, D was denied effective assistance of counsel. Although concession by attorney to certain elements or even to entire charged offense may at times constitute reasonable trial strategy, right to effective assistance of counsel is right of accused to require prosecution's case to survive crucible of meaningful adversarial testing, and adversary process is presumptively unreliable if counsel entirely fails to subject prosecution's case to meaningful adversarial testing. U.S. v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984). Here, in order to prove rape, State must prove penetration occurred. D testified that penetration did not occur; whereas victim testified it did. Forensic evidence presented by State was potentially consistent with no penetration. However, in closing argument, defense counsel conceded that there was penetration. Because determination of facts was reduced to issue of credibility of D vis-a-vis alleged victim, D at least deserved to have own statement weighed with other evidence. Moreover, counsel's concession impeached D's testimony on issue of penetration &, thus, also undermined consent defense. Therefore, counsel's performance resulted in breakdown in adversarial process that rendered resulting convictions fundamentally unfair & unreliable. Held, conviction reversed.

RELATED CASES: Saylor, 55 N.E.3d 354 (Ind. Ct. App 2016) (trial counsel's inadvertent comment during closing that “defendant wasn’t the only one having sex with victim” was made in context of making a point about State's medical evidence and was not a judicial admission of guilt); Conder, 953 N.E.2d 1197 (Ind. Ct. App. 2011) (after D was found guilty of murder and other charges, council’s decision to seek reduction of murder conviction to class A felony voluntary manslaughter and conceding shoes were a "deadly weapon" was a sound, strategic decision); Conrad, App., 747 N.E.2d 575 (in prosecution for unlawful possession of firearm by serious violent felon, D was not denied effective assistance of counsel due to trial counsel’s failure to challenge, in any fashion, State’s evidence that he was serious violent felon).

TITLE: Cole v. State
INDEX NO.: Y.4.b.1
CITE: (9/21/2016), 61 N.E.3d 384 (Ind. Ct. App 2016)
SUBJECT: No IAC for failing to object to belated amendment
HOLDING: Trial counsel was not ineffective for failing to object to a substantive amendment after the omnibus date - one that added another count of Class B felony robbery to the charging information - because Tr. Ct. would not have been required to sustain the objection and dismiss the amended count. At the time (1995), the law was in flux regarding the consequences to the State of failing to timely amend a charging information. See Fajardo v. State, 859 N.E.2d 1201, 1206-07 (Ind. 2007). Held, judgment affirmed.

TITLE: Edgin v. State
INDEX NO.: Y.4.b.1.
CITE: (11-16-95), Ind. App., 657 N.E.2d 445
SUBJECT: No ineffective assistance of counsel - vouching testimony
HOLDING: Trial counsel was not ineffective for failing to properly object to improper "vouching" testimony & for not requesting jury admonishment. After detective testified that victims of child molestations "seemed very credible," trial counsel objected to testimony on basis that it was narrative. Although proper objection to this improper testimony would have been sustained, D failed to show that his attorney's failure prejudiced him & deprived him of fair trial. Attorney had opportunity to cross-examine detective, children & their mother concerning credibility. All evidence concerning children's credibility & bias was available for jury to weigh against detective's statement. Held, denial of post-conviction relief affirmed; Robertson, J., concurring in result.

TITLE: Florida v. Nixon
INDEX NO.: Y.4.b.1.
CITE: 543 U.S. 175 (2004)
SUBJECT: Capital punishment, right to counsel, trial strategy, concession of guilt
HOLDING: When trial counsel informs a D of the strategy counsel believes to be in the D's best interest and the D is unresponsive, counsel's strategic choice does not require the D's express consent. A strategic decision to concede guilt in a bifurcated capital trial and focus on seeking a sentence less than death, without the D's express authorization, does not automatically constitute ineffective assistance of counsel.

RELATED CASES: McCoy v. Louisiana, 138 S. Ct. 1500 (2018) (distinguishing Nixon because defendant in Nixon was unresponsive, Court ruled that 6th Amendment guarantees D's right to choose objective of his defense and to insist that counsel refrain from admitting guilt).

TITLE: Helton v. State
INDEX NO.: Y.4.b.1.
CITE: 907 N.E.2d 1020 (Ind. 2009)
SUBJECT: Ineffective assistance of counsel (IAC) claim - failure to file motion to suppress
HOLDING: To establish an IAC claim, D must demonstrate that counsel performed deficiently, and the deficiency resulted in prejudice. Lee v. State, 892 N.E.2d 1231 (Ind. 2008). Here, D claimed that his defense counsel rendered ineffective assistance by failing to move to suppress evidence obtained pursuant to a search warrant. Assuming that search warrant affidavit was insufficient to establish probable cause, this is not sufficient to establish IAC. At his post-conviction hearing, D failed to carry his burden of proving there was a reasonable probability of insufficient evidence at trial if a suppression motion had been granted.

State is not required to introduce the subject contraband to obtain a conviction for dealing or possession, which may be established through witness testimony and circumstantial evidence. See Clifton v. State, 499 N.E.2d 256 (Ind. 1986); Halsema v. State, 823 N.E.2d 668, 673 n.1 (Ind. 2005). The exclusion of the seized items in D's case, therefore, would not have foreclosed prosecution and conviction based on other evidence. D failed to establish at his post-conviction evidentiary hearing what other evidence of guilt was or was not available. It was incumbent on D--not the State--to show there was a reasonable probability the State's other evidence would have been insufficient if a suppression motion had been granted. Held, transfer granted, denial of post-conviction relief affirmed; Rucker, J., concurring in result, wrote separately to point out majority's broad proposition that State is not required to introduce contraband to obtain a conviction for dealing or possession does not necessarily support its conclusion that the exclusion of the seized items in D's case would not have foreclosed prosecution and conviction based on other evidence.

RELATED CASES: Gentry v. Sevier, 597 F.3d 838 (7th Cir. 2010) (The Indiana Court of Appeals unreasonably applied Strickland v. Washington, 466 U.S. 668 (1984) to the facts of the case when the Court found no IAC; trial counsel was ineffective for failing to move to suppress and object to evidence seized during an illegal stop and search).

TITLE: Hiner v. State

INDEX NO.: Y.4.b.1.

CITE: (2d Dist. 8/8/90), Ind. App., 557 N.E.2d 1090

SUBJECT: Ineffective assistance of counsel (IAC) - lawyer "stands mute" after adverse pre-trial ruling

HOLDING: Where D's attorney, after adverse ruling on state's motion in limine, refused to participate in trial & told Tr. Ct. that D "stood mute," D received IAC. D was charged with dealing cocaine, & before trial, Tr. Ct. granted state's motion in limine prohibiting any mention of informant's prior history of drug use. D's counsel objected, claiming that cornerstone of D's defense was impeachment of informant & introduction of evidence that informant had alternative sources for cocaine. D's counsel then informed Tr. Ct. that he believed that in order to preserve error in ruling on motion in limine, D would have to stand mute throughout trial which he did. After state rested, counsel offered Tr. Ct. handwritten summary of defense witness testimony but told Tr. Ct. that he would offer no defense & witnesses had been excused. D was convicted & on appeal argues that he received IAC. Here, counsel waived any error in ruling on motion in limine. Proper remedy would have been to call defense witness, & if objections to testimony were sustained, make offer to prove. State argues that handwritten summary was sufficient, but appellate Ct.s have found otherwise. See Mitchem 503 N.E.2d 889; Albright, App., 501 N.E.2d 488. Beyond waiving this issue, council's decision to stand mute through remainder of trial in effect rendered him without counsel & without any defense. On appeal, D points to possible defenses that could have been raised. Considering record as whole, Ct. App. finds it readily apparent that D received IAC. Held, reversed & remanded for new trial.

TITLE: Kimmelman v. Morrison
INDEX NO.: Y.4.b.1.
CITE: 477 U.S. 365, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986)
SUBJECT: IAC - failure to file timely Motion to Suppress; deficient performances
HOLDING: Essence of IAC claim is that counsel's unprofessional errors so upset adversarial balance between defense & prosecution that trial was rendered unfair & verdict rendered suspect. Here, habeas petitioner alleged he was denied effective assistance because of attorney's failure to file timely motion to suppress evidence allegedly seized in violation of 4th Amend. In order to prevail, petitioner must show that (1) counsel's representation fell below an objective standard of reasonableness; (2) there exists a reasonable probability that but for counsel's unprofessional errors, result of proceeding would have been different. Strickland v. Washington (1984), 466 U.S. 7668, 104 S. Ct. 2052, 80 L.Ed.2d 674. Where principal allegation of ineffectiveness is defense counsel's failure to litigate 4th Amend. claim competently, D must also prove that 4th Amend. claim is meritorious & that there is a reasonable probability that verdict would have been different absent excludable evidence in order to demonstrate prejudice. Here, petitioner's attorney failed to file timely suppression motion because he was, until first day of trial, unaware of search & of state's intention to offer fruits into evidence. Therefore, petitioner has demonstrated deficient performance. Case remanded for determination as to prejudice. Powell, joined by Burger, & Rehnquist, CONCURS IN JUDGMENT.

TITLE: Knowles v. Mirzayance
INDEX NO.: Y.4.b.1.
CITE: (03-24-09), U.S., 556 U.S. 111, 129 S. Ct. 1411
SUBJECT: Claim of ineffective assistance of counsel - abandoning insanity defense
HOLDING: In a state system that provides for bifurcated trials on issues of guilt and insanity, defense counsel did not provide ineffective assistance by advising his client to abandon an insanity defense to first-degree murder after the guilt-phase jury rejected counsel's argument that the medical testimony on insanity demonstrated that D lacked the capacity for premeditation or deliberation. In convicting D, the jury rejected medical evidence similar to what the D's lawyer would have argued in the second phase. In urging D to drop the insanity plea, lawyer "merely recommended the withdrawal of what he reasonably believed was a claim doomed to fail." Thus, state courts did not violate clearly established federal law when they dismissed D's ineffective assistance of counsel claim. Ninth Circuit erroneously found D received ineffective assistance because it felt the lawyer had "nothing to lose" by putting on the only defense available. "This court has never established anything akin" to a "nothing to lose" standard. Held, Ninth Circuit opinion at 175 Fed. Appx. 142 reversed, denial of post-conviction relief affirmed.

TITLE: Maryland v. Kulbicki
INDEX NO.: Y.4.b.1
CITE: (10/5/2015), 136 S. Ct. 2, 193 L. Ed. 2d 1 (U.S. Supreme Court 2015)
SUBJECT: No IAC for not predicting demise of ballistics-matching test
HOLDING: PER CURIAM

Trial counsel was not ineffective for failing to challenge the State's ballistic-matching technique, which, though disapproved years later by the scientific community, was widely accepted when D was tried and convicted for murdering his mistress.

At D's 1995 trial, an FBI expert in Comparative Bullet Lead Analysis ("CBLA") testified that the bullet fragment taken from the victim's skull matched a bullet fragment found in D's truck. Several years later, CBLA fell out of favor with the scientific community. Thus, in his petition for post-conviction relief, D alleged counsel was ineffective for failing to challenge CBLA. D also claimed that during discovery, counsel should have searched for a report written several years before trial by the FBI expert; the report questioned the methodology behind CBLA but not its overall validity. In granting post-conviction relief, the Maryland Court of Appeals ruled counsel was ineffective for failing to look for the report, because it "presaged the flaws in CBLA evidence," and for failing to cross-examine the FBI expert about the reliability of CBLA.

In reversing, the Court held that the Sixth Amendment did not require counsel to predict the demise of CBLA. Instead, the Maryland Court of Appeals should have measured the reasonableness of counsel's conduct as of the time he represented D. See Strickland v. Washington, 466 U.S. 668, 690 (1984). CBLA was widely accepted when D was tried and was routinely admitted in trials until 2003. As to counsel's failure to look for the report, the Court said there was no evidence a diligent search would have uncovered the report. Held, *cert. granted* and judgment of Maryland Court of Appeals at 99 A.3d 730 reversed.

TITLE: McCullough v. State
INDEX NO.: Y.4.b.1.
CITE: (08-27-12), 973 N.E.2d 62 (Ind. Ct. App 2012)
SUBJECT: IAC - trial strategy
HOLDING: Post-conviction court did not abuse its discretion by denying D's Petition for Post-conviction Relief. Counsel is afforded considerable discretion in choosing strategy and tactics. Reasonable strategy is not subject to judicial second guesses. Here, D was charged with two counts of class A felony child molesting and one count of class C felony child molesting based on the accusations by his stepdaughter, L.D. L.D. claimed that D had molested her in Kindergarten, first and second grade, and pre-school. This entire time period was not charged. Further, counsel admitted evidence that L.D. claimed D had sexual intercourse with her when she was three years old in California and her mother discovered it and yelled at D. Although counsel knew that Mother denied the incident in California and a medical examination showed no trauma, counsel did not introduce this evidence to prove the California claim false. Nor did counsel object to the State's argument in closing that she would have charged the California incident if she had jurisdiction. D testified, denying the California incident.

At the post-conviction hearing, trial counsel testified that he did not call the mother because he did not want to take the chance, she would make new accusations. The decision to exclude Mother's testimony rather than risk unpredictable testimony was reasonable. Although counsel did not have a reason for failing to object to L.D.'s uncharged molest accusations, failing to object was consistent with counsel's strategy of portraying L.D.'s accusations as unbelievable. Trial counsel's performance during trial was consistently aimed at executing his deliberately chosen defense strategy. Held, judgment affirmed; Brown, J., dissenting on basis that cumulative effect of errors entitled D to relief; counsel failed to: 1) introduce evidence proving the California claim was false; 2) object to L.D.'s accusations of prior conduct; 3) cross-examine DCS interviewer and police detective regarding custody battle between D and L.D.; 4) make an offer of proof to preserve a valid issue regarding the Tr. Ct.'s curtailment of D's investigator's testimony; 5) present evidence that Mother coached E.M., L.M.'s sister, to make a molest accusation which was later recanted; 6) present evidence of Mother's motive to coach children, i.e., her arrest one month before the accusations for failing to pay D child support; and 7) request an instruction regarding child hearsay.

RELATED CASES: Hinesley, 999 N.E.2d 975 (Ind. Ct. App 2013) (no IAC due to deliberate strategic choice to permit trier of fact to consider as substantive evidence hearsay statements and failure to object to improper vouching statements); Tatusko, 990 N.E.2d 986 (Ind. Ct. App 2013) (failure to ask Tr. Ct. to interrogate prospective jurors about potentially prejudicial statement by one prospective juror during voir dire was reasonable strategic decision).

TITLE: Peak v. State

INDEX NO.: Y.4.b.1.

CITE: (2/25/2015), 26 N.E.3d 1010 (Ind. Ct. App 2015)

SUBJECT: Failure to move to suppress did not constitute deficient performance - objective basis for stopping D for failing to signal turn

HOLDING: Trial counsel was not ineffective for failing to file a motion to suppress marijuana found on D during a traffic stop and for not objecting at trial to the admission of the drug on the grounds the traffic stop was illegal. A police officer in an unmarked car saw D's car leave from a house suspected in illegal drug transactions. D came to a red light, turned on his turn signal, and turned. The officer radioed for a marked car to pull D over because he did not activate his turn signal 200 feet prior to the turn, in violation of Ind. Code § 9-21-8-25. D argued that the statute does not apply in this case because he did not intend to turn right until he came to a stop at the red light and made the decision. But the duty to signal applies regardless of whether a stoplight or other traffic signal requires a complete stop before turning. Datzek v. State, 838 N.E.2d 1149 (Ind. Ct. App 2005). D might have raised a defense at trial that he lacked the intent to turn during the 200 feet, but the reasonable suspicion analysis looks at the totality of circumstances leading up to a traffic stop to determine whether the officer had a particularized and objective basis for the stop. Failure to signal within the required distance is objective evidence of failure to comply with the statute. D's alleged lack of an intent would not preclude officers from having reasonable suspicion that turn signal law had been violated. If his attorney had filed the motion to suppress or objected to the admission of the marijuana because the traffic stop was illegal, the attorney would not have prevailed. Thus, counsel's performance was not deficient for failing to present a claim that would have been meritless. Held, judgment affirmed.

RELATED CASES: Ware, 78 N.E.3d 1109 (Ind. Ct. App. 2017) (D's IAC claim failed, because had counsel moved to suppress evidence seized by officers who entered her home with a valid warrant, but without first clearly announcing their presence, the motion would not have been successful under Article 1, § 11).

TITLE: PERFORMANCE HELD EFFECTIVE
INDEX NO.: Y.4.b.1.
CITE: NONE
SUBJECT: NONE
HOLDING: NONE

FAILURE TO REQUEST A LESSER INCLUDED INSTRUCTION: Hogan, 966 N.E.2d 738 (Ind. Ct. App 2012) (trial council's decision to go all-or-nothing rather than request a lesser included instruction was reasonable because it was consistent with his trial strategy of attacking the victim's credibility as to whether a crime even occurred).

STIPULATING TO POSSIBLY INADMISSIBLE HEARSAY: Hinesley, 999 N.E.2d 975 (Ind. Ct. App 2013); Curtis, App., 905 N.E.2d 410 (while some question existed as to the admissibility of alleged child molesting victims' pretrial statements, counsel's strategy of stipulating to the admissibility of the hearsay was reasonable in that the inconsistencies among the statements might work to D's advantage).

CHOICE OF DEFENSE: Schlatter, App., 891 N.E.2d 1139 (counsel was not ineffective in sexual misconduct with minor prosecution for failing to assert defense of automatism; because D acted voluntarily in becoming intoxicated, he cannot claim that his actions which resulted from his intoxication were involuntary); Boesch, 778 N.E.2d 1276 (Ct. rejected D's claims that trial counsel's closing statement denied or contradicted his trial testimony that he did not intentionally kill his wife); Danks, App., 733 N.E.2d 474 (counsel did not render IAC by not advising D that death was unlikely result of trial & by not trying to persuade D to proceed to trial); Sada, App., 706 N.E.2d 192 (Ct. rejected D's claim that defense theory that D & Co-D were only "mules" used to transport drugs was legally meritless defense that in fact admitted allegations against them); Whitener, 696 N.E.2d 40 (failure to assert abandonment defense & decision to have D testify not IAC); Wiseheart, 693 N.E.2d 23 (absent other compelling circumstances, D is not subjected to probable & substantial prejudice when counsel simultaneously presents defenses of innocence & insanity); Turner, App., 669 N.E.2d 1024 (because D's trial & sentence were imposed before effective date of ameliorative statute, failure to raise doctrine of amelioration did not constitute IAC); Gilliam, App., 650 N.E.2d 45 (legitimate trial strategy for counsel to argue LIO of residential entry & to tell jury that although D was at scene, he neither entered house nor participated in any crime); Schick, App., 570 N.E.2d 918 (not IAC for D's counsel to concede that D caused victim's death, but argue that he should be convicted of voluntary manslaughter & theft, as opposed to murder & robbery charged. Counsel did not concede guilt on all charges, but instead forced State to prove primary charges, murder & robbery, & D was convicted only of 2 lesser-included offenses. Ct. also found failure to raise unrealistic defenses of intoxication & self-defense not IAC, as evidence did not support defenses); Shackelford 486 N.E.2d 1014 (raising defenses of voluntary intoxication & self-defense to murder charge was not IAC; such theories are not inconsistent as matter of law or factually in this case, *citing* Gunn 365 N.E.2d 1234); Bobbitt 486 N.E.2d 1004 (presenting alibi & insanity defenses do not constitute IAC).

FAILURE TO FILE MOTIONS: Moore, App., 872 N.E.2d 617 (failure to file motion to suppress based primarily on a case which was not yet decided & was a substantial departure from law was not IAC); Danks, App. 733 N.E.2d 474; Little, 501 N.E.2d 447 (IAC claim based on counsel's failure to file motions rejected when D made no showing as to merits of motions); Richardson, App., 800 N.E.2d 639 (no IAC for failing to seek dismissal based on successive prosecutions).

FAILURE TO PRESENT EVIDENCE: Maldonado, App., 908 N.E.2d 632 (in child molest prosecution, counsel was not ineffective for failing to introduce evidence of CW's alleged statements about sex with an imaginary brother; even though such evidence fell within common-law rape shield exception; see full review at O.4.c.2); Bryant, App., 794 N.E.2d 1135 (in robbery prosecution involving defense of mistaken identity, counsel's failure to submit into evidence a newspaper article indicating that third party was sought for vehicle robbery & shooting, a gallery photograph of third party, or to call witness alleged to have overheard D's end of telephone conversation in which third party allegedly confessed to charged robbery, did not constitute deficient performance; robbery with which third party was charged bore no resemblance to charged robbery, victim identified D both in & out of Ct., & evidence did not link third party directly to charged offense).

FAILURE TO MAKE OPENING/FINAL ARGUMENT: Sparks, 499 N.E.2d 738 (failing to make final argument not IAC. Trial counsel testified he sometimes waived closing statements to prevent further rebuttal by state, to emphasize weakness of state's case, or other strategic reasons; waiver of opening statements may reasonably be based on tactical considerations, *citing* Bevill 472 N.E.2d 1247; waiver of closing statements may similarly be tactical decision).

FAILURE TO INTERVIEW & PRESENT ALIBI WITNESS: Clayton, App., 658 N.E.2d 82; Swartz, App., 597 N.E.2d 977 (failing to interview & present alibi witness was not IAC because affidavit of potential witness did not show he could establish iron clad alibi, & trial attorney testified that he couldn't find witness although witness said he was available); West, 938 N.E.2d 305 (Ind. Ct. App 2010) (failing to present alibi witnesses was not IAC because counsel determined that witness' testimonies would not provide assistance to D, as evidence that witnesses could have given did not coincide with period of time testified to as alibi evidence by D and his girlfriend, and testimonies did not coincide with each other).

ELICITING HARMFUL EVIDENCE: Baker, 922 N.E.2d 723 (Ind. Ct. App 2010) *sum. aff'd,* 948 N.E.2d 1169 (Ind.2011) (counsel was not ineffective for stipulating to admissibility of evidence regarding allegations & about opportunities for victims to complain about alleged acts, even if stipulations resulted in lengthy testimony by alleged victims); Johnson, 502 N.E.2d 90 (it was not IAC to question D (charged with first degree murder) re juvenile adjudications; Ct. finds questioning was tactical decision intended to bolster D's credibility); Carpenter,486 N.E.2d 1007 (trial counsel's stipulation re D's involvement in incident was not IAC; decision was one of strategy & tactics fully justified under circumstances); Bevill, 472 N.E.2d 1247 (although commenting that it is usually poor strategy to have D testify, Ct. finds under circumstances council's decision was not deficient); Hill, 442 N.E.2d 1049 (defense counsel's error in reading portion of police report referring to show-up identification of D by witness (which was successfully suppressed by D) did not constitute IAC); Sparks, 499 N.E.2d 738 (failure to challenge allegedly defective grand jury indictment; see card at A.2.c); Mato,478 N.E.2d 57 (although D's trial counsel might have made an objection on one basis whereas another counsel might have chosen different basis, this was an instance of isolated poor trial strategy which does not amount to IAC, *citing* Henson,436 N.E.2d 79 & Hollon,398 N.E.2d 1273); Boone, 449 N.E.2d 1077 (trial counsel was not ineffective for asking hypothetical questions during voir dire that bore only tangential similarities to the actual evidence; questions did not suggest existence of evidence prejudicial to D); Campbell, 3 N.E.3d 1034 (Ind. Ct. App 2013) (trial counsel was not ineffective for asking hypothetical questions during voir dire that bore only tangential similarities to the actual evidence; questions did not suggest existence of evidence prejudicial to D).

FAILURE TO MAKE PROPER OBJECTION: Palacios, 926 N.E.2d 1026 (trial counsel was not ineffective for failing to raise hearsay objections to investigating officer's testimony about: 1) what the victim said at the scene and 2) the victim's daughter's translation of victim's statement to officer, because D failed to show that objections would have been sustained); Singleton, App., 889 N.E.2d 35 (trial counsel did not perform deficiently in failing to object to late addition of habitual offender charge); Zachary, App., 888 N.E.2d 343; Davis, App., 819 N.E.2d 863 (trial counsel was not ineffective for failing to object to criminal prosecution that involved same property as was involved in civil forfeiture action against D); Hendricks, App., 809 N.E.2d 865 (D was not denied effective assistance of appellate counsel where counsel did not challenge admission into evidence of a taped statement to police from the 2-year-old victim & three hearsay statements by the victim to adults); Thacker, App., 715 N.E.2d 1281 (failure to object to detective's hearsay testimony); Norwood, App., 670 N.E.2d 32 (failure to object to evidence seized from warrantless search of hotel room); Manley, App., 656 N.E.2d 277 (failure to attack proportionality of sentence); Emerson, App., 648 N.E.2d 705 (failure to object to evidence allegedly seized in violation of 4th Amendment); Sparks 499 N.E.2d 738 (failure to challenge allegedly defective grand jury indictment; see card at A.2.c); Mato 478 N.E.2d 57 (although D's trial counsel might have made an objection on one basis whereas another counsel might have chosen different basis, this was an instance of isolated poor trial strategy which does not amount to IAC, *citing* Henson 436 N.E.2d 79 & Hollon 398 N.E.2d 1273); Boone 449 N.E.2d 1077 (D was not denied effective assistance of counsel because Tr. counsel failed to (1) object to jurors with prior service in another rape case or (2) request that voir dire be recorded, *citing* Crisp 394 N.E.2d 155).

FAILURE TO SEEK COMPETENCY DETERMINATION: Barber, 141 N.E.3d 35 (Ind. Ct. App. 2020) (no IAC for failure to raise competency of intellectually disabled D to plead guilty); Dodson 502 N.E.2d 1333 (failure to seek competency determination was not IAC; see card at B.9.a).

FAILURE TO TENDER JURY INSTRUCTION ON LIO: Shaw, App., 898 N.E.2d 465 (in murder prosecution, trial counsel was not ineffective for objecting to State's proposed lesser included aggravated battery instruction); Lane, 953 N.E.2d 625 (Ind. Ct. App 2011); Autrey, 700 N.E.2d 1140 (counsel's tactical decision as part of "all or nothing" strategy not to tender LIO instruction did not constitute IAC: no reason to believe that inclusion of LIO would have raised reasonable doubt as to culpability for greater offense); Santana, App., 688 N.E.2d 1275 (evidence did not support voluntary manslaughter instruction); Page, 615 N.E.2d 894 (Not IAC in murder prosecution to fail to submit instruction on voluntary manslaughter as lesser-included offense where case was tried on theory of self- defense); Holland, 444 N.E.2d 1190 (it is not IAC to fail to tender jury instruction on lesser included offense where evidence does not support giving it).

ELICITING/OBJECTING TO IMPROPER VOUCHER TESTIMONY: Edgin, App., 657 N.E.2d 445 (no IAC for failing to properly object to improper "vouching" testimony & for not requesting jury admonishment); King App., 598 N.E.2d 589 (not IAC for defense counsel to elicit improper damaging voucher testimony on CX of state's witnesses because testimony was not elicited by State on direct exam to bolster victim's credibility & nature & extent of CX is matter of trial strategy. Decision contains several instances of counsel's actions bringing in damaging testimony, none of which were found to be IAC.)

SENTENCING: Wieland, App., 848 N.E.2d 679 (Apprendi claim was not significant & obvious from the face of the record, & attorney did not perform deficiently in his representation of D on direct appeal); Walker, App., 843 N.E.2d 50 (Ct. rejected D's claim that his trial & appellate counsels were ineffective for

not challenging his enhanced sentence based on principles enunciated in Apprendi & Blakely)

SPEEDY TRIAL: Culvahouse, App., 819 N.E.2d 857 (D failed to demonstrate that council's decision to move for continuance after D had filed a pro se motion for speedy trial was not a reasonable tactical decision); Dobbins, 721 N.E.2d 867; Broome, 694 N.E.2d 280 (there may exist circumstances in which defense counsel's refusal or neglect to file speedy trial motion specifically requested by D could constitute deficient performance to support claim of IAC; however, such circumstances did not exist here); Payne, App., 658 N.E.2d 635 (counsel's failure to file new CR 4(B) motion for seven-month period after D withdrew his request to plead guilty did not constitute IAC because it was plausible that counsel was not aware that he had to file second CR 4 motion to avoid abandonment).

SYSTEMIC DEFECT: Dubinion, App., 600 N.E.2d 136 (Ct. rejected D's argument that Marion County Municipal Ct. Public Defender's Office, because of systemic financial inability to provide consistent attorney representation, denied him effective assistance of counsel).

MULTIPLE ALLEGATIONS: Webb, App., 655 N.E.2d 1259 (failure to offer evidence of acquittal did not constitute IAC); Gilliam, App., 650 N.E.2d 45 (counsel was not ineffective for: arguing for lesser included offense of theft or residential entry, failing to adequately prepare D before calling him to testify, eliciting prejudicial testimony from witnesses, & failing to make various objections); Fugate, 608 N.E.2d 1370 (Ct. rejected numerous allegations of ineffective assistance of counsel, including: method of questioning witnesses; failure to interview witness prior to trial; failure to previously subpoena witness for surrebuttal; & failure to obtain D's psychiatric records for sentencing hearing.)

TITLE: PERFORMANCE HELD INEFFECTIVE
INDEX NO.: Y.4.b.1

FAILURE TO CHALLENGE IMPROPER AGGRAVATING CIRCUMSTANCES: Duncan, App., 862 N.E.2d 322 (where appellate counsel was also trial counsel, a post-conviction Ct. & the appellate Ct. reviewing a denial of post-conviction relief might well exercise a less stringent standard to correct prejudicial Tr. Ct. sentencing determination); Thompson, App., 793 N.E.2d 1046 (D's trial & appellate counsel provided IAC when she failed to question all 4 aggravating factors cited by Tr. Ct. when enhancing sentence).

FAILURE TO MOVE FOR SEVERANCE OF CHARGES: Wilkerson, App., 728 N.E.2d 239 (D received IAC due to his counsel's failure to move for severance of charges against him & as result suffered prejudice in sentencing); see full review at D.6.b.

FAILURE TO OBJECT TO ADMISSION OF POLYGRAPH: Helton, 479 N.E.2d 538 (D was denied effective assistance of counsel where counsel failed to object to stipulation of polygraph which was not signed by prosecutor/ representative; objection would have been sustained; polygraph waiver must be signed by D & representative of prosecutor's office, *citing* Pavone 402 N.E.2d 976 & Owens, App., 373 N.E.2d 913; in light of nature of case, admission of polygraph results was not harmless; held, reversed & remanded for new trial).

FAILURE TO OBJECT TO ERRONEOUS INSTRUCTION: Taylor, 922 N.E.2d 710 (failure to object to lack of robbery instruction where robbery was underlying felony for felony murder; see full review at D.9.g.2.d); Palmer 573 N.E.2d 880 (see card at D.9.g.2.f.); McWhorter, 970 N.E.2d 770, *sum. aff'd,* 993 me2d 1141 (Ind. 2013) (see full review at D.g.2.d or K.3.b.4).

FAILURE TO CALL CHILD-VICTIM AT AUDIOTAPE ADMISSIBILITY HEARING: Poffenberger 580 N.E.2d 995, see card at O.9.c.17.

FAILURE TO OBJECT TO ADMISSION OF CO-D's STATEMENT: Garland, 719 N.E.2d 1184, see card at J.9.b

FAILURE TO OBJECT TO JUDGE's ASSUMPTION OF ADVERSARIAL ROLE: Owens, App., 750 N.E.2d 403, see card at D.14.c

FAILURE TO INTRODUCE EVIDENCE: Law, App., 797 N.E.2d 1157 (in child molesting prosecution, D received IAC by failing to introduce evidence to rebut State's evidence on issue of complaining witness's age at time of offenses)

FAILURE TO COMMUNICATE PLEA OFFER: Dew, App., 843 N.E.2d 556 (counsel's failure to inform D about plea offer from State prior to retrial constituted IAC; reasonable probability result of proceeding would have been different).

TITLE: Perrryman v. State
INDEX NO: Y.4.b.1.
CITE: (7/30/2014), 13 N.E.3d 923 (Ind. Ct. App 2014)
SUBJECT: No IAC for not objecting to testimony about controlled buy
HOLDING: Trial counsel was not ineffective for failing to object to testimony about a controlled buy, where D sold $20 of crack cocaine to a CI, which allowed police to obtain and execute a warrant the next day and find 16 grams of cocaine in an air duct in D's residence. D was convicted of class A felony possession of cocaine at issue in this appeal.

Details about the controlled buy was not the type of uncharged criminal conduct that is inadmissible under Rule of Evidence 404(b) because the controlled buy was "intrinsic to the charged offense," here, possession of cocaine. See Lee v. State, 689 N.E.2d 435, 439 (Ind. 1997) and United States v. Shores, 700 f.3d 366, 371 (8th Cir. 2012). Held, judgment affirmed.

TITLE: Rogers v. State
INDEX NO.: Y.4.b.1.
CITE: (04/23/91), Ind., 570 N.E.2d 906
SUBJECT: Ineffective Assistance of Counsel (IAC) -failure to advise of possible sentence modification
HOLDING: Appellant had viable issue of Tr. Ct.'s denial of directed verdict (DV) to raise on appeal, & if S. Ct. had found error, D would have been released. Therefore, it was not IAC for trial counsel to fail to advise D of possibility of increase of sentence from 20 years to life on appeal. D was convicted of 1st Degree Murder subsequent to enactment, but prior to effective date, of Ind. Penal Code of 1976. Tr. Ct., however, sentenced D to 20 years under new code. D appealed conviction, raising as 1 of issues, Tr. Ct.'s denial of motion for DV. On direct appeal, S. Ct. found denial of DV not erroneous, & also found sentence of 20 years to be fundamental error, remanding for correction of sentence to life imprisonment. In Petition for Post-Conviction Relief (PCR), D argued that trial counsel was ineffective for not advising her of potential of increased sentence prior to making decision to appeal. S. Ct. held that because issue of whether Tr. Ct. had erred in denying her motion for DV was viable issue on appeal, & could have led to her release if successful, this issue raised in PCR was inconsequential & therefore did not constitute IAC. Held, denial of PCR affirmed, J.J. Krahulik & DeBruler dissenting on IAC issue.

TITLE: Rowe v. State
INDEX NO.: Y.4.b.1.
CITE: (4th Dist., 09-09-09), 912 N.E.2d 441 (Ind. Ct. App 2009)
SUBJECT: IAC - erroneous advice that D should win at trial
HOLDING: Tr. Ct. properly denied D's petition for post-conviction relief. In determining whether counsel's erroneous advice constitutes ineffective assistance of counsel, the proper test is one of reasonableness and perfection is not required. Lawrence v. State, 464 N.E.2d 1291 (Ind. 1981). Here, D was charged with two counts of Class B felony dealing in cocaine and one count of Class A felony dealing in cocaine based on controlled buys that were police videoed and audio taped. While the charges were pending, State's informant died from a drug overdose. Subsequently, the State offered D a plea of ten-years, with two-years suspended. D hired an attorney who was recently out of law school and who had never tried a Class A felony case. She advised D that due to the confidential informant's death, D should win at trial. Thus, based on his attorney's advice, D rejected the plea. D subsequently lost at bench trial and was sentenced to thirty years. Because there is evidence in the record to support the post-conviction court's finding that counsel's advice was merely a prediction of a possible outcome, not an ironclad guarantee, counsel's performance was reasonable. While different interpretations of the record are possible, post-conviction court's findings of fact and ultimate conclusions on this are not clearly erroneous; Brown, J., dissenting on basis that because the record in context is clear that counsel advised D he "would" prevail at trial, counsel was ineffective by not giving D the information required to make an informed decision.

NOTE: Court also *clarified* that D did not have to prove that the court would have accepted the plea in order to prove prejudice.

RELATED CASES: Rowe, App., 915 N.E.2d 561 (on rehearing, Ct. *clarified* proper appellate standard of review from denial of PCR).

TITLE: Smith v. State
INDEX NO.: Y.4.b.1.
CITE: (3rd Dist. 01/29/91), Ind. App. 565 N.E.2d 1114
SUBJECT: IAC - duty to investigate
HOLDING: When D pled guilty to 2 counts of theft without knowing that victims were either deceased or their whereabouts unknown, defense attorney's failure to file for additional discovery or attempt to contact State's witnesses constituted IAC because had D known of witnesses' unavailability, there was reasonable probability he would not have pled guilty. Therefore, his plea was not knowing & voluntary.

D was charged in 1978 but not apprehended until 1983, at which time he entered his guilty plea to both counts. In 1986, D filed PCR seeking to withdraw his guilty plea. At hearing, evidence showed that one of victims committed suicide in 1979 & other's whereabouts were unknown since 1980. Counsel did receive usual discovery & State argued that D's attorney didn't proceed further with discovery because D indicated desire to plead guilty. Ct. of Appeals, however, held that counsel had duty to investigate further. Ct. also found D's PCR petition wasn't barred by laches. See Smith at X.5.e. Held, denial of PCR reversed, J. Garrard, dissenting as to IAC issue.

RELATED CASES: Mast, App., 914 N.E.2d 851 (D received IAC where counsel advised him to plead guilty without waiting for results of two competency evaluations); Parish, App., 838 N.E.2d 495 (D received IAC due to trial counsel's failure to conduct meaningful pretrial investigation); Smith, 636 N.E.2d 124 (Although counsel admitted he did not spend as much time on D's case because of lack of payment, it was not IAC to fail to take depositions, offer material evidence, & consult with D more than twice. D didn't show he was prejudiced or that there was any additional evidence that would have made difference at trial); Smith, App., 611 N.E.2d 144 (Smith, App., 565 N.E.2d 1114 distinguished because here D confessed to crimes, & counsel, after interviewing D, D's mother, & investigating officer, concluded that there was little hope of anything but guilty verdict. Ct. concluded that D was unable to point to any fact which had it been disclosed, would have changed guilty plea. Ct. also found no IAC issues in waiver of competency hearing & failure to present information at sentencing.)

TITLE: State v. Hollin
INDEX NO.: Y.4.b.1.
CITE: (07-12-12), 970 N.E.2d 147 (Ind. 2012)
SUBJECT: IAC - failure to impeach
HOLDING: Tr. Ct. did not commit clear error in granting D=s petition for post-conviction relief on the basis that trial counsel was ineffective for failing to impeach D=s accomplice about his plea agreements with the State.

D and Nathan Vogel entered a home. D was in the kitchen while Vogel entered a bedroom. Vogel returned with a bag filled with $600. D and Vogel were charged with burglary, theft and conspiracy to commit burglary. In pre-trial statements, both D and Vogel denied they had planned to burglarize the home. D denied knowing that Vogel had taken the money from the bedroom until after Vogel showed him the contents of the bag.

Meanwhile, Vogel had a pending theft charge in Decatur County to which he pled guilty and was sentenced to 18 months' imprisonment, most of which was suspended to probation. Subsequently, Vogel was charged with battery as a Class C felony in Decatur County on which petitions to revoke Vogel's suspended sentences were filed in both Ripley and Decatur Counties. Although Vogel had originally said D was unaware of Vogel's theft until after they had left the burglarized home, during a meeting with an officer and a deputy prosecutor, for the first time he claimed he and D had agreed in advance to burglarize homes.

At D's trial, Vogel contradicted his earlier statements by telling the jury what he told the chief deputy prosecutor, that he and D had planned to burglarize the home. Trial counsel did not attempt to impeach Vogel by asking him about his pending Class C felony battery charge or the pending petitions to revoke Vogel's probation in both Ripley and Decatur counties. D's testimony was consistent with his earlier statements; he testified that he only realized the full extent of what had happened when Vogel showed him the items he had taken from the house.

The Tr. Ct.'s finding that trial counsel was ineffective was not clearly erroneous. See Strickland v. Washington, 466 U.S. 668 (1984); see also Ind. Trial Rule 52(A), State v. Cooper, 935 N.E.2d 146, 149 (Ind. 2010) and Ritchie v. State, 875 N.E.2d 706, 714 (Ind. 2007). As the Tr. Ct. concluded, "trial counsel knew or should have known that Vogel was originally charged with burglary and theft felonies that, but for a plea agreement that eliminated jail time, would have subjected Vogel to a maximum sentence of twenty-three years." Trial counsel should have used this information to impeach Vogel. "The jury had no idea that Vogel, the only person who took any property from the [burglarized home], avoided a potential 23-year sentence by pleading guilty and was given probation." Held, transfer granted, Court of Appeals' unpublished memorandum opinion vacated, judgment affirmed and remanded for new trial.

TITLE: Thomas v. State
INDEX NO.: Y.4.b.1.
CITE: (1/8/69), Ind., 242 N.E.2d 919
SUBJECT: Failure of defense counsel to perform adequate investigation prior to trial
HOLDING: Tr. Ct. erred in failing to grant new trial where defense counsel failed to timely contact witness who would have testified that D was not present at scene of crime. It is reversible error not to provide D in criminal prosecution with adequate legal representation at each stage of proceeding. If defense counsel makes reasonable determination at time of trial that there was no evidence available or availing to D, reviewing Ct. will not find inadequate representation. However, any such reasonable belief can only be predicated on proper investigation by defense counsel. Here, two witnesses testified at hearing on D's motion for new trial that they had perpetrated crime and that D had not been present. D stated at hearing that third witness would have testified that she was talking on telephone to D at time crime occurred. Despite request of D, counsel contacted only one of witnesses on night before trial, and none of witnesses were called to testify at trial. Ct. found that because counsel had three months to prepare defense, contacting what might have been key defense witness night before trial was not proper investigation of case. Although Ct. did not find attorney misconduct Ct. concluded that combination of insufficiency of investigation and failure to present requested defense constituted inadequate representation of D. Held, judgment reversed, remanded for new trial.

NOTE: See Strickland v. Washington, (1984) 104 S. Ct. 2052, which sets forth analysis for ineffective assistance of counsel claims.

TITLE: Williams v. State
INDEX NO.: Y.4.b.1.
CITE: (12/21/20), Ind. Ct. App., 160 N.E.3d 563
SUBJECT: Trial counsel not ineffective for opening the door for inculpatory evidence
HOLDING: In murder, attempted murder and carjacking prosecution, trial counsel was not ineffective for opening the door to the admission of handgun evidence, and appellate counsel was not ineffective for failing to raise the issue on direct appeal. Prior to trial, defense counsel reached an agreement with the State that evidence of a handgun recovered from Defendant's hotel room would not be admitted. A first trial resulted in a mistrial due to a deadlocked jury. At Petitioner's second trial, defense counsel pursued a strategy of questioning the attempted murder victim's credibility, highlighting the incomplete and ineffective investigation by police, and suggesting that others had been the shooter. Counsel's cross examination of a police officer opened the door to admission of the handgun evidence, as trial court agreed with the State that defense counsel's questioning created a false impression about the investigation specific to the gun. In post-conviction relief proceedings, Defendant argued trial counsel's opening the door to the handgun evidence constituted deficient performance and prejudice because the first trial, without the gun evidence, had resulted in a mistrial. Before reaching the merits of Petitioner's claim, the Court of Appeals first affirmed the post-conviction court's exclusion of the transcript from the first trial into evidence at the post-conviction relief hearing, finding the transcript from the first trial irrelevant, based on current Indiana state jurisprudence, voicing reluctance to divine the reasons for a jury's verdict and stating without more, the simple fact of a hung jury does not shed light on the jury's reasons for failing to reach a verdict or tend to make any prejudice flowing from a claimed error at a second trial more or less probable. As to the claim of trial counsel's ineffectiveness, the Court found that trial counsel's pursuit of a chosen strategy resulting in the unintended consequence of the admission of evidence previously sought to be suppressed is not per se deficient performance and even if counsel's performance was deficient there was no showing of prejudice due to other significant and substantial evidence of guilt. Turning to the claim of ineffective assistance of appellate counsel, the Court applied the highly deferential standard to appellate counsel's decisions on which issues to raise and found that appellate counsel was not ineffective for failing to challenge the trial court's ruling that the State could introduce the gun and testing of the gun in response to trial counsel opening the door. Even if Court were to have found appellate counsel rendered deficient performance in failing to present this issue on direct appeal, Defendant was not prejudiced because of the considerable independent evidence of Defendant's guilt. There was little probability that the admission of the handgun affected the outcome of Defendant's trial. Held, denial of post-conviction relief affirmed.

TITLE: Wright v. State
INDEX NO.: Y.4.b.1.
CITE: (3d Dist. 11/26/91), Ind. App., 581 N.E.2d 978
SUBJECT: Ineffective Assistance of Counsel (IAC) - Failure to lay proper foundation to impeach
HOLDING: In child molest case where only direct evidence of molest was testimony of alleged victim, it was IAC for counsel to fail to lay proper foundation to impeach alleged victim. Defense witness was prepared to testify that alleged victim had told her that she did not like D because he would not let her play, & that she had made up molest story based on what friend had told her. Witness was not allowed to testify because defense counsel had not previously questioned alleged victim about these prior inconsistent statements, giving her opportunity to deny or explain statements, as required before such testimony can be introduced. Because credibility of alleged victim was crucial issue, counsel's failure to lay required foundation resulted in relevant & probative evidence not being admitted, & constituted IAC. Held, reversed & remanded.

RELATED CASES: Hollin, 970 N.E.2d 147 (Ind. 2012) (Tr. Ct. did not commit clear error in granting D's petition for post-conviction relief on basis that trial counsel was ineffective for failing to impeach D's accomplice about his plea agreements with State); J.J., App., 858 N.E.2d 244 (failure to present evidence that State's witness, who was co-D, was granted immunity constituted IAC & required reversal).

Y. RIGHT TO COUNSEL

Y.4. Ineffective assistance of counsel (IAC)

Y.4.b.2. Prejudice

TITLE: Absher v. State
INDEX NO.: Y.4.b.2.
CITE: (01/24/2021), 162 F.3d 1141 (2021)
SUBJECT: Ineffective assistance of trial and appellate counsel - failure to object to amendment of charges & to challenge sufficiency of evidence on appea1
HOLDING: In child molesting prosecution, trial counsel was ineffective for failing to object to the State's untimely motion to amend the charging information three days before trial. Based on the clear language of Indiana Code § 35-34-1-5(b) in effect at time of trial and supreme court's decision in Haak v. State, 695 N.E.2d 944 (Ind. 1998), trial counsel had a firm basis to object to the prosecutor's amendment to add two new counts and he performed deficiently by failing to object to the amendment as one of substance that was untimely pursuant to the statute. But for trial counsel's failure to object, the appellate court would have vacated the convictions for the two new counts added by the amendment pursuant to Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007). Thus, there is a reasonable probability that, but for trial counsel's deficient performance, the result of the proceeding would have been different. Court noted that its decision in this case "will likely be an outlier" because Indiana Code § 35-34-1-5 was amended shortly after Fajardo was decided, "such that amendments of substance are permitted any time before trial so long as the defendant's substantial rights are not prejudiced." Though a number of Court of Appeals cases found the amendment to be constitutionally retroactive, Defendant's case was distinguishable because the Court on Defendant's direct appeal determined on the merits that the amendment here was prohibited by the statute.

Court also found appellate counsel ineffective for failing to argue insufficient evidence supporting the amended Class A felony count, which alleged that Defendant placed his mouth on complaining witness's (C.W.'s) sex organ. The State's forensic expert testified that amylase, an enzyme found in saliva, was found in C.W.'s underwear, which the State argued was sufficient evidence. But according to the State's expert, one cannot make the leap to conclude that the amylase came from Defendant's saliva. Thus, appellate counsel was deficient in failing to raise the sufficiency issue and the deficiency was prejudicial because it is clearly more likely that the Court of Appeals would have reversed Defendant's conviction on that count.

The Court upheld the denial of post-conviction relief as to the other Class A felony charge, rejecting Defendant's claim that trial counsel was ineffective for failing to object to inflammatory comments the prosecutor made on rebuttal during closing arguments. Trial counsel reasonably and strategically chose not to object to the remarks and therefore did not provide ineffective assistance. Held, denial of postconviction relief reversed and remanded with instructions to vacate Defendant's convictions and sentences for one Class A felony child molesting count and the Class C felony count.

TITLE: Baer v. Neal
INDEX NO.: Y.4.b.2.
CITE: (1/11/2018), 879 F.3d 769 (7th Cir. 2018)
SUBJECT: Ineffective assistance of counsel - failure to object to prosecutorial misconduct and misleading instructions that likely precluded jury from considering mitigating evidence in capital case
HOLDING: The Seventh Circuit Court of Appeals granted habeas relief and reversed D's death sentence, despite the "atrocious" nature of his crimes against victim and her 4-year old daughter, finding prosecutorial misconduct and misleading jury instructions likely influenced the jury's decision to sentence him to death. During voir dire, the Madison County prosecutor repeatedly stated the incorrect legal standard for a guilty but mentally ill conviction and incorrectly told prospective jurors that such a conviction might preclude a death sentence. The prosecutor also told prospective jurors that the victim's family wanted D to be sentenced to death and inserted his personal opinion and facts that were not in evidence into other portions of the trial. Defense counsel's failure to object to these prejudicial comments at trial was prejudicially ineffective, as it is "'reasonably likely' that without the prosecutor's injection of impermissible statements and incorrect law the jurors would not have recommended death."

During penalty phase, jury was instructed to consider as a mitigator that D's "capacity to appreciate the criminality of (his) conduct or to conform that conduct to the requirements of the law was substantially impaired as a result of mental disease of defect." However, this instruction excluded the words "or of intoxication," as stated in Ind. Code § 35-50-2-9(c)(6) and D claimed he had been using methamphetamine on day of murders. Defense counsel failed to object to the modification of the instruction or to a "voluntary intoxication" instruction that allowed intoxication to be a defense if the intoxication was involuntary. Those failures constituted prejudicial ineffective assistance of counsel because "a reasonable juror could have understood the complete penalty phase jury instructions as foreclosing the evidence of voluntary intoxication from consideration." Thus, the Indiana Supreme Court unreasonably applied Strickland v. Washington, 466 U.S. 668 (1984) to D's claims. Held, denial of district court petition for habeas corpus reversed and remanded for further proceedings and resentencing.

TITLE: Baumholser v. State
INDEX NO.: Y.4.b.2.
CITE: (04/08/2022), 186 N.E.3d 684 (Ind. Ct. App. 2022)
SUBJECT: Counsel ineffective in not moving to dismiss charges barred by statute of limitations
HOLDING: Trial counsel provided ineffective assistance by failing to move to dismiss the class C felony child molesting charges at trial when the State rested because the State's evidence proved that the statute of limitations had passed by the time the State charged him. At trial, the complaining witness (C.W.) unequivocally testified that all of the acts of molestation occurred when she was six years old before Christmas of 2007 and no acts occurred after that. As such, the statute of limitations expired at Christmas of 2012. The post-conviction court erroneously determined that acts of concealment tolled the statute of limitations based on an allegation in the probable cause affidavit that Defendant told C.W. not to tell her mother and C.W.'s trial testimony that she was afraid of Defendant because he drank a lot and kept weapons in the house. The post-conviction court's reliance on the probable cause affidavit was unjustified because the probable cause affidavit was not evidence of any matter for the jury's determination and contained hearsay. Nothing in C.W.'s trial testimony supported the allegation in the probable cause affidavit that Defendant told her not to tell her mother. C.W.'s testimony that she was afraid of Defendant is not evidence that he took a positive act calculated to conceal the fact that a crime had been committed and thus does not support the application of fraudulent concealment to toll the statute of limitation. Therefore, Defendant was entitled to relief on that claim. The Court of Appeals denied Defendant's claim that trial counsel provided ineffective assistance by failing to move for a mistrial at the close of the State's evidence because the evidence of the class C felony molestations was inadmissible pursuant to Indiana Evidence Rule 404(b) and its admission subjected him to grave peril in his defense of the class A felonies. Defendant failed to carry his burden to show that C.W.'s testimony of his prior molestations had a reasonable probability of swaying the jury's verdict on the class A felony charge. The Court also denied Defendant's claim that trial counsel failed to object to voir dire questioning that improperly conditioned jurors to favor the child witness over him. Even if the four complained-of questions were improper, in light of all the questions and comments during jury selection, Defendant did not carry his burden to show prejudice.

TITLE: Bobadilla v. State
INDEX NO.: Y.4.b.2.
CITE: (3/5/2019), 117 N.E.3d 1272 (Ind. 2019)
SUBJECT: Ineffective assistance of counsel - failing to inquire and advise re: D's immigration status
HOLDING: Trial counsel rendered ineffective assistance by failing to ask about D's immigration status and failing to warn him of the potential risk of deportation that would accompany his guilty plea to misdemeanor theft and possession of marijuana. D was a "Dreamer" under the Deferred Action for Childhood Arrivals (DACA) program. His guilty plea made him deportable, and he was eventually taken into ICE custody and deported. Defense counsel assumed D was a U.S. citizen, so he marked "N/A" on a form that advised D of immigration consequences without ever asking him about his citizenship status. This was deficient performance. When a D alleges ineffective assistance of counsel based upon his counsel's failure to advise him that pleading guilty could result in deportation, the prejudice inquiry is a subjective test, turning upon whether the particular D's special circumstances support the claim that, had he been properly advised, he would have rejected the plea and insisted on going to trial. The ultimate result of trial is not the determining factor in prejudice inquiries because some Ds would rather be convicted and face a seemingly harsher sentence than receive a lesser sentence and face certain deportation. Supreme Court found D was entitled to post-conviction relief because his attorney's deficient performance prejudiced him, i.e., there is a reasonable probability D would have rejected the guilty plea resulting in deportation and insisted on going to trial. In so holding, Court relied on Lee v. United States, 137 S. Ct. 1958 (2017), and disapproved of Segura v. State, 749 N.E.2d 496, 500-01 (Ind. 2001) to the extent objective prejudice standard it adopted conflicts with Lee's rational-D inquiry. Held, transfer granted, Court of Appeals' opinion at 93 N.E.3d 783 vacated, denial of petition for post-conviction relief reversed; Massa, J., joined by Slaughter, J., dissenting, believe the "seductively sympathetic" record of D's case does not "point unerringly to a different outcome."

RELATED CASES: Marin, 210 N.E.3d 857 (Ind. Ct. App. 2023) (p-c court found trial counsel's testimony that he routinely advised non-citizen clients of potential immigration repercussions following a criminal conviction more credible than D's testimony that he was never advised that his guilty plea could result in deportation; but even assuming no advisement, D could not show prejudice given the substantial benefit he received from plea, coupled with the fact that he had made a recorded confession to investigating officers); Zagal, 130 N.E.3d 601 (Ind. Ct. App. 2019) (trial counsel was not ineffective for failing to separately advise D of immigration consequences where D acknowledged that he read unambiguous advisements containing warning about immigration consequences).

TITLE: Buck v. Davis
INDEX NO.: Y.4.b.2
CITE: (2/22/2017), 137 S. Ct. 759 (S. Ct. 2017)
SUBJECT: IAC by eliciting testimony about future dangerousness based on race
HOLDING: Defendant received ineffective assistance during the capital sentencing phase where counsel elicited testimony that, as an African-American, Defendant was more likely to commit future violent acts.

D murdered his ex-girlfriend and one of her friends. During the sentencing phase, his attorney called a psychologist to offer his opinion about D's future dangerousness. Texas allows the death penalty only if a jury unanimously finds beyond a reasonable doubt that a defendant is likely to commit future violent acts. While the psychologist ultimately concluded that D was unlikely to commit violent acts, he did testify that D was more likely to commit violent acts because he is African-American. The prosecutor highlighted this testimony during his summation. The psychologist's written report, which made the same observation, was admitted as evidence and was later reviewed by the jury during deliberations. The jury returned a sentence of death.

Even though counsel knew the psychologist's report stated that D's race predisposed him to violent conduct, and that this was the principal point of dispute in the penalty phase, he nonetheless called the psychologist to the stand and specifically elicited testimony about the connection between race and violence. No competent defense attorney would do this. See Buck v. Thaler, 565 U. S. 1022 (2011). As to prejudice, the impact of the testimony about D's race was not "de minimis," as the District Court had found. See Strickland v. Washington, 466 U. S. 668, 694 (1984). To the contrary, absent this testimony, it is reasonably probable that at least one juror would have harbored a reasonable doubt on the question of D's dangerousness. "Some toxins can be deadly in small doses. "Held, cert. granted, Fifth Circuit ruling at 623 Fed. Appx. 688, reversed and remanded, and judgment reversed. Roberts, C.J., joined by Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ., Thomas J., dissenting, joined by Alito, J.

TITLE: Conley v. State

INDEX NO.: Y.4.b.2

CITE: (3/1/2021), 164 N.E.3d 787 (Ind. Ct. App. 2021)

SUBJECT: LWOP sentencing hearing inadequately accounted for Defendant's age and mental health

HOLDING: Defendant was a deeply troubled seventeen-year-old when he killed his ten-year-old brother. He pleaded guilty and the trial court imposed the maximum sentence of life without the possibility of parole. The Court of Appeals reversed the post-conviction court in part, concluding defendant's trial counsel was deficient and that the sum of the errors adds up to significant prejudice. Specifically, Defendant was prejudiced by trial counsel's failure to fully investigate and present mitigating factors, failure to effectively cross examine the State's expert witnesses, and failure to advance the prevailing mitigating theory of diminished juvenile culpability per Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183 (2005) and Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011 (2010). "A reasonable probability exists that, but for defense counsel's errors, the proceedings…would have resulted in the imposition of less than the maximum LWOP sentence especially in light of the substantial mitigating factors: [Defendant's] age, the fact that [Defendant] did not have a juvenile or criminal record, and [Defendant's] undisputed, severe mental health issues." The Court of Appeals held the post-conviction court's denial of the remainder of Defendant's claims was not clearly erroneous and remanded with instructions to conduct a new sentencing hearing.

TITLE: Crowder v. State
INDEX NO.: Y.4.b.2.
CITE: (1/16/2018), 91 N.E.3d 1040 (Ind. Ct. App. 2018)
SUBJECT: Guilty plea left intact but right to directly appeal sentence reinstated
HOLDING: Because D's guilty plea counsel was ineffective, in part, and because D's plea was not knowing, in part, D's right to directly appeal his sentence was reinstated, but the plea agreement itself was left intact. D was charged with more than a dozen sex offenses, including Class A felony Child Molesting ("Count 1"). The State offered two plea deals. Under the first, the State would dismiss Count 1 and D would be given a fixed thirty-year sentence if he pled to four of the counts. Under the second deal, D would plead guilty to all counts, except Count 1, and waive his right to appellate review of his sentence in exchange for an open plea. Meanwhile, the deputy prosecutor told D's counsel that the State would dismiss Count 1 under either deal because it concluded that the facts simply did not support Count 1. Counsel neither shared this information with D nor advised him that this made the benefit under the deal illusory. D consulted with several fellow inmates, who assured him the Tr. Ct. was required to impose concurrent sentences. Even though counsel told D this was wrong, D opted for the second deal. At sentencing, the Tr. Ct. imposed a 61-year term. D filed a petition for post-conviction relief, which the Tr. Ct. held in abeyance as D directly appealed his sentence. On the State's motion, the Court of Appeals dismissed the appeal because of the waiver provision in the plea deal. D would likely have pled guilty even if his attorney had advised him that the plea provided only an illusory benefit. See Segura v. State, 749 N.E.2d 496 (Ind. 2001); Hill v. Lockhart, 474 U.S. 502 (1985); Willoughby v. State, 792 N.E.2d 560 (Ind. Ct. App 2013), *trans. denied*. He rejected the fixed thirty-year deal because his fellow inmate told him that the Tr. Ct. would have to impose concurrent sentences, even though his attorney advised him to the contrary. He also wanted the opportunity to argue for less than thirty years. Also, D told his attorney that trial "wasn't really part of the analysis because of the overwhelming amount of evidence that the State had against him." Further, he wanted to avoid trial to spare his family further anguish. Thus, the plea agreement was left undisturbed. However, because D surrendered his right to appeal his sentence under an illusory benefit – dismissal of Count 1 – and his counsel failed to tell D that the benefit was illusory – D's right to directly appeal his sentence was reinstated. Held, judgment affirmed in part and reversed in part.

TITLE: D FAILS TO SHOW PREJUDICE
INDEX NO.: Y.4.b.2.
CITE: None
SUBJECT: VARIES

FAILURE TO ATTEND PRETRIAL LINEUP: Jones 495 N.E.2d 532 (Crim L 641.13 (5); D failed to show any error occurred or prejudice resulted from his attorney's absence at pretrial lineup during which victim identified D as perpetrator: D has not suggested any improper lineup procedures were employed; lineup evidence was only cumulative since victim had made positive on-the-scene identification; identification was not an issue at trial because D admitted his presence).

FAILURE TO CALL WITNESSES: Cobb 505 N.E.2d 51 (Crim L 641.13(6); absent clear showing of injury & prejudice, Ct. will not declare counsel ineffective for failure to call witness, *citing* Osborne 481 N.E.2d 376).

FAILURE TO OBJECT: Thacker, App., 715 N.E.2d 1281 (even assuming that detective's hearsay testimony was improperly admitted by virtue of trial counsel's failure to properly object, other evidence at trial pointed conclusively & unerringly to D's guilt beyond reasonable doubt); Malone, App., 660 N.E.2d 619 (D failed to demonstrate reasonable possibility that, had hearsay statement not been admitted, there would have been insufficient evidence for jury to convict).

FAILURE TO MOVE FOR SEVERANCE: Williams, 706 N.E.2d 149 (D's conviction & sentence would have been same even if he had been granted separate trial); Clark, App., 695 N.E.2d 999 (D was not prejudiced by counsel's failure to move for severance of offenses even though D was entitled to severance).

FAILURE TO INVESTIGATE: Pontius, 930 N.E.2d 1212 (Ind. Ct. App 2010) (in possession of child pornography prosecution, trial counsel was not ineffective for failing to view videos because there is no reasonable probability that additional cross-examination by counsel would have resulted in determination that participant in video was at least sixteen); Van Cleave 517 N.E.2d 356 (Counsel's failure in capital case to investigate exact administrative charge against D in jail uprising did not have impact on outcome; jail uprising was merely one episode in D's criminal history, & Tr. Ct. had sufficient evidence to draw own conclusion on D's culpability); Jackson 483 N.E.2d 1374 (D fails to show counsel was IAC because he refused to examine certain witnesses & call them for trial, or to have saliva tests taken of victim's boyfriend or to depose victim); Aubrey 478 N.E.2d 70 (D failed to show that he was harmed by attorney's failure to investigate more thoroughly or to call additional witnesses re insanity defense); Vickers 466 N.E.2d 3; Taylor 442 N.E.2d 1087 (where D alleges ineffectiveness of counsel because of lack of preparation as demonstrated by failure to interview witnesses prior to trial, D must show what information attorney could have elicited from witnesses had attorney interviewed them, *citing* Hollon 398 N.E.2d 1273 & Crisp 394 N.E.2d 115, which this D failed to do; mere verified statement by attorney that he did not conduct research does not constitute strong & convincing evidence necessary to rebut presumption of competency).

FAILURE TO MOVE FOR MISTRIAL: Morlan 491 N.E.2d 1001 (although attorney's failure to move for mistrial upon learning jury foreman was county commissioner may have been deficient, Ct. finds D failed to show prejudice).

FAILURE TO OBJECT TO LACK OF ARRAIGNMENT: Garren 470 N.E.2d 719 (failure to object to lack of arraignment before trial was not IAC; under prejudice prong of Strickland v. Washington, Ct. finds D was not harmed by omission because D was tried as on a plea of not guilty & was adequately represented by counsel throughout proceedings); Seaton 478 N.E.2d 51 (see card at B.1.a).

MISADVICE TO D: Zavala, App., 739 N.E.2d 135 (insufficient prejudice where attorney failed to object to lack of advisements under Art. 36 of Vienna Convention); Stoltz, App., 657 N.E.2d 188 (no IAC for failure to advise D of automatic license suspension; record was devoid of any affirmative assertion that had D known of license suspension consequences, he would have insisted on going to trial); Lessig 489 N.E.2d 978 (even if counsel's misinformation re suspendibility of sentence was not result of reasonable professional judgment, it is clear from record D suffered no prejudice resulting from information; at her sentencing hearing, D stated she would have pled guilty while maintaining her innocence, amounting to an Alford plea, which a Tr. judge cannot accept; even if D had pled guilty & did not maintain her innocence, she would be unable to show that prejudice resulted from counsel's misinformation since she cannot possibly prove that Tr. judge would have accepted plea bargain agreement).

WAIVER OF OPENING STATEMENT: Berry 483 N.E.2d 1369 (council's decision to reserve O.S. until close of state's case-in-chief (C-I-C) was a strategy decision, consistent with local custom & counsel's past practice; Ct. finds no prejudice; record shows counsel presented framework for evidence to jury in other ways).

FAILURE TO OBJECT TO INADMISSIBLE EVIDENCE: Tucker, App., 646 N.E.2d 972 (reference to mug shot & child molesting conviction together prejudiced D & deprived him of fair trial);

FAILURE TO OBJECT TO ADMISSION OF POLYGRAPH: Helton 479 N.E.2d 538 (D was denied effective assistance of counsel where counsel failed to object to stipulation of polygraph which was not signed by prosecutor/representative; objection would have been sustained; polygraph waiver must be signed by D & representative of prosecutor's office, *citing* Pavone 402 N.E.2d 976 & Owens, App., 373 N.E.2d 913; in light of nature of case, admission of polygraph results was not harmless; held, reversed & remanded for new trial).

FAILURE TO REQUEST LESSER INCLUDED OFFENSE INSTRUCTIONS: Sharkey, App., 672 N.E.2d 937(failure to tender LIO instructions was prejudicial to D because without LIO instructions, jury was presented with only 2 options - conviction for intentional killing or acquittal).

TITLE: Games v. State

INDEX NO.: Y.4.b.2.

CITE: (12-23-97), Ind., 690 N.E.2d 211

SUBJECT: Ineffective assistance of counsel (IAC) - prejudice standard; appeal from denial of post-conviction relief

HOLDING: Ct. granted rehearing solely to clarify proper appellate standard for reviewing denials of post-conviction claims of IAC. Standard to be applied by post-conviction Ct. is whether, considering alleged deficiency of counsel, ultimate result (conviction) was fundamentally unfair or unreliable. Games, 684 N.E.2d 466. When reviewing post-conviction Ct.'s negative judgment, Ct. focuses on whether there is evidence supporting judgment that result was fair & reliable, not simply whether there is "no evidence" supporting conviction. In prior Games opinion, Ct. articulated standard of appellate review of post-conviction judgment that is too narrow, requiring appellant to show that there was no evidence presented which supported conviction. While Ct. considers evidence supporting conviction, overall focus is broader & considers all evidence relevant to post-conviction Ct.'s determination of D's claim. Here, in affirming post-conviction Ct.'s finding of no prejudice, Ct. found overwhelming evidence presented which supported fair & reliable conviction for murder. Held, rehearing granted, denial of post-conviction relief affirmed but previous opinion at 684 N.E.2d 466 modified; remanded for remaining penalty phase proceedings.

RELATED CASES: Haynes, App., 695 N.E.2d 148 (petitioner failed to meet burden); Hubbards, App., 696 N.E.2d 72 (trial result was not made fundamentally unfair or unreliable by counsel's failure to object to instruction asserting knowing mens rea when information contained only intentional mens rea).

TITLE: Gibson v. State

INDEX NO.: Y.4.b.2.

CITE: (10-24-19), 133 N.E.3d. 673 (Ind. 2019)

SUBJECT: Ineffective assistance of counsel claim in death penalty case "unpersuasive and largely unsupported by the record"

HOLDING: Defendant received the death penalty as a result of his murder convictions in the 2012 strangulations of two women, as well as a 65-year sentence for a 2003 murder he confessed to after his arrest. The Indiana Supreme Court upheld Defendant's conviction and death sentences on direct appeal in 2016, Here, the Court likewise affirmed the denial of post-conviction relief, concluding that Defendant had not received ineffective assistance of counsel during his trials. In so holding, the Court rejected these arguments from Defendant: 1) there was unreasonable delay in assembling his legal representation, which led to harmful self-incriminating statements; 2) that the defense team was deficient in questioning potential jurors; 3) that his attorneys failed to sufficiently pursue a plea agreement that would spare the death penalty; 4) that mitigating factors were not sufficiently presented; and 5) that counsel failed to object to allegedly coerced statements and allegedly false or prejudicial testimony.

The Court likewise rejected Defendant's claim that trial counsel as Chief Public Defender of Floyd County labored under a conflict of interest by placing the financial needs of his office and the efficient administration of public funds above loyalty to his client. Applying the standard Strickland analysis to Defendant's claim, rather than the presumption-of-prejudice standard under Cuyler v. Sullivan, Court found neither deficient performance nor prejudice. Court noted the public defender office submitted claims for reimbursement totaling more than $686,000. "Based on the actual expenditures in representing Gibson and the employment of co-counsel, an investigator, a mitigation specialist, experts, and other consultants, we have little doubt that Gibson received quality representation, not ineffective assistance of counsel prejudicial to his defense."

TITLE: Glover v. U.S.
INDEX NO.: Y.4.b.2.
CITE: 531 U.S. 198, 121 S. Ct. 696, 148 L.Ed.2d 604 (2001)
SUBJECT: Ineffective assistance of counsel, sentencing, prejudice
HOLDING: Even a slight increase in sentence is enough to support a claim of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Here, D alleged that trial and appellate counsel had failed to argue that his multiple prior offenses should have been grouped for sentencing purposes under the U.S. Sentencing Guidelines, and that as a result his sentence was 6 to 21 months longer than would have been legal otherwise. Held, a petitioner has established prejudice if an increased prison sentence flowed from an error.

TITLE: Hamilton v. State

INDEX NO.: Y.4.b.2

CITE: (12/09/2020), 159 N.E.3d 998 (Ind. Ct. App. 2020)

SUBJECT: Ineffective assistance of counsel -- failure to investigate the extent of client's credit-restricted exposure at sentencing or develop a factual record to potentially limit that exposure

HOLDING: A sentencing court is to determine eligibility for a credit restriction based upon the nature and date of the offense. Here, Defendant pleaded guilty to a Class A felony child molesting charge. At the conclusion of the guilty plea hearing, the State observed an error as to the date in the charging information. Defense counsel took no action to narrow the time frame to determine Defendant's credit restriction eligibility and potentially avoid ex post facto punishment. Court of Appeals finds counsel was ineffective and client was prejudiced. Held, denial of post-conviction relief reversed with remand for a new sentencing hearing.

TITLE: Kaushal v. State

INDEX NO.: Y.4.b.2

CITE: (10/5/2018), 112 N.E.3d 1138 (Ind. Ct. App. 2018)

SUBJECT: Ineffective assistance of counsel (IAC) claim - failure to advise of deporation consequences

HOLDING: In Jae Lee v. United States, 137 S. Ct. 1958 (2017), the U.S. Supreme Court *clarified* that a defendant alleging that his counsel's deficient performance led him to enter a guilty plea in lieu of going to trial must establish a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Here, Tr. Ct. denied D's motion to withdraw his guilty plea to child molesting, wherein he alleged he would not have pled guilty had he known it would subject him to automatic deportation.

On remand from United States Supreme Court for further consideration in light of Jae Lee, Court of Appeals reaffirmed its original holding, finding once again that D failed to establish that he was prejudiced by his counsel's failure to adequately warn him of threat of deportation before entering into guilty plea such that it must be set aside. The record does not reflect that deportation was an overriding concern for D in deciding whether to plead guilty or go to trial. Unlike Jae Lee, whose chances of achieving his ultimate goal of avoiding deportation were increased by going to trial, D had no increased chance of achieving his ultimate goal of avoiding prison by going to trial. Rather, the opposite is true because his plea agreement guaranteed that he would not be imprisoned. Held, denial of motion to set aside guilty plea affirmed.

TITLE: Lee v. U.S.
INDEX NO.: Y.4.b.2.
CITE: (6/23/2017), 137 S. Ct. 1958 (2017)
SUBJECT: D prejudiced by bad advice about immigration consequences of plea deal
HOLDING: Defendant was prejudiced by counsel's bad advice about the immigration consequences of pleading guilty, even though Defendant had little chance of being acquitted at trial.

Based on a tip, officers obtained a warrant to search Defendant's home where they found drugs, cash, and a loaded gun. During plea negotiations, Defendant's lawyer repeatedly told him he would not be deported if he pled guilty, so Defendant pled to possession of ecstasy with intent to distribute, which resulted in a shorter sentence than if he had been convicted at trial. However, despite counsel's assurances, Defendant had in fact pled to an "aggravated felony" under the Immigration and Nationality Act, 8 U. S. C. §1101(a)(43)(B), so he was subject to mandatory deportation. See §1227(a)(2)(A)(iii).

In later habeas proceedings, Defendant testified that "deportation was the determinative issue" and that that he would have proceeded to trial had known his plea would subject him to mandatory deportation. See Hill v. Lockhart, 474 U.S. 52, 59 (1985). The District Court and 6th Circuit both agreed that Defendant received bad advice but held that he was not prejudiced, with the 6th Circuit reasoning that "no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence."

The decision whether to plead guilty involves assessing the respective consequences of a conviction by plea or by trial. See INS v. St. Cyr, 533 U.S. 2389, 322-23 (2001). When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. Defendant would have rejected any plea leading to deportation in favor of throwing a "Hail Mary" at trial.

While courts should not upset a plea agreement solely because of a defendant's post hoc claims he would have pled differently but for counsel's mistakes, Defendant here has shown a reasonable possibility that would have rejected the plea offer had he known it would lead to mandatory deportation. See Padilla v. Kentucky, 559 U.S. 356, 372 (2010). Held, cert. granted, 6th Circuit opinion at 825 F.3d 311 reversed, and case remanded. Roberts, C.J., Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ; Thomas, J., dissenting, joined by Alito, J.; Gorsuch, J., not participating.

RELATED CASES: Hill, 474 U.S. 52 (1985) (D was prejudiced by counsel's bad advice about immigration consequences of pleading guilty, even though D had little chance of being acquitted at trial; see full review in this section); Willis, App., 498 N.E.2d 1029 (erroneous advice as to possibility of parole eligibility following murder plea may be ineffective assistance, but D failed to show, but for confusion over sentence, he would have gone to trial); Van Cleave, 674 N.E.2d 1293 (issue was whether conviction may be set aside if post-conviction Ct. concludes that there is reasonable probability D would not have pleaded guilty but for deficient performance, or whether D must establish reasonable probability that ultimate result would have been different had counsel met reasonableness standard; Ct. concluded that showing of prejudice necessary to establish constitutional claim requires that D show reasonable probability that he would not have been convicted at trial).

TITLE: Lewis v. State
INDEX NO.: Y.4.b.2.
CITE: (12/21/2018), 116 N.E.3d 1144 (Ind. Ct. App. 2018)
SUBJECT: Ineffective assistance of counsel claim rejected - failure to advocate at sentencing
HOLDING: Where the sum total of trial counsel's participation at sentencing was to defer to his client for any comments, counsel was clearly deficient in his representation of D. However, no prejudice resulted because there was no reasonable probability that D's sentence would have been any different if mitigating circumstances had been proffered. Also, appellate counsel was not ineffective in failing to challenge the sentence because no mitigation had been presented in the Tr. Ct.

TITLE: Lockhart v. Fretwell

INDEX NO.: Y.4.b.2.

CITE: 506 U.S. 364, 113 S. Ct. 838, 122 L.Ed.2d 180 (1993)

SUBJECT: Ineffective assistance of counsel (IAC) - prejudice; failure to raise claim based on case subsequently *overruled*

HOLDING: Trial counsel's failure to assert federal constitutional claim based on federal court of appeals decision in existence at time of trial but later *overruled* did not prejudice petitioner within meaning of 6th amend. test for effectiveness of counsel, even if assertion of claim would have caused different result at trial. Petitioner was charged with felony murder, with robbery as underlying felony, and jury sentenced him to death based on aggravating circumstance that murder was committed for pecuniary gain. At time petitioner was sentenced, decision in federal court of appeals for petitioner's circuit held that basing death sentence on aggravator that duplicated element of underlying offense was unconstitutional because it did not adequately narrow class of death-eligible murderers. In federal habeas petition, petitioner alleged that trial counsel was ineffective for failing to raise claim based on this decision, although it had been *overruled* since petitioner's trial. Federal district court granted habeas, and Court of Appeals affirmed. However, Supreme Court reverses, finding that trial counsel's failure did not constitute IAC, despite fact that absent this failure petitioner could not have been sentenced to death. Majority holds that prejudice, second prong of Strickland IAC test, is not established merely by showing that outcome would have been different. What matters is whether counsel's performance rendered results of proceeding unfair or unreliable. Performance prong of IAC test is determined using legal and practice standards at time of trial but focus of prejudice prong is whether proceeding was fair and reliable, and that inquiry can be aided by hindsight. Stevens & Blackmun, JJ. DISSENT.

RELATED CASES: Dickens, 997 N.E.2d 56 (Ind. Ct. App. 2013) (D failed to demonstrate likelihood of different result at trial had trial counsel objected to use of stun-belt restraint; stun-belt was concealed under D's clothes, so D was not marked as dangerous person or suggest his guilt was foregone conclusion); Williams, 120 S. Ct. 1495 (Strickland IAC test was not modified by Fretwell).

TITLE: Middleton v. State
INDEX NO.: Y.4.b.2.
CITE: (4/21/2017), 72 n.E.3d 891 (Ind. 2017)
SUBJECT: Court of Appeals misstates IAC standard
HOLDING: The Court of Appeals reached the right result but applied the wrong standard in affirming the Tr. Ct.'s denial of Defendant's ineffective assistance of counsel (IAC) claim. During voir dire, defense counsel referred to his client as a "Negro, an African American or Black [or] whatever term is politically correct these days." The Court of Appeals said this statement prejudiced defendant, but that he was not entitled to relief because he had "not established that but for counsel's error, the result of the proceeding would have been different." However, to demonstrate prejudice from counsel's deficient performance, a petitioner need only show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984) (emphasis added). Nonetheless, the Court of Appeals correctly found that Defendant was not entitled to relief. Held, transfer granted, Court of Appeals' opinion summarily affirmed with the exception of its misstatement of the Strickland standard, and judgment affirmed.

TITLE: Myers v. State
INDEX NO.: Y.4.b.2.
CITE: (5/28/2015), 33 N.E.3d 1077 (Ind. Ct. App. 2015)
SUBJECT: Ineffective assistance of counsel claims rejected - failure to deliver on promise in opening statement to present exculpatory evidence
HOLDING: In a lengthy opinion, Court held that D failed in his post-conviction claim of ineffective assistance of trial counsel in murder prosecution on numerous grounds, including: 1) that defense counsel were ineffective for telling the jury in opening statements the defense would present evidence regarding an alternative suspect, but never presented evidence to support the claims; 2) that counsel were ineffective for not impeaching the testimony of his grandmother or ex-girlfriend or failing to undermine the State's theory that victim had ridden her bicycle north toward D's home on morning of her disappearance instead of a route south of Bloomington; and 3) that trial counsel were ineffective for failing to object to testimony suggesting victim had been raped and admission of evidence of a bloodhound tracking search.

Also, D failed to show that the State failed to disclose all exculpatory evidence to the defense. He was unable to identify any specific evidence that the State may have suppressed.

Finally, D's claim of prosecutorial misconduct was freestanding, and as such, not cognizable in the PCR proceeding. D fell "far short" of establishing the complained-of-testimony and evidence were false or the State knew as much. Held, judgment affirmed.

TITLE: Pace v. State
INDEX NO.: Y.4.b.2.
CITE: (2-5-2013), 981 N.E.2d 1253 (Ind. Ct. App. 2013)
SUBJECT: IAC of trial counsel - failure to bifurcate SVF and dealing charges
HOLDING: Defendant was denied effective assistance of counsel by his trial counsel's failure to move to bifurcate Defendant's SVF in Possession of a Firearm charge from his Dealing in Amphetamine charge. A claim of IAC of trial counsel requires a showing that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. It is well established that trial strategy is not subject to attack through IAC claims, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness.

Here, Defendant was charged with being a SVF in possession of a firearm and dealing in amphetamine based on constructive possession of a gun and drugs found in a car in which he was a passenger. Defendant's trial attorney never requested the trial court to bifurcate the SVF charge from the amphetamine charge despite the fact he was entitled to such bifurcation under Hines v. State, 794 N.E.2d 469 (Ind. Ct. App. 2003), adopted on transfer by, 801 N.E.2d 634 (Ind. 2004). Thus, the jury heard that Defendant had been previously charged with three counts of Dealing in Cocaine, of which he was convicted of one. Despite trial counsel's testimony that he did not move to bifurcate because he thought one trial would be better than two, trial counsel's decision not to request bifurcation based on Hines, *supra*, was unreasonable. Further, given the highly prejudicial nature of the prior dealing charges and conviction in the instant dealing case, the failure to bifurcate undermined the confidence in the outcome and prejudiced Defendant. As such, the post-conviction court clearly erred when it denied Defendant's petition for post-conviction relief. Held, judgment reversed and remanded.

TITLE: Scott v. State
INDEX NO.: Y.4.b.2.
CITE: (3/27/2013), 986 N.E.2d 292 (Ind. Ct. App. 2013)
SUBJECT: Ineffective assistance of counsel (IAC) - incorrect advice re: maximum possible sentence
HOLDING: D received IAC where counsel advised him that the maximum sentence he could receive for operating a vehicle with a BAC of at least .18 causing death and resisting law enforcement causing death was 30 years of incarceration. Generally, the same harm cannot be used to elevate multiple convictions. Pierce v. State, 761 N.E.2d 826 (Ind. 2002). D could not be sentenced for both class B felonies since his case involved one death. Dawson v. State, 612 N.E.2d 580 (Ind. Ct. App 1993). Thus, D's BAC conviction would have been a Class A misdemeanor and his resisting law enforcement conviction (which Tr. Ct. had merged into the other counts) would have had to have been reduced to a Class D felony to avoid punishing him twice for victim's death had D gone to trial. D established prejudice, because trial counsel's failure to inform him of the correct maximum sentence of 23 rather than 30 years rendered his plea unintelligent. Held, denial of post-conviction relief reversed and remanded with instructions to impose 23-year executed sentence.

RELATED CASES: Hanks, 71 N.E.3d 1178 (Ind. Ct. App 2017) (counsel's failure to advise D of judge's sentencing practices did not constitute IAC, but Ct. remanded to resolve to resolve D's claim that his guilty plea was not knowingly, intelligently, and voluntarily made; see full review at Y.4.b); Black, 54 N.E.3d 414 (D failed to show counsel gave bad advice about potential sentence and that such advice rendered his plea involuntary); even if counsel had given inaccurate information, D failed to show that the advice affected his decision to plead guilty).

TITLE: Sears v. Upton
INDEX NO.: Y.4.b.2.
CITE: (06-29-10), U.S., 130 S. Ct. 3259
SUBJECT: IAC - Erroneously narrow application of prejudice prong
HOLDING: Per Curiam. Georgia courts misapplied the "prejudice" prong of an ineffective assistance of counsel claim when they reasoned that because counsel presented "some" mitigation evidence at the penalty phase of D's trial, they could not speculate as to how additional evidence, later uncovered, regarding D's upbringing and mental handicaps, would have changed the outcome. A reasonable strategy or tactical decision regarding presentation of mitigation evidence does not foreclose the inquiry into whether a deficient mitigation investigation prejudiced the D. To assess the probability of a different outcome under Strickland v. Washington, 466 U.S. 688 (1984), Court considers the totality of available mitigation evidence--both adduced at trial, and the evidence adduced in the habeas proceeding--and reweigh it against the evidence in aggravation. Court reversed and remanded to allow the Georgia courts to reweigh the new evidence. Scalia, J., joined by Thomas, J., DISSENTING.

TITLE: Segura v. State
INDEX NO: Y.4.b.2.
CITE: (6-26-01), Ind., 749 N.E.2d 496
SUBJECT: Ineffective assistance of counsel (IAC) - guilty plea; prejudice; defective advice regarding penal consequences
HOLDING: To vacate conviction based on claim of IAC, a D who pleads guilty must show reasonable probability that he would not have been convicted if he had gone to trial. Van Cleave, 674 N.E.2d 1293. U.S. S. Ct.'s decision in Williams v. Taylor, 529 U.S. 362, does not affect the Van Cleave standard for evaluating IAC claims as to errors or omissions of counsel that overlook or impair a defense or failure to mitigate penalty. As to those claims, in order to establish guilty plea would not have been entered if counsel had performed adequately, D must show defense was overlooked or impaired & that defense would likely have changed outcome of proceeding. Similarly, if counsel's shortcomings are claimed to have resulted in lost opportunity to mitigate penalty, in order to obtain new sentencing hearing, D must show reasonable probability that oversight would have affected sentence.

As to claim regarding incorrect advice as to penal consequences, Ct. concluded that finding of prejudice requires evidence demonstrating a reasonable probability that erroneous or omitted advice materially affected D's decision to plead guilty, i.e., that D would have elected to go to trial if properly advised. Here, D argued that counsel was ineffective for failing to inform him of possibility of deportation if he pleaded guilty. Failure to advice of consequence of deportation can, under some circumstances, constitute deficient performance. Williams v. State, 641 N.E.2d 44 (Ind. Ct. App. 1994). In this case, D offered nothing more than naked allegation that his decision to plead would have been affected by counsel's advice. Specific facts must establish objective reasonable probability that competent representation would have caused petitioner not to enter plea. Held, transfer granted, denial of post-conviction relief affirmed; Sullivan, J., & Shepard, C.J., concurring in result, would require showing of reasonable probability of more favorable result for claims arising from counsel's legal advice regarding penal consequences.

RELATED CASES: Bobadilla, 117 N.E.3d 1272 (Ind. 2019) (Ct. disapproved of Segura to the extent objective prejudice standard it adopted conflicts with rational-defendant inquiry set forth in Lee v. United States, 137 S. Ct. 1958 (2017); see full review, this section); Soucy, 22 N.E.3d 683 (Ind. Ct. App. 2014) (where trial counsel overlooked defense of actual innocence because D's threats were never communicated to the victim, D's petition for post-conviction should have been granted and his guilty plea vacated); Manzano, 12 N.E.3d 321 (Ind. Ct. App. 2014) (trial counsel not ineffective for advising D to plead guilty to Class A felony child molesting; D did not show there was a reasonable chance of acquittal at trial); Carrillo, 982 N.E.2d 461 (Ind. Ct. App. 2013) (D did not show prejudice from counsel's failure to advise about potential negative immigration consequences from pleading guilty because 1) evidence of D's guilt was overwhelming, 2) plea greatly benefited D; 3) D failed to show harsh impact of plea on his family at the time he entered the plea in 1997); McCullough, 987 N.E.2d 1173 (Ind. Ct. App. 2013) (guilty plea counsel not ineffective and D did not show reasonable probability of acquittal had he gone to trial so plea was intelligent, knowing, and voluntary); Suarez, 967 N.E.2d 552 (Ind. Ct. App. 2012) (knowledge of potential deportation from guilty plea would not have affected a reasonable D's decision to plead guilty because State had a strong case against D and plea agreement gave substantial benefit to him); Springer, 952 N.E.2d 799 (Ind. Ct. App. 2011) (attorney's incorrect advice that D was facing a maximum sentence of 141 years when he really was facing only 111 years likely affected D's decision to plead;

convictions vacated); Mays, App., 790 N.E.2d 1019 (Although advising D to plead guilty to offenses which violate double jeopardy principles may be seriously questioned, it is not per se ineffective where D does not present any evidence to support his claim); Reynolds, App., 783 N.E.2d 357 (defense counsel rendered effective assistance when he advised D to accept plea agreement, in light of high probability of State proving that D neglected dependent which resulted in death by cocaine overdose).

TITLE: Sial v. State
INDEX NO: Y.4.b.2.
CITE: (4th Dist., 03-28-07), Ind. App., 862 N.E.2d 702
SUBJECT: Ineffective assistance of counsel (IAC) - failure to advise of deportation consequences
HOLDING: D received IAC as a result of his attorney's failure to advise him of the penal consequences of his felony theft conviction. D's conclusory testimony at post-conviction hearing that he would not have pleaded guilty had he known that deportation was a possible consequence of pleading guilty to a felony conviction is insufficient to merit post-conviction relief. Segura v. State, 749 N.E.2d 496 (Ind. 2001). To succeed, D must show special circumstances or specific facts showing that if his attorney had properly advised him of penal consequences of a guilty plea-- here, deportation--there is a reasonable probability that he would have chosen to proceed to trial. Id.

Here, Court concluded that presence of a wife & daughter in D's life & the fact that he has lived in this country as a permanent resident for over twenty years are sufficient special circumstances to make the requisite showing. At guilty plea hearing, neither D's attorney nor Tr. Ct. inquired regarding D's immigration status or possibility of deportation. Statement in PSI one month after guilty plea hearing does not undercut prejudice D suffered as result of his attorney's failure to advise him that a felony conviction could lead to deportation. Thus, D received IAC & post-conviction court erred in denying D's petition for PCR. Court agreed with trial counsel's admonishment that "all attorneys representing non-native born clients should be sure to get all the facts & advise the client accordingly." Held, judgment reversed & remanded for trial.

RELATED CASES: Carrillo, 982 N.E.2d 461 (Ind. Ct. App. 2013) (D did not show prejudice from counsel's failure to advise about potential negative immigration consequences from pleading guilty because 1) evidence of D's guilt was overwhelming, 2) plea greatly benefited D; 3) D failed to show harsh impact of plea on his family at the time he entered the plea in 1997); Clarke, 974 N.E.2d 562 (Ind. Ct. App. 2012) (even assuming D has established special circumstances with respect to his unborn children, considering the strength of the State's case against him and the significant benefit conferred upon him under the plea agreement, Ct. concluded that the knowledge of the risk of deportation would not have affected a reasonable D's decision to plead guilty); Gulzar, 971 N.E.2d 1258 (Ind. Ct. App. 2012) (While D may have shown special circumstances related to his family, in light of evidence establishing his guilt, he failed to demonstrate prejudice as a result of trial counsel's failure to explain risk of automatic deportation); Bonilla, 957 N.E.2d 682 (Ind. Ct. App. 2011) (D failed to allege "special circumstances or objective facts" to prove he would have rejected the plea had he been informed of immigration consequences of his conviction); Trujillo, 962 N.E.2d 110 (Ind. Ct. App 2011) (Ct. held that D failed to show that he suffered prejudice as a result of the failure of counsel to advise him regarding the adverse immigration consequences of pleading guilty; unlike Sial, D failed to show during his post-conviction telephonic hearing that he had a spouse or children living in the United States).

TITLE: State v. Hamilton

INDEX NO.: Y.4.b.2.

CITE: (10/24/22), Ind. Ct. App., 197 N.E.3d 356

SUBJECT: Counsel's failure to advise sentence was non-suspendible when pleading guilty did not prejudice Defendant where he was properly advised at sentencing and declined to withdraw plea

HOLDING: Defendant was charged with multiple drug offenses and entered a plea to one offense in exchange for State dropping others. At sentencing, it was discovered that Defendant's trial attorneys failed to properly advise him that a portion of his sentence would be non-suspendible. However, at sentencing the trial court corrected this error, properly informing Defendant of the potential non-suspendible sentence he was facing. He clearly and unequivocally chose to proceed with the plea. Defendant therefore failed to present evidence of special or unique circumstances supporting a finding that, but for his counsels' errors, he would have insisted on going to trial. Court of Appeals also held that the postconviction court clearly erred in determining that Defendant was prejudiced by his trial attorney's alleged failure to investigate his learning disabilities. The evidence shows that his attorneys were well aware of his learning disabilities. More importantly, Defendant failed to present any evidence showing how he was prejudiced by his trial attorney's alleged failure to investigate his learning disabilities. Thus, the postconviction court clearly erred in determining that Defendant was prejudiced by any deficient performance on the part of his trial attorneys. Held, grant of post-conviction relief petition reversed.

TITLE: State v. Van Cleave
INDEX NO.: Y.4.b.2.
CITE: (12/19/96), Ind., 674 N.E.2d 1293
SUBJECT: Ineffective Assistance of Counsel (IAC) - Guilty Plea; Prejudice
HOLDING: In order to establish prejudice prong of an IAC claim to set aside conviction resulting from guilty plea, D must demonstrate reasonable probability of acquittal at trial. D here was charged with felony murder & conspiracy to commit robbery, & State sought death penalty. On advice of counsel, D pled guilty to felony murder in exchange for dismissal of conspiracy charge. After sentencing hearing in which both sides presented evidence & cross-examined witnesses, D was sentenced to death. Post-conviction Ct. set aside conviction & sentence, finding that trial counsel had rendered IAC for failure to investigate & develop mitigation evidence, failure to view D's videotaped statement to police in which he demonstrated remorse, failure to scrutinize strength & consistency of state's evidence, & failure to investigate viability of intoxication defense. State appealed only vacation of conviction, arguing that post-conviction Ct. had applied wrong standard in reviewing prejudice claim with regard to conviction. Post- conviction Ct. had concluded that D must show that, but for counsel's deficient performance, he would not have pled guilty. Indiana S. Ct. agreed with State. In Strickland v. Washington, 466 U.S. 668, U.S. S. Ct. set out two-pronged deficient performance/prejudice test for IAC. Strickland, which involved a D who went to trial, defined prejudice as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 694. The Ct. elaborated on the prejudice standard in another "trial" case, Lockhart v. Fretwell, 113 S. Ct. 838 (1993), in which it wrote that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Under Fretwell, a different outcome at plea stage is constitutionally insignificant if ultimate result reached was neither unfair nor unreliable. Reviewing facts here, Ct. determined that D did not establish prejudice. Intoxication defense was not available at time D would have gone to trial, & even if it were available, it would have failed. Guilt was reliably established; evidence defense counsel failed to develop was mitigating, not exculpating. Fact that D will not have jury recommendation when he goes back for resentencing is not prejudicial, because it is purely speculative what effect a jury recommendation might have had. Held, order vacating conviction is reversed; remanded for new sentencing hearing.

RELATED CASES: Jeffries, 966 N.E.2d 773 (Ind. Ct. App. 2012) (D could not establish reasonable possibility of better outcome than 40-year sentence he received under plea agreement); Segura, 749 N.E.2d 496 (Williams v. Taylor, 529 U.S. 362 (2000), does not affect Van Cleave standard for evaluating IAC claims as to errors or omissions of counsel that overlook or impair a defense or failure to mitigate penalty); See Apprendi v. New Jersey at E.4.c (constitution requires that any fact that increases penalty for crime beyond statutory maximum, other than fact of prior conviction, must be submitted to jury and proved beyond reasonable doubt).

TITLE: Warren v. State
INDEX NO.: Y.4.b.2.
CITE: (4/8/2020), 146 N.E.3d 972 (Ind. Ct. App.)
SUBJECT: Denial of post-conviction relief affirmed despite trial counsel's deficient performance
HOLDING: In petition for post-conviction relief from his murder conviction, Defendant argued trial counsel was ineffective for failing to thoroughly investigate alternative suspects to the murder. The State argued evidence that an alternative suspect committed the murder would have been inadmissible because it primarily came from a third party. The Court of Appeals found the evidence that someone else may have been the murderer "raises several red flags" and although the evidence from a third party may not have been admissible, trial counsel could have investigated the other suspect by deposition, interview, or subpoena for testimony. But trial counsel did none of these things. Fingerprints from yet another individual were found at the scene of the murder, but trial counsel failed to offer the evidence of the fingerprints as an alternative suspect to the murder. While there is not always a reasonable probability that the result of a proceeding would have been different, trial counsel's failure to thoroughly investigate evidence of an alternative suspect is deficient performance. Here, although trial counsel's performance was deficient, Defendant was not prejudiced because State presented overwhelming evidence of guilt at trial. Held, denial of post-conviction relief affirmed.

TITLE: Washington v. State
INDEX NO.: Y.4.b.2.
CITE: (11/08/2021), 177 N.E.3d 498 (2021)
SUBJECT: Ineffective assistance of counsel for failure to object to an erroneous instruction and to tender a correct instruction on sudden heat
HOLDING: Defendant was charged with murder in a drug deal gone bad that resulted in a fight and death of victim. Trial counsel failed to object to an erroneous instruction on voluntary manslaughter as a lesser included offense of murder and tendered an erroneous instruction that was given to the jury that misstated Indiana law on sudden heat. The Court of Appeals found this to be deficient performance and that Defendant was prejudiced because had jury been properly instructed, they may have opted to convict Defendant of voluntary manslaughter instead of murder. Held, denial of post-conviction relief reversed on direct appeal.

TITLE: Weaver v. Massachusetts
INDEX NO.: Y.4.b.2.
CITE: (6/22/2017), 137 S. Ct. 1899 (2017)
SUBJECT: Must show prejudice for claim of IAC "structural error"
HOLDING: Even though violating a D's right to public trial is a "structural error," a D who raises this within a claim that counsel was ineffective must demonstrate prejudice, either that but for counsel's errors the result of the trial would have been different or that the trial was fundamentally unfair. Here, D does not demonstrate either. D's trial was set in a small courtroom that could not accommodate all potential jurors. Thus, an officer of the court excluded any member of the public who was not a potential juror, including D's mother and her minister. Defense counsel did not object or raise the issue on direct appeal. D was convicted of murder. Years later in a motion for new trial, D argued his lawyer was ineffective by failing to object to the courtroom closure. His motion was denied and was affirmed on appeal.

Barring D's family members from jury selection violated his right to public trial. See Presley v. Georgia, 558 U. S. 209 (2010). This error was not an individual error happening during the course of the trial, but a "structural error," one that affects "the entire framework" of a trial. See Arizona v. Fulminante, 499 U. S. 279, 310 (1991). Examples of structural error include abridging a D's right to represent himself or his right to choose his own lawyer. Because structural errors do not always impinge on fundamental fairness, the proper remedy depends on the context within which the claim was raised. If raised at trial or on direct appeal, a right-to-public trial claim usually results in automatic reversal. But where, as here, the issue is raised through an IAC claim, a D must establish prejudice, either by showing a reasonable probability that the result of the proceeding would have been different but for counsel's error or that counsel's error made the trial fundamentally unfair. See Strickland v. Washington, 466 U.S. 668, 694-96 (1984).

Although potential jurors might have behaved differently if D's family or the public been present during jury selection, D has offered no evidence to suggest a reasonable probability of a different outcome but for counsel's failure to object. He has also failed to show fundamental unfairness. His mother and her minister were indeed excluded during jury selection, but his trial was not conducted in secret; closure was limited to *voir dire*; and the courtroom remained open during the evidentiary phase of the trial. Furthermore, none of the potential harms from courtroom closure occurred here: misbehavior by the prosecutor, judge, or any other party. Held, *cert granted*, opinion at 54 N.E.3d 495 affirmed, and judgment affirmed. Kennedy, J., joined by Roberts, C.J., and Thomas, Ginsburg, Sotomayor, and Gorsuch, JJ; Thomas, J., concurring, joined by Gorsuch, J.; Alito, J., concurring, joined by Gorsuch, J.

RELATED CASES: Durden v. State, 99 N.E.3d 645 (Ind. 2018) (defective juror removal procedure was structural error, but since Defendant invited the error, he was not entitled to a new trial), McCoy v. Louisiana, 138 S. Ct. 1500 (2018) (counsel's concession of client's guilt in capital case was structural error, requiring no showing of prejudice).

TITLE: Willoughby v. State
INDEX NO.: Y.4.b.2.
CITE: (2nd Dist., 7-29-03), Ind. App., 792 N.E.2d 560
SUBJECT: Ineffective assistance of counsel (IAC) - guilty plea; intimidation by way of exaggerated penalty
HOLDING: Whether viewed as IAC or involuntary plea, post-conviction relief may be granted if guilty plea can be shown to have been influenced by counsel's incorrect advice as to the law & penal consequences. Segura v. State, 749 N.E.2d 496 (Ind. 2001). When an error in advice supports claim of intimidation by exaggerated penalty, post-conviction petitioner must establish specific facts that lead to conclusion that a reasonable D would not have entered guilty plea had error in advice not been committed.

Here, D argued that, as consequence of counsel's failure to inform him of single larceny rule, his plea agreement was not knowing, voluntary, or intelligent. Ct. held that D failed to meet his burden of establishing that a reasonable D in his situation would have rejected a plea had he or she been properly informed of the single larceny rule. Not only would D have wished to avoid trial, he could have expected nothing substantially better than his sentence under plea bargain, with a high degree of exposure to a much harsher sentence. Held, denial of post-conviction relief affirmed.

RELATED CASES: Suarez, 967 N.E.2d 552 (Ind. Ct. App. 2012) (knowledge of potential deportation from guilty plea would not have affected a reasonable D's decision to plead guilty because State had a strong case against D and plea agreement gave substantial benefit to him); Roberts, 953 N.E.2d 559 (Ind. Ct. App 2011) (D knew that he was not an habitual offender, thus State's threat to amend charges to include HO allegation was not his motivation for pleading guilty; D cannot establish prejudice due to trial counsel's deficient performance); Harley, 952 N.E.2d 301 (Ind. Ct. App. 2011) (counsel ineffective for not advising D about valid defense to non-support charge; see full review at K.11.k.1); Graham, 941 N.E. 2d 1091 (Ind. Ct. App. 2011) (Ct. remanded for further proceedings to consider whether there exist facts that meet the Segura standard for setting aside a guilty plea based on improper threat of an habitual offender enhancement); Kistler, 936 N.E. 2d 1258 (Ind. Ct. App. 2010) (Ct. could not say that D demonstrated that he would not have pled guilty even if properly advised that habitual offender charge was invalid, nor has he shown facts that support a reasonable probability that the hypothetical reasonable D would have elected to go to trial if properly advised). Hacker, App., 906 N.E.2d 924 (given strength of State's case against him and substantial benefit D received from plea agreement, D failed to meet his burden that trial counsels' misadvise about maximum sentence he faced "materially affected" his decision to plead guilty).

TITLE: Wise v. State
INDEX NO.: Y.4.b.2.
CITE: (5th Dist., 06-15-94), Ind. App., 635 N.E.2d 221
SUBJECT: Ineffective assistance of counsel - insufficient prejudice
HOLDING: Although counsel was ineffective in opening door to evidence prior sexual misconduct previously excluded by motion in limine, D did not show sufficient prejudice to require reversal because of other evidence of guilt. D was charged with attempted rape & criminal confinement. On direct exam of D, after D had told how accusations of rape & incest had been a nightmare, counsel said "[n]o one ever accused you of anything like that in your life have they?" & D answered "No." State was then allowed to bring in previously excluded evidence that D had touched complaining witness & four other girls in sexual manner. Ct. found this action constituted ineffective assistance of counsel, but because complaining witness gave clear & unequivocal testimony about attempted rape, & D admitted to police that he was in motel room with her, had his pants down, & acted as if he was going to penetrate her with his penis, insufficient prejudice was shown to require reversal. Held, conviction affirmed.

TITLE: [Terry] Williams v. Taylor
INDEX NO.: Y.4.b.2
CITE: 529 U.S. 362, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000)
SUBJECT: Ineffective assistance of counsel (IAC)
HOLDING: The proper test for IAC is first, whether counsel's performance fell below an objective standard of reasonableness, and second, whether the D was prejudiced thereby. In this context, prejudice means a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. The proper test was laid out in Strickland v. Washington, 466 U.S. 668 and does not require the D to show that the proceedings were "fundamentally unfair," (as some lower courts, including Indiana appellate courts, had held). The Strickland test was not modified by Lockhart v. Fretwell, 506 U.S. 364.

Y. RIGHT TO COUNSEL

Y.4. Ineffective assistance of counsel (IAC)

Y.4.c. IAC of appellate counsel (Evitts v. Lucey)

TITLE: Allen v. State

INDEX NO.: Y.4.c.

CITE: (12-29-11), 959 N.E.2d 343 (Ind. Ct. App. 2011)

SUBJECT: Remedy for ineffective assistance of appellate counsel is reinstated direct appeal, not new trial

HOLDING: In an issue of first impression, Court held that proper remedy for denial of effective assistance of appellate counsel is a reinstated direct appeal, not a new trial. "A person convicted of, or sentenced for, a crime by a court of this state has a constitutional right to appeal that conviction or sentence directly to either this court or our supreme court." Owens v. State, 822 N.E.2d 1075, 1077 (Ind. Ct. App. 2005). The Sixth Amendment to the United States Constitution entitles a criminal D to effective assistance of counsel during his first appeal as of right. Taylor v. State, 840 N.E.2d 324, 337 (Ind. 2006) (*citing* Evitts v. Lucey, 469 U.S. 387, 396 (1985)). If a D requested an appeal, but appellate counsel failed to perfect an appeal, then "the court should enter an order providing the appropriate relief for the ineffective assistance: the D receives the right to an appellate proceeding, as if on direct appeal with the assistance of counsel." Castellanos v United States, 26 F.3d 717, 720 (7th Cir. 1994); see also McHale v. United States, 175 F.3d 115, 120-21 (2d Cir. 1999); Dodd v. Knight, 533 F. Supp. 2d 844, 852 (N.D. Ind. 2008).

Here, D was convicted of attempted robbery and robbery, both class B felonies. D appealed with appointed counsel. Later, Court of Appeals allowed counsel to withdraw because of a conflict of interest. The Court twice directed Tr. Ct. to appoint new appellate counsel, but it failed to do so. Eventually, Court dismissed the appeal because D did not file a brief. D filed a petition for post-conviction relief, claiming he was denied effective assistance of appellate counsel. The Tr. Ct. granted D's petition on that basis, but denied D's request for a new trial, instead ruling that his proper remedy was to pursue the direct appeal he was denied. On appeal, State conceded D was denied effective assistance of counsel but argued that Tr. Ct. awarded the proper remedy. The denial of D's right to pursue an appeal did not necessarily affect the validity of D's convictions and sentences. The deprivation of [D's] right to appeal had nothing to do with his trial. And if any reversible error occurred during [D's] trial or sentencing, then he will be able to present such error in a reinstated direct appeal. Thus, Court directed the appellate clerk to reinstate D's direct appeal. Held, judgment affirmed and direct appeal reinstated.

TITLE: Archer v. State
INDEX NO.: Y.4.c.
CITE: (9-12-19), Ind. Ct. App., 133 N.E.3d 176
SUBJECT: Appellate counsel ineffective for failing to review voir dire transcript
HOLDING: The Court of Appeals granted rehearing to correct an error in its original opinion, namely that the disputed juror was not dismissed and did serve on the jury. Because the juror did in fact serve, Defendant demonstrated prejudice and the post-conviction court erred in denying his petition for postconviction relief.

TITLE: Atchely v. State
INDEX NO.: Y.4.c.
CITE: (5th Dist.; 6-20-00), Ind. App., 730 N.E.2d 758
SUBJECT: IAC - failure to raise issue; must look at law at time of appeal
HOLDING: Appellate counsel was not ineffective for failing to raise issue of whether multiple convictions based on same conduct violate DJ clause of Ind. Const. To establish violation of 6th Amend. right to effective assistance of counsel, D must show that counsel's performance fell below objective standard of reasonableness based on prevailing professional norms. Strickland v. Washington, 466 U.S. 668 (1984). Here, petitioner was convicted of 5 counts of murder based on 5 victims' deaths in one fire. In 1993, petitioner's attorney appealed his multiple convictions for arson, but failed to argue that multiple convictions violated Ind. constitutional DJ clause because they were based on one act. Petitioner alleges that appellate counsel should have relied on Clem v. State, 42 Ind. 420 (1873), to support his proposition that his multiple convictions violated DJ. However, in view of extensive body of countervailing law developed in more than 100 years following Clem decision, appellate counsel's failure to cite Clem as authority for proposition that multiple convictions of murder violated DJ clause in Ind. Const. did not fall below objective standard of reasonableness. Thus, regardless that today, under Richardson, 717 N.E.2d 32, petitioner's multiple convictions would violate Ind. constitutional DJ provision, appellate counsel was not ineffective for failing to raise such claim prior to Richardson. Held, denial of PC relief affirmed.

Note: Although Ct. states that law at time of appeal was clear that Indiana Constitution permitted multiple convictions of murder where single act resulted in deaths of multiple victims, Ct. failed to recognize all related case law available at this time. There are cases which found DJ violations based on temporal proximity of act where there were two victims. See, e.g., Randall, 455 N.E.2d 916; Isaac, App., 439 N.E.2d 1193. In addition, Ct. erroneously *cites* Lockhart v. Fretwell, 506 U.S. 364 (1993), as standard for determining prejudice in IAC claim. Williams v. Taylor, 120 S. Ct. 1495 (2000).

RELATED CASES: Robinson, 175 N.E.3d 859 (Ind. Ct. App. 2021) (based on precedent at time of direct appeal, appellate counsel did not render ineffective assistance by failing to raise a double jeopardy argument under the Indiana Constitution, as there was no state double jeopardy issue to raise).

TITLE: Bell v. State

INDEX NO.: Y.4.c.

CITE: (07-20-21), Ind. Ct. App., 173 N.E.3d 709

SUBJECT: Ineffective assistance of appellate counsel -- failing to raise habitual offender phase jury waiver issue on direct appeal

HOLDING: After Defendant was convicted of murder and conspiracy to commit robbery, he admitted his prior convictions with respect to the habitual offender count without personally waiving his right to jury. On direct appeal, counsel did not raise the issue as a fundamental error. The Court of Appeals concluded the trial court failed to advise Defendant of his right to a jury trial regarding the habitual phase and his personal expression of his desire to forgo a jury trial is not apparent from the record. Noting that our Supreme Court has long held that the failure to secure a proper waiver of a defendant's jury-trial right is fundamental error, the Court of Appeals found that the post-conviction court's decision was contrary to law. The Court held the trial court committed a fundamental constitutional error that caused Defendant prejudicial harm and would have merited automatic reversal on direct appeal and that the outcome of his appeal would have been different if the issue had been raised. Held, reversed, and remanded with instructions to vacate the habitual offender adjudication and to conduct a new trial on the habitual offender information.

TITLE: Benson v. State
INDEX NO.: Y.4.c.
CITE: (5th Dist., 12-30-02), Ind. App., 780 N.E.2d 413
SUBJECT: Ineffective assistance of appellate counsel - rejection of plea agreement
HOLDING: D was denied effective assistance of appellate counsel when counsel failed to raise on direct appeal Tr. Ct.'s rejection of his plea agreement & unilateral vacation of his guilty plea. Record revealed unequivocally that Tr. Ct. accepted D's guilty plea, plea agreement, & that it entered judgment against D. Nevertheless, Tr. Ct. erred in unilaterally rejecting plea agreement & declaring judgment of conviction "a nullity" a month later. Absence of order book entry was not dispositive. Where, as here, Tr. Ct. accepts plea agreement, it shall be bound by its terms. Freije v. State, 709 N.E.2d 323 (Ind. 1999). D was prejudiced by appellate counsel's failure to raise this significant & obvious issue, because D received sentence fifty years greater than sentence provided under plea agreement. Had issue been raised, appellate Ct. would have reversed convictions & reinstated plea agreement. There was no strategic reason to ignore this issue on appeal, & failure to raise it was unreasonable. Held, denial of post-conviction relief reversed & remanded for sentencing & disposition under terms of plea agreement.

RELATED CASES: Hooker, App., 799 N.E.2d 561 (although more recent case law supports D's claim that his plea agreement should have been enforced, case law at time he filed his direct appeal indicated that a Tr. Ct. could accept a guilty plea without being bound by terms of underlying plea agreement).

TITLE: Burton v. State
INDEX NO.: Y.4.c.
CITE: (11/17/83) Ind., 455 N.E.2d 938
SUBJECT: Ineffective assistance of counsel (IAC) - on appeal
HOLDING: D was denied due process right to effective representation because of "total inadequacy" of appellate attorney's attempted appeal. The standard for reviewing quality of legal representation appeal is mockery of justice as modified by requirement of adequate legal representation. See Frances, 305 N.E.2d 883; Adams, 301 N.E.2d 368. Here, D was never informed that appellate attorney had been appointed; attorney never contacted him, attorney waived issues (without D's consent) presented in MCE by not raising them or by presenting inadequate legal arguments. Held, Ct. App. decision (441 N.E.2d 1023) vacated; cause ordered to be re-briefed.

RELATED CASES: Baxter, 689 N.E.2d 1254 (failure to raise issue of Tr. Ct.'s failure to instruct jury on definition of prior unrelated felonies during HO determination constituted fundamental error where State did not put on evidence proving proper order); Robinson, App., 634 N.E.2d 1367 (Because D did not show sentencing was fundamentally unfair or unreliable because he was sentenced by judge de facto rather than judge de jure, appellate counsel was not ineffective for failing to raise trial counsel's failure to object to authority of judge as fundamental error or IAC); Mato 478 N.E.2d 57 (Crim L 641.13(7); IAC of both trial & appellate counsel are judged by same standard); Hill, 462 N.E.2d 1048 (failure to present an issue on direct appeal did not constitute IAC where issue was meritless, *citing* Conrad, 406 N.E.2d 1167); Talley, App., 442 N.E.2d 721.

TITLE: Carew v. State
INDEX NO.: Y.4.c.
CITE: (2nd Dist., 11-9-04), Ind. App., 817 N.E.2d 281
SUBJECT: Ineffective assistance of appellate counsel - failure to challenge exclusion of expert testimony
HOLDING: Appellate counsel was ineffective for failing to challenge on direct appeal the Tr. Ct.'s exclusion of expert testimony. Excluded testimony involved expert opinion involving deceptive police techniques used in the interrogation of a mentally retarded individual. While such testimony should be excluded if it extends to a determination of whether a witness testified truthfully, testimony should be allowed regarding police techniques used in a particular interrogation. Callis v. State, 684 N.E.2d 233 (Ind. Ct. App.1997); Miller v. State, 770 N.E.2d 763 (Ind. 2002). Appellate counsel testified he did not raise the issue because he did not want to clutter the record & felt the involuntariness of the confession "would carry the day." Although strategic decisions by appellate counsel are given considerable deference, Ct. did not find the decisions reasonable in light of the facts of the case & the precedent available to counsel at the time the decision was made.

Ct. noted that trial counsel went to great lengths to preserve the expert opinion issue for appeal by conducting two in-depth offers to prove at trial, specifically noting the issue in a pre-appeal form & e-mailing the public defender's appellate division as to the importance of this particular issue. Further, trial counsel had worked in coordination with the defense in the Miller case, which was eventually remanded for a new trial by the S. Ct. While Miller had not been decided when appellate counsel considered his appeal, the Callis opinion relied on heavily by the Miller Ct. was available. The majority here "differ[s] with the dissent in that [Ind. Evid.] Rule 704(b) does not prohibit general opinion testimony that coercive police techniques could increase the likelihood of a false confession from an individual with diminished intellectual functioning." Held, denial of post-conviction relief reversed & remanded for a new trial; Sullivan, J. dissenting because much of offer to prove in relation to testimony was related to whether police techniques would increase "false confessions" which is a different issue than if such techniques led to an "involuntary" confession.

TITLE: Carter v. State
INDEX NO.: Y.4.c.
CITE: (07-01-10), 929 N.E.2d 1276 (Ind. 2010)
SUBJECT: IAC - appellate counsel's failure to challenge attempted murder instruction
HOLDING: In attempted murder case, post-conviction court was Alikely wrong@ in concluding appellate counsel performed Awithin the range of reasonableness,@ even though she failed to challenge jury instruction that did not advise jury that State was required to prove that D intended to kill the victim. However, D did not suffer sufficient prejudice to warrant a new trial for IAC because jury was nonetheless told what the law required. During closing argument, both D and the State told jury that State was required to prove intent to kill to obtain attempted murder conviction. Held, transfer granted, Court of Appeals' opinion at 898 N.E.2d 315 vacated, judgment affirmed.

TITLE: Fisher v. State

INDEX NO.: Y.4.c.

CITE: (6-17-04), Ind., 810 N.E.2d 674

SUBJECT: Ineffective assistance of appellate counsel - failing to raise issue where case law is unsettled

HOLDING: In murder prosecution, failure to raise on appeal Tr. Ct.'s refusal to give a lesser-included reckless homicide instruction constituted ineffective assistance of appellate counsel. State of law clearly requiring instructions for inherently lesser-included offenses was not settled until after D's direct appeal had been decided. However, this fact is not dispositive of whether lesser-included instruction issue was significant, obvious, & clearly stronger than issues counsel presented on direct appeal. Further, appellate counsel's failure to present issue on direct appeal was not a strategy-based decision. Evaluating evidence presented by both parties, Ct. concluded that there was a serious evidentiary dispute in this case concerning D's state of mind that would justify giving requested reckless homicide instruction. Although rejecting D's defense of accident, jury could have returned a conviction of reckless homicide instead of murder depending on how it weighed & credited all the evidence. Held, transfer granted, Ct. App.' decision at 785 N.E.2d 320 vacated, denial of post-conviction relief reversed.

RELATED CASES: Garrett, 992 N.E.2d 710 (Ind. 2013) (appellate counsel not ineffective for failing to anticipate change in then-existing law); Garcia, 936 N.E. 2d 361 (Ind. Ct. App 2010) (because multiple aggravators supported consecutive sentences D's forty-year sentence was 110 years less than 150-year maximum he could have received, D's claim that trial and appellate counsel were ineffective for failing to raise line of cases ordering consecutive child molesting sentences to be served concurrently was unavailing); Shaw, App., 898 N.E.2d 465 (appellate counsel was not ineffective for failing to foresee future decisions and argue Tr. Ct. erred by allowing State to amend charging information after omnibus date (see Fajardo at A.5); at time of D's appeal, there appeared to be no case law in which a court had invalidated any amendment).

TITLE: Garza v. Idaho

INDEX NO.: Y4.c.

CITE: (2/27/2019) 139 S. Ct. 738 (U.S. 2019)

SUBJECT: Despite appeal waiver, defense lawyer's refusal to file requested noticed of appeal constitutes ineffective assistance

HOLDING: Defense attorneys may not disregard their clients' instructions to file appeals from criminal convictions and sentences even when the clients had agreed to waive appeals as part of their plea agreements. "No appeal waiver serves as an absolute bar to all appellate claims...A D who has signed an appeal waiver does not, in directing counsel to file a notice of appeal, necessarily undertake a quixotic or frivolous quest."

Here, defense counsel rendered deficient performance by not filing a notice of appeal in light of D's clear requests. Given the possibility that a D will end up raising claims beyond an appeal waiver's scope, simply filing a notice of appeal does not necessarily breach a plea agreement. Thus, counsel's choice to override D's instructions to file a notice of appeal was not a strategic one. In any event, the bare decision whether to appeal is ultimately the D's to make. Held, Idaho Supreme Court opinion at 405 P. 3d 576 reversed and remanded. THOMAS, J., joined by ALITO and GORSUCH, JJ., DISSENTING, believe defense counsel in this case acted appropriately, protecting D from the possibility of a longer sentence.

NOTE: In Creech v. State, 887 N.E.2d 73 (Ind. 2008), the Indiana Supreme Court held that Ds may waive the right to appeal sentence as part of a plea agreement. Garza retained a right to appeal at least some issues despite his waivers. Thus, prejudice from failing to file a notice of appeal was presumed pursuant to Roe v. Flores-Ortega, 528 U. S. 470 (2000), even though Garza had fewer possible claims than other appellants.

TITLE: Gray v. State
INDEX NO.: Y.4.c.
CITE: (5th Dist., 2-10-06), Ind. App., 841 N.E.2d 1210
SUBJECT: Appellate counsel ineffective for not arguing SVF bifurcation issue
HOLDING: Appellate counsel was ineffective for not pursuing bifurcation on serious violent felon charge where D was also charged with murder, attempted murder, & robbery. Trial counsel had moved to sever the SVF count from the other counts. Counsel noted his concerns with D being labeled a "serous violent felon" in relation to the murder & attempted murder charges & noted to the Tr. Ct. precedent at the time was "undecided" & "unclear." After receiving an adverse ruling, trial counsel stipulated to D's SVF status, explaining in the PCR hearing that he did so to limit the jury from hearing that his serious violent felony was for dealing drugs where he was charged for murdering a drug dealer. Trial counsel also noted in a pre-appeal memorandum to appellate counsel that he believed this issue was a viable issue on appeal. However, appellate counsel did not raise the issue because apparently, she did not believe the issue was properly preserved and/or she "would have problems with the stipulation." Instead, she raised two issues on direct appeal, which the Court noted were neither particularly strong nor groundbreaking. Conversely, the issue of severance/bifurcation of an SVF count from other counts was truly undecided during the time of D's trial & appeal. Just four months after D's direct appeal was decided, the Court remanded a case involving an SVF count from other counts. See Hines v. State, 794 N.E.2d 469 (Ind. Ct. App2003), *opin. adopted by* 801 N.E.2d 634 (Ind.2004).

Court determined trial council's decision to stipulate was a Hobson's choice or an apparently free choice that is really no choice at all. Thus, this was not a "decision" to waive the issue. Finding that the unraised issue was significant & obvious from the record, Court considered whether the error resulted in prejudice to D. State conceded if the issue were raised on appeal a possibility existed the result may have been different, but distinguished Hines on the S. Ct.'s "heavy emphasis" on the State's rejection of D's offer to stipulate to the prior conviction. Court noted the first point emphasized by the S. Ct. was the denial of the motion to bifurcate the SVF count from the robbery count. Further, the stipulation in Hines was materially different than here. Hines offered to stipulate that he was a SVF *if* he were found guilty of robbery. Whereas here, the stipulation paved the way for the jury to hear several references to D as an SVF throughout his murder trial. Court also could not agree with State that the evidence against D was "very strong," noting it consisted primarily of two witnesses, one who was injured during the incident & unable to identify D in a photo array with consistency, & the other was a jailhouse informant. Court also noted there were problems with the investigation, including collection of evidence. Consequently, the jury had some "serious credibility determinations" to make. Held, judgment reversed & remanded for new trial.

TITLE: Hall v. State
INDEX NO.: Y.4.c.
CITE: (5th Dist., 2-7-95), Ind. App., 646 N.E.2d 379
SUBJECT: No ineffective assistance of appellate counsel
HOLDING: Appellate counsel did not render ineffective assistance for failing to raise question of master commissioner's lack of authority to sentence D. Because D did not object at trial, issue was waived for appellate review, Floyd v. State, Ind., 650 N.E.2d 28. Moreover, D received presumptive term of imprisonment, & failed to present any facts to PCR Ct. showing that his sentencing was fundamentally unfair or unreliable simply because he was sentenced by master commissioner rather than by sitting judge. Held, judgment affirmed.

Note: D did not specifically allege that appellate counsel was ineffective for failing to raise ineffectiveness of trial counsel on direct appeal, thus any claim of ineffective assistance of trial counsel was waived.

RELATED CASES: Jones, App., 656 N.E.2d 303 (no IAC on appeal for failing to argue that trial judge engaged in improper ex parte communications with jury); Williams, App., 646 N.E.2d 80 (No IAC on appeal for failure to challenge erroneous jury instruction & authority of sentencing judge).

TITLE: Harris v. State
INDEX NO.: Y.4.c.
CITE: (02-27-07), Ind., 861 N.E.2d 1182
SUBJECT: IAC- failure to provide record on appeal to show crimes were part of same episode
HOLDING: Appellate counsel was ineffective for failing to provide the trial record establishing facts that support a valid claim raised in the appeal but unsupported by the record. One form of appellate ineffectiveness occurs when appellate counsel's work is so deficient that an issue, though technically raised, is deemed waived for failure to present cogent argument and/or cite facts in the record supporting the claim. Implicitly, this type of ineffectiveness claim requires that the underlying issue be re-adjudicated. In short, the Sixth Amendment right to counsel trumps the state law res judicata doctrine.

Here during the course of trial, D decided to plead guilty to two class B felony sexual misconduct charges. Trial Ct. sentenced D to maximum, consecutive sentences. On appeal, D argued that the two crimes were part of the same criminal episode limiting consecutive sentences but failed to include the transcript of the victims at trial establishing that the two acts of sex occurred within five minutes of one another on the same bed, although with two different victims. Without the trial transcript, the only evidence in front of the appellate Ct. was that D had sex with each victim during the course of the night. Had the appellate Ct. had the transcript, it would have found the acts part of the same criminal episode. Just because there were separate acts & separate victims does not mean the acts cannot be part of the same criminal episode. Two acts of sexual misconduct which occurred five minutes apart in the same bed & based on the same reason- the girl's need for a place to stay for the night-are a connected series of offenses that are closely connected in time, place, & circumstance. Held, transfer granted, judgment reversed, & D's sentence is revised to thirty years.

RELATED CASES: Perry, 904 N.E.2d 302 (Ind. Ct. App. 2009) (where appellate court explicitly found that record omissions did not result in waiver of the D's sentencing claims, D failed to establish prejudice).

TITLE: Hopkins v. State
INDEX NO.: Y.4.c.
CITE: (2nd Dist., 01-31-06), Ind. App., 841 N.E.2d 608
SUBJECT: Ineffective assistance of appellate counsel - failure to cite clear precedent
HOLDING: D's appellate counsel was ineffective for failing to adequately argue that D's two convictions for Class A felony robberies should be reduced to Class C felonies instead of Class B felonies after the convictions were reduced based on double jeopardy in relation to two attempted murder convictions. Claims of inadequate presentation of certain issues, when such were not deemed waived on direct appeal, admittedly are the most difficult for Ds to advance & reviewing tribunals to support. Bieghler v. State, 690 N.E.2d 188 (Ind.1997). An ineffectiveness challenge resting on counsel's presentation of a claim must overcome the strongest presumption of adequate assistance. Here, Court noted appellate counsel only briefly addressed the need to reduce the robbery convictions to Class C felonies based on the double jeopardy violation, *citing* only to Lowrimore v. State, 728 N.E.2d 860 (Ind. 2000) & Grace v. State,731 N.E.2d 442 (Ind.2000) (which was misidentified as having the same result as Lowrimore). At least two Indiana S. Ct. opinions were handed down prior to initial appellate briefing in D's case, which "clearly set forth the proper analysis" for whether a Class A felony robbery conviction should be reduced to a Class B or Class C felony in the event of a double jeopardy conflict with a simultaneous murder or attempted murder. See Hampton v. State, 719 N.E.2d 803 (Ind.1999); Logan v. State, 729 N.E.2d 125 (Ind.2000). Before the briefs were filed in D's case, these cases made it clear that the proper remedy is to reduce the robbery to a Class C felony unless the State had specifically alleged that the D used a deadly weapon in the commission of the robbery. Court came "to the conclusion that this is one of the very rare instances in which a petitioner's claim in a case where an attorney did address an issue is meritorious. Court noted these cases were not out-of-date or obscure, but rather recent cases addressing the new double jeopardy framework established by Richardson v. State, 717 N.E.2d 32 (Ind.1999). Counsel should have located & relied upon these cases; & the sheer brevity of counsel's argument doubtfully complied with the requirement of Ind. App. Rule 46(A)(8)(a) to support all contentions with cogent reasoning. Held, judgment reversed & remanded with instructions that D's two robbery convictions be reduced to Class C felonies.

RELATED CASES: Absher, 162 N.E.3d 1141 (Ind. Ct. App. 2021) (appellate counsel ineffective for failing to argue insufficient evidence supporting amended Class A felony child molest count; see full review at Y.4.b.2); Hollowell, 19 N.E.3d 263 (Ind. 2014) (appellate counsel was not ineffective for not arguing D's sufficiency claim with greater specificity); Greene, (Ind. Ct. App. 2013) (trial and appellate counsel were ineffective for failing to adequately challenge the sufficiency of evidence for Class B felony criminal confinement based on counsels' omission to *cite* Long v. State, 743 N.E.2d. 253 (Ind. 2001), which precludes enhancement where injuries did not occur during removal; see full review at K.3.c.2); Lee, App., 880 N.E.2d 1278 (Counsel cannot be deemed deficient when a literal application of the actual evidence test yields no double jeopardy violation, but a more relaxed application does); McCann, App., 854 N.E.2d 905 (D received ineffective assistance of appellate counsel for failing to raise “significant & obvious” double jeopardy issue).

TITLE: Johnson v. State
INDEX NO.: Y.4.c.
CITE: (6/1/2018), 103 N.E.3d 704 (Ind. Ct. App. 2018)
SUBJECT: No IAC for failing to raise proportionality argument on direct appeal
HOLDING: Appellate counsel was not ineffective for failing to argue that D's sentence for Class B felony aggravated battery violated the Proportionality Clause of the Indiana Constitution; the controlling precedent at the time counsel filed his appellate brief clearly established that D's 15-year sentence was permissible under the Proportionality Clause. See Ind. Const. Art. 1, Sec. 16; see also Matthews v. State, 944 N.E.2d 29 (Ind. Ct. App. 2001).

D was convicted of Class B felony aggravated battery, four other felonies, and was adjudicated as an habitual substance offender. The Tr. Ct. imposed an aggregate sentence of 35 years. On direct appeal, appellate counsel did not raise the proportionality argument. D later argued on post-conviction review that the B felony aggravated battery conviction violated the Proportionality Clause because it and Class D felony criminal recklessness had the same elements. D relied on Poling v. State, 853 N.E.2d 1270, 1276-77 (Ind. Ct. App. 2006), which held that a sentence violates the Proportionality Clause when "offenses with identical elements [are] given different sentences." However, both the post-conviction court and the Court of Appeals observed that Matthews ruled that the two offenses do not, in fact, have the same elements. Matthews, 944 N.E.2d at 33. Since Matthews was controlling when appellate counsel filed his brief, he was not ineffective for failing to raise the proportionality argument. Held, judgment affirmed.

TITLE: Martin v. State

INDEX NO.: Y.4.c.

CITE: (1-4-02), Ind., 760 N.E.2d 597

SUBJECT: Claim of ineffective assistance of appellate counsel - failure to raise issue of supplemental jury instruction

HOLDING: D was not denied effective assistance of appellate counsel even though counsel failed to argue that Tr. Ct. erroneously gave accomplice liability instruction in response to jury question in middle of deliberations. Counsel listed issue in summary of arguments section in D's appellate brief, but counsel failed to address issue in argument section. Ct. concluded it was plausible that counsel chose to abandon this argument rather than simply failed to address it. Even assuming D's appellate counsel erroneously omitted argument, this single, isolated mistake did not render representation ineffective. Moreover, in light of overwhelming evidence presented at trial, counsel's failure to argue issue worked little prejudice & would have been rejected had it been presented on direct appeal. Held, transfer granted, denial of post-conviction relief affirmed.

RELATED CASES: Campbell, 3 N.E.3d 1034 (Ind. Ct. App. 2014) (trial counsel was not ineffective for failing to object to pattern jury instruction on intent, even though there was conflicting authority about the propriety of the instruction, because the Ind. S. Ct. has not addressed the tension between two Court of Appeals cases addressing the same issue); Burnside, App, 858 N.E.2d 232 (appellate counsel was ineffective for failing to challenge erroneous instruction which made a finding of self-defense a precondition to a finding of LIO, reckless homicide as fundamental error); Concepcion, App., 796 N.E.2d 1256 (no error in concluding that D's appellate counsel was not ineffective for inadequately challenging attempted murder instruction on appeal because counsel cannot be held ineffective for failing to anticipate or effectuate a change in the existing law).

TITLE: Mauricio v. State
INDEX NO.: Y.4.c.
CITE: (02-03-11), 941 N.E. 2d 497 (Ind. 2011)
SUBJECT: Ineffective assistance of appellate counsel - failure to raise sentencing claim
HOLDING: Appellate counsel was ineffective for not arguing that D was sentenced under the incorrect version of Ind. Code 35-50-2-3, which sets the penalty for murder. Ind. Code 35-50-2-3 was amended twice in the 1994 legislative session. The first amendment changed the presumptive sentence from forty to fifty years, but the second amendment did not incorporate changes of first amendment. In Smith v. State, 675 N.E.2d 693 (Ind. 1996), Court applied rule of lenity and held that second amendment, which set the forty-year presumptive sentence, should be used for offenses committed until statute was corrected in 1995.

Here, D committed his crime on July 17, 1994. State asked for maximum sentence, and judge imposed a fifty-year sentence, which he said was "the presumptive sentence." Although trial judge could have intended to sentence D to fifty years for reasons unrelated to the fifty-year presumptive sentencing statute, appellate counsel clearly should have raised this sentencing claim on direct appeal. Held, transfer granted, Court of Appeals' memorandum opinion vacated, denial of post-conviction relief reversed and remanded for new sentencing.

TITLE: Mays v. State
INDEX NO.: Y.4.c.
CITE: (3/15/2019), 120 N.E.3d 1070 (Ind. Ct. App. 2019)
SUBJECT: D failed to show prejudice from appellate counsel's deficient performance
HOLDING: Appellate counsel performed deficiently when she failed to include in the record on appeal a pretrial transcript relevant to the issue raised on appeal. However, D failed to show that he was prejudiced by his appellate counsel's deficient performance because had the Court of Appeals addressed the underlying issue of the untimely amendment of charges, he still would not have prevailed. The State's untimely amendment to add an attempted murder charge was substantive, but it did not prejudice his substantial rights pursuant to Ind. Code § 35-34-1-5(b), which retroactively applied to D's case. Held, denial of post-conviction relief affirmed.

TITLE: McCary v. State
INDEX NO.: Y.4.c.
CITE: (1-18-02), Ind., 761 N.E.2d 389
SUBJECT: Claim of ineffective assistance of appellate counsel
HOLDING: Appellate counsel was not ineffective for raising issue of ineffective assistance of trial counsel on direct appeal. In reviewing claim of ineffective assistance of appellate counsel, post-conviction Ct. must determine whether appellate counsel's performance was deficient & that, but for deficiency of appellate counsel, trial counsel's performance would have been found deficient & prejudicial. Ben-Yisrayl v. State, 729 N.E.2d 102 (Ind. 2000). D argued that appellate counsel should not have raised issue of trial counsel's ineffectiveness during direct appeal because insufficient facts were available to make claim. However, appellate brief & testimony at post-conviction hearing contradicted that argument. Held, transfer granted, Ct. App.' opinion at 739 N.E.2d 193 vacated, denial of post-conviction relief affirmed.

TITLE: Minor v. State

INDEX NO.: Y.4.c.

CITE: (2nd Dist., 7-22-03), Ind. App., 792 N.E.2d 59

SUBJECT: Ineffective assistance of appellate counsel - right to 12-member jury for Class C felony enhancement

HOLDING: On rehearing of opinion at 782 N.E.2d 459, Court held that D's appellate counsel was ineffective in failing to raise as issue that D was not tried by twelve-person jury. D was charged with residential entry, carrying a handgun without a license as a Class A misdemeanor, and Class C felony carrying handgun without a license by virtue of his prior conviction for robbery. In Henderson v. State, 690 N.E.2d 706 (Ind. 1998), which was issued more than two months before D's direct appeal was decided, Indiana Supreme Court held that when State's charging instrument charges D with Class C felony or higher, regardless of whether charge has been elevated by virtue of prior conviction, a twelve-person jury is required.

In reversing post-conviction court's denial of post-conviction relief as to D's Class C felony conviction, Court noted that reversal would have been required had appellate counsel *cited* Henderson. D has shown more than reasonable probability that, but for his appellate counsel's errors, result of his direct appeal would have been different. Although Henderson was issued after D's direct appeal was fully briefed, counsel had over two months in which to bring this additional authority to Court's attention before D's appeal was decided. Held, judgment affirmed in part and reversed in part.

TITLE: Miske v. State
INDEX NO.: Y.4.c.
CITE: (2-7-2020), 142 N.E.3d 439 (Ind. Ct. App. 2020)
SUBJECT: Ineffective assistance of appellate counsel - failure to raise common law double jeopardy claim based on multiple deadly force enhancements
HOLDING: Failure to raise a common law double jeopardy claim, when apparent from the record that a defendant's conviction and punishment for an enhancement of a crime was imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished, constitutes ineffective assistance of appellate counsel, even if appellate counsel raised a different double jeopardy issue on appeal.

Appellate counsel was ineffective for failing to raise two common law double jeopardy claims: 1) that his Class A felony enhancements to his rape and two criminal deviate conduct convictions were all based on the same additional behavior (deadly force) and therefore only one Class A felony conviction could stand while the other two should be reduced to Class B felonies, and 2) that the strangulation, domestic battery and battery convictions were all based on the same behavior that supported the Class A felony enhancement and therefore could not stand as independent convictions. The deadly force was not specified in the State's charging information nor identified in the trial court's instruction during the jury trial. Considering the generic charging information, evidence, final instructions and arguments of counsel, Court found a reasonable possibility the jury used the same evidence of deadly force occurring in living room to enhance the Class A felony enhancements to all three sexual assaults that came after in victim's bedroom. Rather than untangle the evidence to try to show separate and distinct behaviors accompanying each alleged act of sexual conduct, the State conflated the evidence and argued the very same behavior was used to enhance three Class A felonies. Had appellate counsel raised this significant and obvious issue, Defendant's 145-year sentence would have been significantly reduced. Held, denial of post-conviction relief reversed and remanded with instructions to vacate two of Defendant's Class A felony convictions, enter judgment of conviction as Class B felonies, and vacate remaining convictions based on very same behavior as the Class A felony enhancement.

TITLE: Montgomery v. State

INDEX NO.: Y.4.c.

CITE: (11/21/2014), 21 N.E.3d 846 (Ind. Ct. App. 2014)

SUBJECT: Erroneous grant of second direct appeal after finding ineffective assistance of appellate counsel

HOLDING: Post-conviction court erred when, following a determination that D received ineffective assistance of appellate counsel, it ordered that D be granted a second direct appeal and raise the issue previously unaddressed by his initial appellate counsel. Proper remedy in this situation is to vacate the conviction and sentence imposed thereon and, where proper, grant a new trial. Gray v. State, 841 N.E.2d 1210 (Ind. Ct. App. 2006). Under these circumstances, however, Court found that post-conviction court's error did not prejudice D's substantial rights. Addressing issue on merits, Court found no abuse of discretion in excluding evidence that another person committed the crime. Held, judgment affirmed in part, reversed in part on other grounds and remanded.

TITLE: Reed v. State
INDEX NO.: Y.4.c.
CITE: (11-14-06), Ind., 856 N.E.2d 1189
SUBJECT: IAC- failure to raise issue of first impression on appeal was ineffective; improper consecutive sentences based on single episode of criminal conduct
HOLDING: Failure to raise on appeal the aggregate length of consecutive sentences for two counts of attempted murder constituted ineffective assistance of appellate counsel. To evaluate the performance prong when counsel allegedly waived issues upon appeal, the courts apply the following test: (1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are clearly stronger than the raised issues. Here, D was sentenced to consecutive sentences for two attempted murder convictions for shooting at two different officers during a chase. At the time of D's appeal, the issue of whether attempted murder was a violent offense, thereby excluding it from the limitations on consecutive sentences set forth in Ind. Code 35-40-1-2(c), had not been decided. However, this did not excuse the failure to raise the issue. The issue would have been a clear winner. Failure to raise an issue of first impression where a plain reading of a statute demonstrates that D is entitled to immediate relief is sufficient to demonstrate that this unraised issue was significant and obvious from the face of the record. Further, this issue was clearly stronger than the issues raised on appeal.

D was prejudiced by appellate counsel's failure to raise the consecutive sentencing issue because the issue would have resulted in relief. At the time the attempted murders were committed, the statute limited the Tr. Ct.'s authority to impose consecutive sentences if the convictions were not for crimes of violence and arose out of an episode of criminal conduct. Ind. Code 35-50-1-2(c). Although the ability to recount each charge without referring to the other can provide additional guidance on the question of whether a D's conduct constitutes an episode of criminal conduct, it is not a critical ingredient in resolving the question. Rather, the Ct's. must look to the timing of the offenses. Here, there was time lapse of approximately five seconds between the first and last shots fired that served the basis of the two attempted murder convictions. Thus, this was one criminal episode. Held, transfer granted, judgment reversed & remanded to post-conviction Ct. with instructions to order new sentencing consistent with opinion; Ct. App.'s opinion at 825 N.E.2d 911 (Ind. Ct. App. 2005) *overruled*.

RELATED CASES: Daugherty, 52 N.E.3d 885 (Ind. Ct. App. 2016) (Appellate counsel ineffective for not challenging aggregate consecutive sentences of 33 years; even though events occurred at two locations, D's crimes were committed within a single episode because neither episode could be explained without referring to the other where officers stopped D for OWI, discovered illegal weapons, and when having brought him to hospital for treatment of his injuries, D threatened their lives); Gallien, 19 N.E.3d 303 (Ind. Ct. App. 2014) (D received ineffective assistance of appellate counsel for failing to raise "significant and obvious" argument regarding the consecutive sentencing limitation of Ind. Code 35-50-1-2 as applied to his two burglary convictions); Garrett, 992 N.E.2d 710 (Ind. 2013) (appellate counsel not ineffective for failing to raise double jeopardy actual evidence issue because it was not "clearly stronger" than issues he did raise); Brown, App., 880 N.E.2d 1226 (distinguishing Reed and holding standard is not whether case law subsequent to direct appeal can be reconstructed with prior case law, it is whether appellate counsel acted reasonably at time of direct appeal); Duncan, App., 862 N.E.2d 322 (where appellate counsel was also trial counsel, a post-conviction Ct. and the appellate Ct. reviewing a denial of post-conviction relief might well exercise a less stringent standard to correct prejudicial Tr. Ct. sentencing determination).

TITLE: Roe v. Flores-Ortega
INDEX NO.: Y.4.c.
CITE: 528 U.S. 470, 120 S. Ct. 1029 (2000)
SUBJECT: Ineffective assistance of counsel, appeals -- waiver, professional responsibility
HOLDING: Counsel has a constitutional duty to consult with the D about an appeal when there is reason to think either (1) that a rational D would want to appeal, or (2) that this D reasonably demonstrated to counsel that he was interested in appealing. To show prejudice when counsel fails to do so, the D must demonstrate that there is a reasonable probability that he would have otherwise timely appealed.

RELATED CASES: Idaho v. Garza, 139 S. Ct. 738 (2019) (the presumption of prejudice for Sixth Amendment purposes recognized in Flores-Ortega applies regardless of whether a defendant has signed an appeal waiver).

TITLE: Seeley v. State
INDEX NO.: Y.4.c.
CITE: (1st Dist., 2-10-03), Ind. App., 782 N.E.2d 1052
SUBJECT: Ineffective assistance of appellate counsel claim - not barred by res judicata
HOLDING: It was appropriate to address D's ineffective assistance of appellate counsel claim in appeal of denial of post-conviction relief, despite recent case law suggesting otherwise. Relying on Sims v. State, 771 N.E.2d 734 (Ind. Ct. App. 2002), State argued that res judicata barred D's ineffective assistance of appellate counsel claim, which was based on appellate counsel's failure to properly argue ineffective assistance of trial counsel. Sims based its opinion on S. Ct.'s decision in Allen v. State, 749 N.E.2d 1158 (Ind. 2001). Ct. disagreed with Sims, noting that a closer reading of Allen also leads to conclusion that S. Ct. did not intend to preclude claims of ineffective assistance of appellate counsel when clams of ineffective assistance of trial counsel are precluded.

Turning to merits of D's claim, D argued that appellate counsel was ineffective for failing to argue that search conducted on D's semi-trailer, which resulted in seizure of methamphetamine, was stale in that it took place at least 31 days after alleged offense. While passing of approximately one month between alleged conduct & probable cause hearing does raise some concerns, it is not dispositive of issue. Search was not for drugs which were used at that time, but rather for mirrors which contained drug residue; therefore, it was logical to conclude that mirrors could still contain drug residue & that they could still be located in semi- trailer which was used for storage. D did not establish that he was prejudiced by the performance of his trial counsel. Held, denial of post-conviction relief affirmed.

TITLE: Sharp v. State
INDEX NO.: Y.4.c.
CITE: (2nd Dist., 8-22-97), Ind. App., 684 N.E.2d 544
SUBJECT: Claim of ineffective assistance of appellate counsel - speedy trial issue
HOLDING: Appellate counsel was not ineffective for failing to raise speedy trial claim in direct appeal. Fact that D was not tried within 70-day period of CR 4(B)(1) in no way rendered result of trial fundamentally unfair or unreliable. D argued that his rights were violated because State sabotaged him by filing voluminous discovery response close to original trial setting, forcing him to choose between going to trial unprepared or waiving his right to speedy trial by moving for continuance. Ct. noted that case was complex, & additional time beyond seventy-day period gave defense counsel more time to prepare & probably rendered result more reliable. Because D failed to raise speedy trial claim on direct appeal, issue was waived. Holliness, 494 N.E.2d 305. Held, denial of post-conviction relief affirmed.

RELATED CASES: Attebury, App., 703 N.E.2d 175 (because there was no evidence in record to support or refute Tr. Ct.'s finding of congestion, Ct. remanded for D to pursue his claim of IAC via post- conviction relief).

TITLE: Thomas v. State

INDEX NO.: Y.4.c.

CITE: (10-22-03), Ind., 797 N.E.2d 752

SUBJECT: Ineffective assistance of appellate counsel claim - failure to preserve issue on record in direct appeal

HOLDING: In rape case, D was not denied effective assistance of appellate counsel based on counsel's failure to take steps necessary to assure that appellate record contained certain medical & laboratory results. Trial counsel failed to introduce two forensic reports containing information that doctors had found no injuries or signs of penetration immediately after examining rape victim. Appellate counsel knew of records, & D argued that counsel should have sought to suspend appeal & supplement record by means of special evidentiary proceeding pursuant to Davis v. State, 368 N.E.2d 1149 (Ind. 1997).

Ct. did not decide whether deficient performance of appellate counsel was established. Given direct testimony of victim that D sexually assaulted & penetrated her, Ct. could not conclude that presentation of omitted impeachment evidence would necessarily have required post-conviction Ct. to find a reasonable probability that result of direct appeal (i.e., outcome of trial) would have been different. In addition, fact that trial counsel did not present medical reports to jury may have been a reasonable tactical strategy, since reports could have had effect of corroborating & otherwise bolstering much of victim's testimony. Held, transfer granted, Ct. App.' decision at 776 N.E.2d 1227 summarily affirmed as to issues other than ineffective assistance of appellate counsel, denial of post-conviction relief affirmed. Boehm, J., dissenting, concluded there was a reasonable probability that omitted evidence would have affected jury's finding of penetration.

TITLE: Thomas v. State
INDEX NO.: Y.4.c.
CITE: (3rd Dist., 10-06-94), Ind. App., 640 N.E.2d 772
SUBJECT: No Ineffective Assistance of Appellate Counsel
HOLDING: Appellate attorney's failure to raise several issues included in motion to correct errors filed by trial counsel was not ineffective assistance of counsel (IAC). Trial counsel's motion challenged several evidentiary rulings of Tr. Ct. & contained request for new trial based on newly discovered evidence of two witnesses who were unavailable for trial. Challenged evidentiary rulings were well within Tr. Ct.'s discretion & D failed to demonstrate at MCE & PCR hearings that newly discovered evidence warranted new trial. Appellate counsel is not required to raise issues deemed frivolous or improper as matter of professional judgment, Ingram v. State, Ind., 508 N.E.2d 805. Ct. also rejected argument that appellate counsel was ineffective for failing to raise issue of ineffective assistance of trial counsel.

RELATED CASES: Winters, App., 698 N.E.2d 1197 (no IAC for appellate counsel's failure to raise issue of improper ex parte responses to jury questions); Hackett, App., 6661 N.E.2d 1231 (no IAC for failing to raise issue of State's nondisclosure of known & anticipated rebuttal witness); Holt, App., 656 N.E.2d 495 (although sensitive to legitimate IAC claims, Ct. is adverse to addressing issue of ineffective assistance of appellate counsel where it is merely raised as convenient vehicle to present arguments that have been waived).

TITLE: United States v. Poindexter
INDEX NO.: Y.4.c.
CITE: 492 F.3d 263 (4th Cir. 2007)
SUBJECT: Attorney ineffective for not filing appeal despite plea waiver; 7th Cir. disagrees
HOLDING: Fourth Circuit Court of Appeals held that an attorney renders constitutionally ineffective assistance of counsel if he fails to follow his client's unequivocal instructions to file a notice of appeal even though the client waived his right to appeal as part of a plea bargain. See also United States v. Tapp, 491 F.3d 263 (5th Cir. 2007) for similar holding issued on same day. Sixth Amendment claims of counsel ineffectiveness usually are subjected to two-part test that requires a showing that defense counsel's performance fell below objective standards of reasonableness and prejudiced the D. However, in Roe v. Flores-Ortega, 528 U.S. 470 (2000), the U.S. Supreme Court held that an attorney's failure to file a requested notice of appeal is per se ineffectiveness, regardless of whether the appeal would have merit or the failure to file the notice prejudiced the D. Neither the Fourth nor Fifth circuits found the appeal waivers agreed to by the Ds relevant to the outcome.

But see Nunez v. United States, 06-1014 (7th Cir. 2007) (disagreeing with these and other circuits and finding that ineffectiveness in filing a plea cannot make a valid waiver of appeal invalid, thus making the direct appeal moot.)

RELATED CASES: Idaho v. Garza, 139 S. Ct. 738 (2019) (defense lawyer's refusal to file requested appeal constitutes ineffective assistance, despite D's appeal waiver; see full review, this section).

TITLE: White v. State
INDEX NO.: Y.4.c.
CITE: 971 N.E.2d 203 (Ind. Ct. App. 2012) (07-27-12)
SUBJECT: Ineffective assistance of appellate counsel claim rejected
HOLDING: Appellate counsel was not ineffective for failing to challenge D's felony murder conviction under the proportionality clause of the Indiana Constitution--Article I, § 16. D's argument was based on Poling v. State, 853 N.E.2d 1270 (Ind. Ct. App. 2006), which held that the proportionality clause is violated where offenses with identical elements were given different sentences. D contended that the elements of his felony murder conviction were identical to the elements of involuntary manslaughter, as a Class C felony. However, State never alleged Class C felony robbery, the parties never argued Class C felony robbery, the jury was not instructed on and did not find D guilty of Class C felony robbery. The only robbery ever at issue was the Class A felony robbery alleged by State as its second count and found by the jury as an essential predicate to the State's felony murder charge. A Class A felony is not an element of involuntary manslaughter. Had D's appellate counsel raised this argument under guise of Poling, Court would have soundly rejected it. Held, denial of post-conviction relief affirmed.

RELATED CASES: Johnson, (6/1/2018) (Ind. Ct. App. 2018) (No appellate IAC for not arguing that D's sentence for Class B felony aggravated battery violated the Proportionality Clause of the Indiana Constitution; Matthews v. State, 944 N.E.2d 29 (Ind. Ct. App. 2001) controlled, as it held that aggravated battery and D felony criminal recklessness do not have same elements, so a Proportionality argument would have been groundless; see full review, this Section).

TITLE: Wieland v. State
INDEX NO.: Y.4.c.
CITE: (2nd Dist., 06-05-06), Ind. App., 848 N.E.2d 679
SUBJECT: Ineffective assistance of appellate counsel -- failure to amend brief
HOLDING: Appellate counsel was not ineffective for failing to amend D's brief on direct appeal in order to challenge his sentence in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). Apprendi, decided over three & one-half months after appellate counsel filed reply brief, held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, & proved beyond a reasonable doubt." Even after Apprendi was decided, there was no basis for appellate counsel to believe that Apprendi had any impact upon D's jury trial waiver & sentence. It was not until four years after Apprendi, when U.S. S. Ct. decided Blakely v. Washington, 542 U.S. 296 (2004), that there was any indication that the Apprendi decision had an impact on Indiana's sentencing scheme such that it would have affected D's sentence. See Smylie v. State, 823 N.E.2d 679, 687-90 (Ind. 2005) (appellate lawyer would not be ineffective for proceeding without adding a Blakely claim before Blakely was decided).

Thus, an Apprendi claim was not significant & obvious from the face of the record, & attorney did not perform deficiently in his representation of D on direct appeal. Moreover, even had D's attorney been permitted to amend his brief, D has not shown that outcome would have been different because, at that time, Apprendi had not been interpreted in a manner that would have invalidated D's sentence. Held, denial of post-conviction relief affirmed.

TITLE: Wilson v. State

INDEX NO.: Y.4.c.

CITE: (1/30/2018), 94 N.E.3d 312 (Ind. Ct. App. 2018)

SUBJECT: Ineffective assistance of appellate counsel - failure to raise unknowing waiver of counsel argument

HOLDING: Appellate counsel was ineffective for failing to argue that D, who proceeded pro se, was not properly advised of the dangers and disadvantages of self-representation as required by Faretta v. California, 422 U.S. 806 (1975) and Poynter v. State, 749 N.E.2d 1122 (Ind. 2001). The Tr. Ct. failed to ensure D's waiver of counsel was knowing, voluntary and intelligent by not asking any questions to ensure those requirements were met. Although neither D nor his stand-by public defender advised appellate counsel of this issue, which was developed during pre-trial hearings, such hearings are part of the record and appellate counsel had a duty to obtain and thoroughly review the entire record. Inasmuch as the Tr. Ct. made no Poynter advisement, it is highly likely the Court of Appeals would have reversed had appellate counsel raised this citically important issue. An unknowing waiver of counsel argument on appeal would have been stronger than the insufficient evidence argument raised by appellate counsel. Thus, D was prejudiced by his appellate counsel's ineffective representation, and the presence of standby counsel did not waive the Tr. Ct.'s duty to ensure his waiver of counsel met the necessary requirements. Court chastised Tr. Ct.'s "egregious lack of knowledge" on the right to proceed pro se and the procedures for waiving the right to counsel and advised the judge to review relevant caselaw "without delay." Held, denial of post-conviction relief reversed and remanded for further proceedings.

Y. RIGHT TO COUNSEL

Y.4. Ineffective assistance of counsel (IAC)

Y.4.d. IAC of post-conviction relief counsel

TITLE: Bahm v. State
INDEX NO.: Y.4.d.
CITE: (1st Dist., 5-29-03), Ind. App., 789 N.E.2d 50
SUBJECT: Post-conviction counsel - ineffective assistance
HOLDING: D's post-conviction counsel rendered ineffective assistance by failing to present any evidence, which deprived D of fair hearing. Post-conviction counsel's performance is reviewed under highly deferential standard. Baum v. State, 533 N.E.2d 1200 (Ind. 1989). While D's counsel appeared at post-conviction hearing & made legal arguments, representation failed to meet acceptable standard. Counsel presented no evidence to support D's position, he did not call any witnesses, submit any affidavits, or even submit direct appeal record. Counsel's failure to present evidence caused post-conviction Ct. to inappropriately take judicial notice of its records to determine whether D was subjected to double jeopardy & whether he received ineffective assistance from trial & appellate counsel. Therefore, Ct. reversed denial of D's request for post-conviction relief.

RELATED CASES: Bahm, App., 794 N.E.2d 444 (on rehearing, Ct. held that D can't argue his convictions should be reversed because of insufficient evidence or erroneous jury instructions; issues otherwise waived can be raised in PCRs as argument to support claims of IAC of trial or appellate counsel, but to argue an issue in post-conviction proceedings as a reason why counsel was ineffective, it must have been raised in PCR petition); Taylor, App., 882 N.E.2d 777 (where petitioner's counsel relied solely on court of Appeal's decision reversing convictions of Co-D who was tried jointly with D and failed to offer any evidence, including the transcript, petitioner was denied a procedurally fair proceeding).

TITLE: Baum v. State
INDEX NO.: Y.4.d.
CITE: (2/7/89), Ind., 533 N.E.2d 1200
SUBJECT: Ineffective assistance of counsel (IAC) - standard for post-conviction relief (PCR) hearing
HOLDING: Performance of counsel at PCR hearing need not meet Strickland standard. In 2d PCR petition, D alleges IAC of 1st PCR counsel. Tr. Ct. denied 2d PCR, finding that 1st PCR counsel was not ineffective. PCR 1, Section 1 authorizes D to challenge conviction & sentence. Thus, D may challenge performance of trial counsel. However, if this is not done in 1st PCR petition, claim is properly subject to waiver or res judicata. Tillman 511 N.E.2d 447. D may not circumvent these defenses by alleging IAC of 1st PCR counsel, since that is not cognizable ground for PCR relief. Further, any determination of merit of D's claim would require creation of legal standards to be applied in judging performance of PCR counsel. Right to counsel in PCR proceedings is not guaranteed by either U.S. or Ind. constitution. PCR proceeding is not generally regarded as criminal proceeding & does not call for public trial. Carman v. State (1935), 196 N.E. 78. It is thus not necessary to employ 6th Amend. standards when judging performance of PCR counsel, but rather merely to ensure that D was afforded due process of law. Ind. S. Ct. adopts standard that counsel need merely appear & represent D in procedurally fair setting resulting in judgment of Ct. Held, denial of PCR affirmed.

RELATED CASES: Jordan, 60 N.E.3d 1062 (Ind. Ct. App 2016) (though D's probation counsel failed to challenge the authority of the judge, who had earlier recused himself, counsel met the standards of due process and thus rendered adequate representation); Hill, 960 N.E.2d 141 (Ind. Ct. App 2012) (counsel's performance when representing D on a petition for permission to file a belated appeal must be analyzed under the lower standard enunciated in Baum and not the Strickland v. Washington standard; however, if D is granted permission to file a belated appeal, his attorney on appeal will be held to the standard set forth in Strickland); Curry, App., 643 N.E.2d 963 (states have no obligation to provide collateral avenue of relief and, when they do, fundamental fairness mandated by due process does not require that State supply lawyer as well as collateral review or provide procedures designed solely to protect right to appointed counsel which extends to first appeal of right).

TITLE: Graves v. State
INDEX NO.: Y.4.d.
CITE: (2nd Dist., 03-16-05), Ind., 823 N.E.2d 1193
SUBJECT: Claim of ineffective assistance of post-conviction counsel rejected
HOLDING: In post-conviction proceeding, petitioner was represented in a procedurally fair setting & thus did not receive ineffective assistance of counsel. The Ct. App. mistakenly relied on Zimmerman v. State, 436 N.E.2d 1087 (Ind.1982), which held that to obtain relief from a guilty plea when the hearing record is lost or destroyed, the petitioner must either reconstruct the record pursuant to Ind. App. Rule 31(A), or present evidence showing reconstruction is impossible. Ct. noted that Zimmerman was decided during a period where pleas were routinely set aside if the Tr. Ct. failed to recite any of the required advisements. However, this approach was *overruled* in White v. State, 497 N.E.2d 893 (Ind. 1986), which held a petitioner needs to plead specific facts to show by a preponderance of the evidence that the trial judge's failure rendered petitioner's decision to plead guilty involuntary or unintelligent.

Ct. noted the constitutions do not guarantee the right to counsel for post-conviction relief (PCR). The test in PCR is based on due course of law & "if counsel in fact appeared & represented the petitioner in a procedurally fair setting which resulted in a judgment of the Ct. "Baum v. State, 533 N.E.2d 1200 (Ind.1989). This test is necessary due to Cts. aversion to serial re-litigation & that at some point the value of finality begins to outweigh the benefits of mandating further review at the PCR stage. Here, Ct. found that petitioner's PCR counsel met this lower standard & "certainly did not abandon" petitioner. Held, transfer granted, Ct. App.' decision at 784 N.E.2d 959 vacated, denial of petitioner's second petition for post-conviction relief affirmed; Rucker, J., concurring in result without separate opinion.

RELATED CASES: Vickers, 963 N.E.2d 1135 (Ind. Ct. App. 2012) (absence of recording of guilty plea hearing to show D waived right to counsel was insufficient to grant PCR; court must examine other evidence in record, which here, did not establish that D met his burden to show he did not waive right to counsel); Hall, 849 N.E.2d 466 (petitioner alleging he was not advised of Boykin rights in guilty plea from which he is no longer serving sentence is not entitled to relief solely because guilty plea transcript is lost & cannot be reconstructed).

TITLE: McCann v. State

INDEX NO.: Y.4.d.

CITE: (4/7/83) Ind., 446 N.E.2d 1293

SUBJECT: Ineffective assistance of counsel (IAC) - failure to present favorable evidence at PCR hearing

HOLDING: Ct. finds PCR atty.'s statement on the record that he was not calling Tr. counsel because "we're putting a man on the spot as a professional & I just don't think that's appropriate" was entirely wrong & intolerable but affirms denial of PCR. Here, D contends his guilty plea was not knowing & intelligent & his Tr. atty. was IAC in advising him to plead guilty on the morning of Tr. & his PCR atty. was IAC for failing to call his Tr. atty. as witness (W) at PCR hearing. Letters from Tr. counsel were offered at PCR hearing to support D's claim. PCR Ct. refused to admit letters. PCR atty. then called Tr. counsel for limited purpose of identifying letters, asking no additional questions. Ct. finds record indicates knowing & intelligent plea. Since Tr. counsel could "have done appellant's case more harm than good" as a W at PCR hearing, D was not harmed by PCR atty.'s decision not to question him regarding guilty plea. Held, no error. DISSENT by Hunter would remand for a new PCR hearing. Hunter contends PCR atty.'s apparent lack of cognizance of rule that Ct. may presume atty. would not have corroborated petitioner's testimony regarding allegations of IAC if not called as PCR W (Cobbs 434 N.E.2d 883) & his misplaced deference to professional status of Tr. counsel (in violation of concepts of "independent professional judgment" & "zealous representation" embodied in CPR Canons 5 & 7) resulted in incomplete presentation of D's PCR petition.

RELATED CASES: Murphy 477 N.E.2d 266 (PCR counsel was not IAC for failing to call Tr. counsel, whom PCR atty. had alleged IAC (but then found effective), at PCR hearing).

TITLE: Patton v. State

INDEX NO.: Y.4.d.

CITE: (4th Dist. 4/26/89), Ind. App., 537 N.E.2d 513

SUBJECT: Ineffective assistance of counsel (IAC) - performance at post-conviction relief (PCR) hearing

HOLDING: PCR counsel's failure to apprise himself of caselaw & procedural rules & to gather & present requisite evidence was IAC, even under lesser standard for PCR. While PCR counsel will not be held to Strickland standards, D must have fair hearing in accordance with due process principles. Baum 533 N.E.2d 1200 (card at Y.4.d). Here, record of D's guilty plea proceeding was either lost or destroyed. In such case, D must either (1) attempt to reconstruct record pursuant to AR 7.2(A)(3) (c); or (2) present evidence establishing that reconstruction is not possible. Zimmerman 436 N.E.2d 1087. At initial PCR hearing, when state *cited* Zimmerman & AR 7.2(A)(3)(c), D's counsel indicated that he was not aware of them. Counsel then requested permission to file memorandum of law prior to Ct.'s ruling on petition, & PCR Ct. granted it, saying "Obviously you're going to look at 7.2(A)(3)(c)." Memorandum, which was filed nearly 2 months later, contained no mention of Zimmerman or AR 7.2, & continued no evidence intended either to reconstruct record or to show that it could not be reconstructed. Although he was made aware of case law & procedural rules, counsel failed to follow them & made no effort to present evidence from which Ct. could determine only critical issue before it. This was not "procedurally fair setting" required by Baum, since PCR Ct. had no record from which to review D's claim. Held, remanded to PCR Ct. to allow D to file new PCR petition. See Alston, App., 521 N.E.2d 1331. Conover, J. DISSENTS.

RELATED CASES: Vickers, 963 N.E.2d 1135 (Ind. Ct. App. 2012) (absence of recording of guilty plea hearing to show D waived right to counsel was insufficient to grant PCR; court must examine other evidence in record, which here, did not establish that D met his burden to show he did not waive right to counsel); Hall, 849 N.E.2d 466 (petitioner alleging he was not advised of Boykin rights in guilty plea from which he is no longer serving sentence is not entitled to relief solely because guilty plea transcript is lost & cannot be reconstructed).

TITLE: Poling v. State
INDEX NO.: Y.4.d.
CITE: (1st Dist.; 12-12-00), Ind. App., 740 N.E.2d 872
SUBJECT: IAC of PCR attorney - no prejudice
HOLDING: Although post-conviction relief attorney's failure to timely file record in appeal of denial of first petition for post-conviction relief may have fell below performance standard expected of post-conviction relief attorney, Petitioner was not prejudiced by attorney's failure. Petitioner must demonstrate that he was prejudiced by his counsel's actions before Ct. can find that his counsel was ineffective. To demonstrate prejudice, Petitioner must show that but for counsel's unprofessional errors, result of proceeding would have been different. Strickland v. Washington,466 U.S. 668, 104 S. Ct. 2052 (1984). Here, to establish prejudice from attorney's failure to perfect appeal, Petitioner must show that Ct. would have reversed post-conviction Ct.'s denial of his first petition for post-conviction relief. In first petition for post-conviction relief, Petitioner asserted fifteen errors. One issue had already been decided on its merits through interlocutory appeal of denial of motion for DNA testing in second petition for post-conviction relief. Seven issues were waived because Petitioner could have raised them on direct appeal. Three issues were barred by doctrine of res judicata because they were already addressed on direct appeal. Two issues were found to be meritless. Another issue did not require reversal because there was overwhelming evidence of guilt at trial, i.e., confession & witness. Finally, last issue would not have been addressed because Petitioner was asking Ct. to reweigh evidence. Thus, Petitioner was not prejudiced by post-conviction relief counsel's failure to perfect appeal because all fifteen issues in appeal were either waived, barred by res judicata, meritless, or harmless. PCR Ct. did not err in granting State's motion for summary disposition without hearing in Petitioner's second PCR case. Held, judgment affirmed.

Y. RIGHT TO COUNSEL

Y.4. Ineffective assistance of counsel (IAC)

Y.4.f. Conflicts (see also N.2.c)

TITLE: Commonwealth v. Croken

INDEX NO.: Y.4.f.

CITE: 733 N.E.2d 1005 (Mass. 2000)

SUBJECT: Romance with Prosecutor -- Conflict of Interest

HOLDING: Where defense attorney is having intimate relationship with attorney employed by prosecutor's office, lawyer should refuse to represent D if he reasonably believes that the representation would be adversely affected by relationship. If the lawyer determines that he can represent D vigorously, he must still disclose relationship to D and obtain informed consent.

TITLE: State v. Cottle

INDEX NO.: Y.4.f.

CITE: 194 N.J. 449, 946 A.2d 550 (N.J. 2008)

SUBJECT: Right to counsel: Prejudice not necessary where D's attorney under indictment in same county

HOLDING: New Jersey Supreme Court announced a criminal D who was represented by an attorney who was under indictment in the same county does not have to demonstrate actual prejudice to make out a violation of the right to counsel guaranteed by the New Jersey Constitution. In contrast to the U.S. Supreme Court's Sixth Amendment decision in Mickens v. Taylor, 535 U.S. 162 (2002), Court announced that an attorney has a per se conflict of interest when both he and his client are simultaneously being prosecuted by the same prosecutor's office and that, in the absence of a waiver, prejudice is to be presumed.

Y. RIGHT TO COUNSEL

Y.4. Ineffective assistance of counsel (IAC)

Y.4.f.1. In general

TITLE: Cox v. State
INDEX NO.: Y.4.f.1.
CITE: (3/21/85) Ind., 475 N.E.2d 664
SUBJECT: Ineffective assistance of counsel (IAC)- attorney is potential witness
HOLDING: Where defense counsel's testimony would have been cumulative, failure to withdraw & testify does not constitute IAC or a violation of DR 5-102(A). See Hodge 344 N.E.2d 293 (Tr. Ct. did not err in refusing defense counsel's request to testify; testimony was cumulative therefore any error was harmless). Here, central issue in case was how D knew precise sequence of wounds to decedent if he wasn't killer. D contends he learned sequence from defense counsel, who should have testified re D's independent knowledge. Ct. finds same information was established by 2 other witnesses; thus counsel's testimony was cumulative. Held, no error.

TITLE: Burger v. Kemp
INDEX NO.: Y.4.f.1.
CITE: 483 U.S. 776, 107 S. Ct. 3114, 97 L.Ed.2d 638 (1987)
SUBJECT: Conflict of interest
HOLDING: Representation of coindictees by 2 attorneys who are partners is not ineffective assistance of counsel. Representation of co-Ds by single attorney is not per se ineffective assistance of counsel. Holloway v. AR (1978), 435 U.S. 475, 482, 98 S. Ct. 1173, 1178, 55 L.Ed.2d 526. Prejudice is presumed "only if the D demonstrates that counsel `actively represented conflicting interests' & `that an actual conflict of interest adversely affected his lawyer's performance.' " Strickland v. Washington (1984), 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L.Ed.2d 674; see also Cuyler v. Sullivan (1980), 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed.2d 333. Here, D & coindictee were represented by 2 attorney-partners. Court finds representation did not so infect D's representation as to constitute active representation of competing interests. In smaller communities it is difficult to find competent lawyers for capital cases & Ds may actually benefit from joint efforts of partners who are presumed to understand requirement of complete loyalty to specific client. Nor does court find actual conflict of interest. D's attorney represented both coindictees on appeal & did not raise "lesser culpability" argument in brief. Court finds failure to raise this argument had sound strategic basis. Even had D established actual conflict of interest court finds joint representation did not adversely affect quality of representation he received. Blackmun, joined by Brennan, & Marshall, DISSENTS.

RELATED CASES: Jackson, 992 N.E.2d 926 (Ind. Ct. App 2013) (because D cited no evidence to substantiate conflict-of-interest claim that trial counsel was "helping" the State, Tr. Ct. had no duty to inquire about potential conflict; court was not required to appoint alternate counsel as it adequately advised D about dangers of proceeding pro se).

TITLE: Fox v. State
INDEX NO.: Y.4.f.1.
CITE: (1st Dist.; 10-19-99), Ind. App, 717 N.E.2d 957
SUBJECT: Ineffective assistance of counsel - not imputed conflict to members of firm
HOLDING: Trial counsel was not ineffective for failing to disclose to D that attorney in his firm was married to chief deputy prosecuting attorney working in county where he was tried. Lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent client in representation directly adverse to person who lawyer knows is represented by other lawyer except upon consent by client after consultation regarding relationship. Ind. Prof. Cond. R 1.8(I). However, disqualification stated in Rule 1.8(I) is personal & is not imputed to members of firms with whom lawyers are associated. Ind. Prof. Cond. R. 1.8(I) cmt. Thus, fact that defense attorney worked with attorney who was married to deputy prosecutor did not disqualify defense attorney or require defense attorney to disclose relationship to D. Held, judgment affirmed.

TITLE: Mickens v. Taylor
INDEX NO.: Y.4.f.1.
CITE: 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d. 291 (2002)
SUBJECT: Conflict of interest, IAC, effective assistance of counsel
HOLDING: D was convicted of murdering a fellow inmate and sentenced to death. Federal habeas counsel discovered that one of D's trial attorneys had also been counsel for the murdered inmate at the time of his death, and that the Tr. Ct. had not inquired into potential for prejudice to D from this conflict of interest. D argued that the federal habeas court should presume prejudice in this situation.

Held, where the Tr. Ct. failed to inquire into defense counsel's conflict of interest, federal habeas courts will not presume that the D was prejudiced for purposes of a claim of ineffective assistance of counsel.

RELATED CASES: Cuyler v. Sullivan, 446 U.S. 335 (1980) (sets forth standard to follow where ineffectiveness claim is based on counsel's conflict of interest).

TITLE: Strong v. State
INDEX NO.: Y.4.f.1.
CITE: (5/22/89), Ind., 538 N.E.2d 924
SUBJECT: IAC - counsel forced to testify
HOLDING: Requiring defense counsel to read transcript of interview with state's child witness at competency hearing did not materially interfere with function as advocate for D. D faced multiple charges in connection with death of grandchild. At competency hearing for another 7-year-old grandchild, one of D's 2 attorneys was called by state to read transcript of interview with child. D argues that this allowed state to use defense counsel's work product & trial preparation, infringing her right to effective assistance. D does not claim counsel was required to divulge confidential communications. Counsel had already provided state with copy of transcript he read from. Content of testimony did not provide any elements of charged offenses, nor did it constitute sole basis on which child witness was found competent to testify. Testimony occurred outside presence of jury, & D's co-counsel actively participated. Requiring counsel to testify, by itself, does not constitute material interference with function as advocate. US v. Freeman (CTA 9 1975), 519 F.2d 67. Held, conviction affirmed.

TITLE: Wheat v. U.S.
INDEX NO.: Y.4.f.1.
CITE: 486 U.S. 153, 108 S. Ct. 1692, 100 L.Ed.2d 140 (1988)
SUBJECT: Choice of counsel / waiver of conflict-free representation
HOLDING: Purpose of guaranteeing assistance of counsel "is simply to ensure that criminal Ds receive a fair trial." Strickland v. Washington (1984), 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674. In evaluating 6th Amend. claims, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." U.S. v. Cronic (1984), 466 U.S. 648, 657, 104 S. Ct. 2039, 80 L.Ed.2d 657, n. 21. While right to select & be represented by one's preferred attorney is comprehended by 6th Amend., essential aim of 6th Amend. is to guarantee effective advocate for each D rather than to ensure that D will inexorably be represented by lawyer whom D prefers. Here, two days prior to trial D moved to be represented in complex drug conspiracy by same attorney who represented co-Ds. D & all affected co-Ds waived conflict of interest. Tr. Ct. refused to permit substitution of counsel. Courts have interest in ensuring that criminal trials are conducted within ethical standards & that legal proceedings appear fair. Institutional interest in rendition of just verdict may be jeopardized by unregulated multiple representation. Waiver by D does not solve problem - appellate courts have entertained claims of ineffective assistance from Ds who specifically waived right to conflict-free counsel. [Citations omitted.] Held, Tr. Ct. must recognize presumption in favor of D's counsel of choice, but presumption may be rebutted by showing of actual conflict or serious potential for conflict. District Ct. ruling which denied substitution of counsel upheld. Marshall, joined by Brennan, DISSENTING; Stevens, joined by Blackmun, DISSENTING.

RELATED CASES: cf. Luis, 136 S. Ct. 1083 (U.S. 2016) (right to hire counsel of choice is fundamental right); Kaley, 134 S. Ct. 1090 (2014) (while right to hire counsel of choice is "vital interest" and at “the root meaning” of the 6th Amendment, there is no such right to counsel - whether chosen or not - to challenge a grand jury's finding of probable cause; *ex parte* proceedings are adequate for such proceedings and power to find probable cause vests solely in a grand jury).

Y. RIGHT TO COUNSEL

Y.4. Ineffective assistance of counsel (IAC)

Y.4.f.2. Multiple representations3

TITLE: Burse v. State
INDEX NO.: Y.4.f.2.
CITE: (12/10/87) Ind., 515 N.E.2d 1383
SUBJECT: Ineffective assistance of counsel (IAC) - conflict of interest
HOLDING: Counsel's representation of both D & D's family is not IAC where conflict did not adversely affect voluntariness of guilty plea. In general, to prove IAC, D must show: (1) that counsel's performance was deficient, & (2) that deficient performance prejudiced defense. Strickland v. Washington (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674. Where D pleads guilty, as prejudice D must show reasonable probability that, but for IAC, he/she would not have pled guilty. Hill v. Lockhart (1985), 474 U.S. 52, 106 S. Ct. 366, 88 L.Ed.2d 203. Where conflict of interest is raised as basis for IAC, D must show actual conflict which adversely affected counsel's performance. Cuyler v. Sullivan (1980), 446 US. 335, 100 S. Ct. 1708, 64 L.Ed.2d 333. Consequently, when guilty plea is involved, D must show actual conflict of interest which adversely affected voluntariness of guilty plea. Here, actual conflict existed since counsel represented both D & D's family. Counsel negotiated immunity from prosecution for family, in exchange for information which led to recovery of murder weapon. At trial, murder weapon & family's testimony would have been damaging to D, & counsel would have been somewhat constrained in cross-examination. However, D did not testify that this conflict affected his decision to plead guilty. D had confessed each crime to police & faced maximum sentence of 280 years. Through his plea, D received minimum, 30 years. Held, IAC not established; conviction affirmed.

RELATED CASES: McGillam, App., 516 N.E.2d 1112 (in PCR petition, D alleged IAC because D's counsel was also city attorney; PCR denial upheld, since D did not show actual conflict affecting outcome).

TITLE: Griffin v. McVicar
INDEX NO.: Y.4.f.2.
CITE: 84 F.3d 880 (7th Cir. 1996)
SUBJECT: Conflict of Interest -- Ineffective Assistance of Counsel (IAC)
HOLDING: Attorney representing D and co-D rendered IAC by pursuing joint alibi defense and ignoring alternative defense which would have given D better chance of acquittal. When D was first charged, he admitted his presence at scene of murders, but claimed to be innocent by-stander while co-D was shooter. Statements of eyewitnesses conflicted and rendered support for this 'by-stander' defense. After attorney assumed representation of both D and co-D, however, D agreed to testify in support of joint alibi defense. Co-D had priors and could not testify. Facts here demonstrate actual conflict of interest, showing specific instances where counsel could have and would have done something differently had he represented only D. Counsel had information suggesting availability of defense focused on discrediting eye-witness identification of D as shooter and shifting blame to co-D. He was aware of D's initial statement placing both him and co-D at scene and describing co-D as shooter. He was also aware of conflicts in eye-witness statements and weakness of evidence that D was a shooter. To render effective assistance, counsel should have pressed D as to validity of alibi, and discussed with him the possibility of a bystander defense or pointed out the comparative weakness of the state's case against him versus co-D. While by- stander defense was not promising, joint alibi defense was hopeless.

TITLE: Holleman v. State
INDEX NO.: Y.4.f.2.
CITE: (3d Dist. 10-17-94), Ind. App., 641 N.E.2d 638
SUBJECT: No ineffective assistance of counsel (IAC) - conflict of interest not fundamental error
HOLDING: Post-conviction Ct. did not err in denying relief to D who claimed ineffective assistance of trial & appellate counsel. D's appointed counsel was unable to cross-examine D's witness at trial because witness was instrumental in establishing alibi defense for co-D, who was also represented by D's counsel. Because error was not raised on direct appeal, it is not eligible for review unless it was fundamental, Capps v. State (1992), Ind. App., 598 N.E.2d 574. Despite conflict of interest & presumed prejudice from dual representation, fact that D was convicted only of crime to which he confessed & that properly admitted confessions established his guilt rendered error harmless. Because confessions amply support conviction, trial counsel was not ineffective for failing to cross-examine witness & appellate counsel was not ineffective for failure to raise error on appeal.

Ct. also rejected claim that trial counsel failed to preserve error as to admission of his confessions, noting that issue was vigorously raised & determined adversely to him on direct appeal. Post-conviction procedures do not afford D opportunity for "super appeal," & post- conviction Ct. will not review issues which were or could have been raised on direct appeal, Weatherford v. State (1993), Ind., 619 N.E.2d 915.

RELATED CASES: Sada, App., 706 N.E.2d 192 (record failed to support conclusion that trial counsel's joint representation of co-Ds in drug dealing & conspiracy prosecution resulted in actual prejudice to D).

TITLE: Latta v. State
INDEX NO.: Y.4.f.2.
CITE: (3-16-01), Ind., 743 N.E.2d 1121
SUBJECT: Joint representation of Ds - waiver; conflict of interest vs. right to counsel of one's choice
HOLDING: Counsel's joint representation of both D & Co-D is not per se violation of constitutional guarantee of effective assistance of counsel. Hanna v. State, 714 N.E.2d 1162 (Ind. Ct. App 1999). Moreover, under some circumstances D may properly waive right to conflict-free representation. Ward v. State, 447 N.E.2d 1169 (Ind. Ct. App 1983). Here, D & her husband were charged with felony murder, tried jointly, & were represented by same counsel. State moved for mistrial, arguing, among other things, that testimony of State's witness had given rise to conflict of interest. *Citing* Wheat v. United States, 486 U.S. 153 (1988), Ct. noted that Tr. Ct. must be given latitude in its efforts to reconcile conflicting Sixth Amendment rights to counsel of one's choice & to competent counsel. Important step in evaluating whether actual conflict or serious potential for conflict is sufficient to override D's express choice of counsel is assessment of D's apprehension of dangers of joint representation. Presumption of deference to D's choice is strengthened by confidence that it is informed & individual choice by D.

Ct. held that D's waiver of conflict-free representation should be presumed valid, & burden in post-conviction proceedings is on D to prove otherwise. If there is evidence supporting conclusion of uninformed or improperly influenced waiver, post-conviction Ct. must assess D's appreciation of risks. If knowing & voluntary, waiver is at least entitled to very strong presumption of validity & may be conclusive because it invokes her right to counsel of her choice. If waiver does not preclude subsequent claim of ineffective assistance, there remains issue of whether actual conflict of interest adversely affected lawyer's performance. Cuyler v. Sullivan, 446 U.S. 335 (1980). Here, Tr. Ct.'s questioning of D was quite brief, with conclusory testimony at trial that D & Co-D were informed of & discussed risks associated with joint representation. Ct. found that D's counsel was ineffective on other grounds but cautioned Tr. Ct.'s in similar circumstances to inquire in greater detail as to D's understanding of potential areas of conflict. Here, these included risks that defenses may not be fully aligned & that evidence exculpatory of one may be inculpatory of another.

Ct. App. erred in applying fundamental error analysis in this case, as Cuyler expressly sets forth standard to follow where ineffectiveness claim is based on counsel's conflict of interest. Because it involves balancing conflicting Sixth Amendment interests, merits of claim may depend on circumstances leading up to D's consent to joint representation, but it has nothing to do with fundamental error. Held, transfer granted, Ct. App.' opinion at 722 N.E.2d 389 vacated; denial of post-conviction relief reversed & remanded for new trial.

RELATED CASES: Jones, 151 N.E.3d 790 (Ind. Ct. App. 2020) (D failed to show that the joint representation resulted in an actual conflict of interest that adversely affected counsel's performance), Edwards, App., 807 N.E.2d 742 (D, convicted of sexual misconduct with a minor in a joint bench trial with her husband, was not denied effective assistance of counsel where the same attorney represented them both).

TITLE: Tate v. State
INDEX NO.: Y.4.f.2.
CITE: (2d Dist. 12/3/87) Ind. App., 515 N.E.2d 1145
SUBJECT: Ineffective assistance of counsel - conflict of interest
HOLDING: Tr. Ct. committed fundamental error in allowing same public defender to represent co-Ds during joint trial. Where no timely objection was made, D must show that an actual conflict adversely affected his/her lawyer's performance. Cuyler v. Sullivan (1980), 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed.2d 333. Some states require only an actual conflict, but IN holds to requirement of adverse effect, as well. "Actual conflict" component refers to competing interests themselves; here, focus would be on co-D's relationships with one another. "Adversely affected performance" component refers to attorney's conduct. Where actual conflict of litigation interests between co-Ds exists, attorney's performance will necessarily be impaired as to at least one D. In such cases, record must be searched to determine: (1) whether attorney at different times represented different interests, in which case reversal would be warranted for all, or (2) whether attorney favored one client over other, in which case performance is not adversely affected as to favored client. Here, each D attempted to clear himself by pointing finger at co-D, creating actual conflict. Record shows attorney did not consistently favor either D, so that his performance was necessarily impaired as to both. Finally, state argues Ds must show prejudice, *citing* Strickland v. Washington (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674. However, in Strickland, the U.S. S. Ct. wrote that, "Prejudice is presumed when counsel is burdened by an actual conflict of interest." Held, reversed & remanded for new trial. Buchanan, J., DISSENTS.

TITLE: Whittle v. State
INDEX NO.: Y.4.f.2.
CITE: (8/31/89), Ind., 542 N.E.2d 981
SUBJECT: Ineffective assistance of counsel (IAC) - conflict; multiple representation
HOLDING: Defense counsel's representation of motorcycle club membership, including 5 co-Ds & 2 prosecution witnesses, was not IAC. D was charged with murder & conspiracy to commit murder & was convicted of manslaughter & conspiracy to commit battery with deadly weapon. Charges arose from shoot-out between rival motorcycle clubs outside co-Ds' clubhouse. Evidence shows that club leader obtained counsel to represent all club members involved in shoot-out. D did not object to joint representation at trial but argues on appeal that this created conflict of interest leading to IAC. Where no timely objection is made, D must show actual conflict which adversely affected representation. [Citations omitted; see other cards at Y.4.f.2.] Here, 5 co-Ds were all charged with same acts & all claimed same defense. None were singled out as more culpable than others. Consequently, their interests did not conflict. D alleges conflict between interests of co-Ds & 2 members who became prosecution witnesses, & further alleges that defense counsel "obtained" immunity for these 2 members. However, evidence shows that they were called as prosecution witnesses & refused to testify on 5th Amend. grounds. State offered each immunity, & Tr. Ct. granted immunity & ordered them to testify. Defense counsel's only involvement was to inquire whether immunity would extend to other jurisdictions. Testimony of these witnesses was in fact consistent with co-Ds' theory of defense. Held, joint representation did not result in IAC; convictions affirmed.

RELATED CASES: See also Gray 579 N.E.2d 605 (finding no prejudice).

TITLE: Williams v. State
INDEX NO.: Y.4.f.2.
CITE: (3d Dist. 11/2/88), Ind. App., 529 N.E.2d 1313
SUBJECT: Ineffective assistance of counsel (IAC) - conflict of interest
HOLDING: Joint representation of D & co-D by same attorney constituted fundamental error. D & co-D were charged with robbery resulting in serious bodily injury & were represented by same lawyer. On day both were to be tried, co-D pled guilty to lesser charge of attempted theft. At guilty plea hearing, co-D stated that he knew D had gun, but did not know of robbery until after it occurred, at which point he drove car away. At co-D's sentencing, counsel argued that co-D was less culpable than D, & that his involvement resulted from having associated with D, who was potentially dangerous. At D's sentencing, held same day, counsel argued unsuccessfully against enhancement. In PCR petition, D claims IAC because of conflict of interest. Joint representation is not per se IAC. Holloway v. AR (1978), 435 U.S. 475, 98 S. Ct. 1173, 55 L.Ed.2d 426. Absent timely objection, D must demonstrate that actual conflict of interest adversely affected attorney's performance. Cuyler v. Sullivan (1980), 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed.2d 333. To raise this error for the first time in PCR, it must be fundamental error; existence of actual conflict precluding counsel's undivided loyalty must be plainly shown. Armstrong v. People (1985), Colo., 701 P.2d 17. Actual conflict of interest existed between D & co-D, & counsel's advancing argument that co-D less culpable clearly impaired his representation of D. Prejudice is presumed. Strickland v. WA (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674; Cuyler, *supra*; Tate 515 N.E.2d 1145. Held, PCR denial reversed & cause remanded for new trial. Hoffman, J., DISSENTS.

RELATED CASES: Holleman, App., 641 N.E.2d 638 (while not every case of dual or successive representation creates conflict of interest, any divergence of interests between Ds requires separate counsel).

Y. RIGHT TO COUNSEL

Y.5. Court's duty to inquire re nature of D's dissatisfaction with counsel

TITLE: State v. Johnson
INDEX NO.: Y.5.
CITE: (2nd Dist.; 8-9-99), Ind. App., 714 N.E.2d 1209
SUBJECT: Ct.'s duty to inquire into effective assistance of counsel - use of thirteenth juror
HOLDING: Tr. Ct. properly set aside jury's verdict & ordered new trial by using thirteenth juror rule. Ind. Cts. have inherent power to grant new trials *sua sponte* & are expressly authorized to do so by Ind. Trial Rule 59(B). Preamble to T.R. 59(J) provides in relevant part: "Ct., if it determines that prejudicial or harmful error has been committed, shall take such action as will cure error. . ."Although Tr. Ct. must enter special finding of facts when it grants new trial based on weight of evidence, there is no Ind. authority requiring Tr. Ct. to enter special findings when it grants new trial on grounds that do not contemplate weighing & sifting evidence. Appellate Ct. will reverse Tr. Ct.'s decision to grant new trial only if decision is without reason or is based upon impermissible reasons or considerations. Here, twenty days after verdict, defense counsel moved for mistrial based on his ineffective representation. Ct. set aside verdict based on manifest injustice created by defense counsel's performance. Tr. Ct. was not required to enter special finding of facts because it did not vacate judgment & order new trial based upon finding that verdict was against weight of evidence. Rather, on its own motion Tr. Ct. determined that new trial was warranted to prevent manifest injustice. Because record presented ample evidence of trial counsel's deficient performance, Tr. Ct. did not abuse its discretion by granting new trial in order to cure prejudicial or harmful error that was committed. Held, judgment affirmed; Brook, J., concurring on basis that criminal defense attorneys may not purposely provide ineffective assistance & expect new trial granted.

TITLE: State v. Jones
INDEX NO.: Y.5.
CITE: 2007 WI. App. 248, 742 N.W.2d 341 (Wis. Ct. App. 2007)
SUBJECT: Hearing-impaired indigent entitled to counsel with whom can communicate
HOLDING: Wisconsin Court of Appeals held a hearing-impaired indigent D whose appointed attorney was not allowed to withdraw despite purported problems in communicating with his client is entitled to an evidentiary hearing to determine whether his client is entitled to an evidentiary hearing to determine whether the impasse was so serious as to entitle him to a new trial. At a hearing on D's motion to withdraw, the Tr. Ct. did not ask D how his hearing impairment might have affected his ability to communicate with his lawyer, even though D had said he needed an interpreter to do so. Instead, the Tr. Ct. focused on the possibility of a sign-language interpreter at trial and elicited D's testimony that he did not think that his counsel was acting in his interests. Tr. Ct. denied the motion to withdraw, stating that D had no right to counsel of his choice, and he was not being denied his Sixth Amendment right to counsel. State v. Lomax, 432 N.W.2d 89 (Wis. 1988) made clear that an indigent D is entitled to a lawyer with whom he can communicate. Court held that the Tr. Ct. in this case failed to conduct an adequate inquiry into the communication issue and that D is entitled to a hearing on the matter in the Tr. Ct.

Y. RIGHT TO COUNSEL

Y.6. Right to other assistance (Ake v. Oklahoma)

TITLE: Davidson v. State
INDEX NO.: Y.6.
CITE: (8/29/90), Ind., 558 N.E.2d 1077
SUBJECT: Right to funds for expert assistance
HOLDING: Tr. Ct. did not abuse its discretion in denying D's request for funds to hire numerous experts to assist in preparing defense & in preparing & presenting mitigation at capital sentencing phase. D was charged with murdering 2 of her young children, & state sought death penalty. Prior to trial, D petitioned Tr. Ct. for funds to hire expert on severance of charges, competent co-counsel, investigators, polygraph expert, consulting psychologist, jury consultant, civil engineer, & sociologist. With exception of co-counsel, Tr. Ct. denied these requests. After D was found guilty, she filed motion to hire psychiatrist to aid in identifying mitigating factors, claiming she suffered from emotional disorders. Tr. Ct. denied this motion, as well. On appeal, D argues denial of funds to hire these experts impinged upon her 6th Amend. rights of effective cross-exam & compulsory process & her 8th Amend. right to present mitigating evidence in capital sentencing process. An accused, however, is not constitutionally entitled at public expense to any & all types of experts he/she desires. This is left to discretion of Tr. Ct. Wisehart, 484 N.E.2d 949. D fails to specify how her case would have benefited from use of requested experts. Whether to sever charges is not particularly susceptible to illumination by expert; D's counsel conducted effective cross-exam; & D offered testimony of psychologist at sentencing hearing. Absent showing of prejudice, Supreme Ct. finds no abuse of discretion. Held, convictions affirmed.

NOTE: Supreme Ct. does not discuss Ake v. Oklahoma, (1985), 470 U.S. 68, 105 S. Ct. 1087, 84 L.Ed.2d 53, & its due process analysis.

TITLE: Doe v. Superior Court of LA County
INDEX NO.: Y.6.
CITE: 39 Cal.App.4th 538 (Cal. Ct. App. 1995)
SUBJECT: Indigent D's Right to Assistance of Experts: Not Limited to Court's "Approved" Panel
HOLDING: Indigent capital D in need of appointed psychiatric expert is not limited to those on court's approved panel if no one on panel has expertise within specialized area pertinent to defense. D here sought expert assistance in areas of battered spouse syndrome and PTSD. Tr. Ct. ruled that she could select only from among those on panel. Court of Appeals disagreed, finding that D had due process right to access to competent mental health professional which could be met only by professional with expertise in areas pertinent to her case. While D does not necessarily have right to expert of her choosing, she has a right to competent expert who will conduct appropriate examination and assist in evaluation, preparation, and presentation of defense.

Note: You should look at this case if you are litigating whether your client is mentally retarded pursuant to Ind. Code 35-36-9-1, et seq.

TITLE: Graham v. State
INDEX NO.: Y.6.
CITE: (11/29/82) Ind., 441 N.E.2d 1348
SUBJECT: D's right to expert assistance
HOLDING: Due process does not require that any expert D believes helpful to defense must be appointed at public expense. Smith v. Baldi, (1953), 344 U.S. 561, 73 S. Ct. 391, 97 L. Ed. 549; Underhill, 428 N.E.2d 759; Himes, 403 N.E.2d 1377; Roberts, 373 N.E.2d 1103. Entitlement to such assistance generally rests in discretion of Tr. Ct. Determination must be made in context of case & only clear abuse of that discretion will be deemed denial of due process. Griffin, 415 N.E.2d 60; Himes. Here, D requested appointment of psychiatrist (no insanity defense; D claimed lack of ability to form requisite intent because of alcohol consumption over five-day period). D contended equal protection due process & effective assistance of counsel rights were denied because he could not hire & Tr. Ct. did not appoint psychiatrist. Ct. finds no substantial question existed at trial requiring expert testimony to be resolved. Held, no abuse of discretion.

TITLE: McWilliams v. Dunn
INDEX NO.: Y.6.
CITE: (6/19/2017), 137 S. Ct. 1790 (2017)
SUBJECT: Alabama violated mentally ill defendant's rights under Ake v. Oklahoma
HOLDING: Where a defendant's mental health is at issue, the State must provide access to a mental health expert to effectively "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake v. Oklahoma, 470 U.S. 68, 83 (1985). Here, the District Court's and Circuit court's finding that the State of Alabama met this standard is contrary to clearly established federal law.

Defendant was charged with rape and murder. Alabama's "Lunacy Commission" found he was competent to stand trial and that he was not suffering from mental illness at the time of the alleged offense. Defendant was convicted of murder, and the jury recommended the death penalty. While awaiting the sentencing hearing, the Tr. Ct. granted Defendant's request for a neurological examination, which was conducted by Dr. John Goff, a neuropsychologist employed by the State's Department of Mental Health. Dr. Goff filed his report just two days before the sentencing hearing. He concluded that Defendant was likely exaggerating his symptoms but also found genuine neurological problems. Also just before the hearing, Defendant received updated records from the Commission's evaluation and previously subpoenaed records from the Alabama Department of Correction. Defendant asked for a continuance and the appointment of an expert to review Dr. Goff's findings and the most recently produced records. The Tr. Ct. denied the request and sentenced Defendant to death. The State courts affirmed Defendant's conviction and sentence, and the federal courts found that the Alabama met its obligations under Ake.

The federal courts' finding that Alabama met its obligation under Ake is contrary to clearly established federal precedent. Even if Alabama met the first Ake requirement when it appointed Dr. Goff to examine Defendant, it failed to satisfy the requirement that an expert "assist in evaluation, preparation, and presentation of the defense." Id., 470 U.S. at 83. No expert helped evaluate Dr. Goff's report or Defendant's extensive medical records and translate this information into a legal strategy. No expert helped prepare and present arguments that might have explained that Defendant's purported malingering was not necessarily inconsistent with mental illness. No expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing.

On remand, the 11th Circuit shall determine whether the Alabama courts' error had the "substantial and injurious effect or influence" required to grant habeas relief. See Davis v. Ayala, 135 S. Ct. 2187, 2198 (2015). Held, cert. granted, opinion at 634 Fed. Appx. 698 reversed, and case remanded. Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ; Alito, J., dissenting, joined by Roberts, C.J., and Thomas and Gorsuch, JJ, arguing that majority decided the case on grounds not argued by the parties.

RELATED CASES: Ake, 470 U.S. 68 (1985) (trial court denied D's rights under Ake because even though an expert evaluated D, no expert helped D evaluate neurological analysis, D's extensive medical records and translate this information into a legal strategy; no expert helped D prepare direct or cross-examination of witnesses, or testified at the judicial sentencing hearing); Hashfield, 210 N.E.2d 429 (Ct. appointed three physicians to assist D in addition to psychiatrists appointed pursuant to insanity statute); Jones, 524 N.E.2d 1284 (within Tr. Ct.'s discretion to determine whether requested service would be needless, wasteful or extravagant).

TITLE: Mitchell v. State
INDEX NO.: Y.6.
CITE: (7/18/89), Ind., 541 N.E.2d 265
SUBJECT: Ex parte hearing on motion for hiring of experts
HOLDING: Tr. Ct. did not err in denying D's request to be relieved of responsibility of serving state with motions for employment of experts, etc. On appeal, D argues that this requirement provided state with continuous source of information on course of defense which would not have been available had D not been indigent. Rights of poor to equal access to Ct's. & to have counsel appointed in criminal prosecutions is fundamental. [Citations omitted.] However, absolute equality in extending these rights is not required, & Ct. can subject them to rational regulation & restriction. All that is required is that D's access to Ct. be meaningful & D's counsel must simply be able to provide legal assistance which falls within reasonable norms of professional representation. Tr. Ct. has authority to determine when & how public funds shall be made available to defense. Tr. Ct. here could reasonably have believed that correct determination would be facilitated through adversarial process. Further, this type of information is routinely available to state through broad reciprocal discovery. Requirement that D serve state with notice of motions for hiring of experts did not impermissibly impinge upon right to access to Ct. or to have effective assistance of counsel. Held, conviction affirmed.

NOTE: See Directory of Expert Witnesses for fuller discussion of issues involved.

TITLE: Schuck v. State
INDEX NO.: Y.6.
CITE: (5/4/2016), 53 N.E.3d 571 (Ind. Ct. App. 2016)
SUBJECT: Private attorney may bypass local P.D. office for public fund request
HOLDING: D's private attorneys, who wanted to obtain public funds to hire an investigator, were not required to first get permission from the local public defender's office before asking the Tr. Ct. for public funds.

Private attorneys agreed to represent D pro bono in his murder case if the Tr. Ct. would approve funds to hire an investigator, who was needed to question a witness who may have committed the crime. The attorneys did not get preapproval from the local public defender's office before asking the Tr. Ct. for funds. The State claimed this failure barred the request for public funds.

Preapproval from the local public defender's office was not necessary. Indiana Public Defender Commission's Standard for Indigent Defense Services in Non-Capital Cases, Standard N, addresses situations like these, where a person has hired private counsel but cannot afford to pay for an investigator necessary to prepare a defense. See http://www.in.gov/ judiciary/pdc/files/indigent-defense-non-cap.pdf. Nothing in the Standards indicates that, under such circumstances, the local public defender's office must consent to the request. Instead, funds are eligible simply on request to the Tr. Ct. ("Such services are eligible for reimbursement from the public defense fund if authorized by the court.") Held, judgment reversed and matter remanded for Tr. Ct. to hold a hearing to determine the amount of public funding that should be awarded to the attorneys.

TITLE: Scott v. State
INDEX NO: Y.6.
CITE: (06/11/92), Ind., 593 N.E.2d 198
SUBJECT: Indigent Ds' right to expert assistance
HOLDING: S. Ct. granted transfer to outline relevant factors Tr. Ct's. should consider in deciding whether indigent Ds' requests for expert assistance at public expense should be granted. Appointment of expert assistance is within Tr. Ct.'s discretion, and D bears burden of demonstrating need. While determination is case sensitive, Ct. set out some factors to consider: (1) presence of specific showing of what expert would provide for D; (2) whether proposed expert's services would bear on an issue which is generally regarded to be one for which expert opinion would be necessary; (3) probability that proposed expert could demonstrate that which the D desires; (4) whether expert services will go toward answering substantial question or simply ancillary one; (5) how technical evidence is; (6) how serious charge and penalty facing D are; (7) how complex case is; (8) cost of services requested; (9) timeliness of request; & (10) likelihood of admissibility of expert's testimony at trial. Ct. also stated: "If the State is relying upon an expert and expending substantial resources on the case and Ds with monetary resources probably would choose to hire an expert, the Tr. Ct. should strongly consider such an appointment to assist defense counsel in investigating the same matters, cross-examining the State's expert, or providing testimony".

RELATED CASES: Vega, 119 N.E.3d 193 (Ind. Ct. App. 2019) (D failed to meet burden of demonstrating need to have alleged child victim submit to mental health evaluation at public expense because she had already been evaluated); Schuck, 53 N.E.3d 571 (Ind. Ct. App. 2016) (where D hired private counsel but could not afford to hire investigator, D adequately showed how he would benefit from and be entitled to an investigator; moreover, D's attorneys were not required to first get permission from local P.D.'s office to seek public funds before asking the trial court; see full review, this section); McConniel, 974 N.E.2d 543 (Ind. Ct. App. 2012) (where information, evidence, and arguments emphasized abuse and neglect of victim, not merely manner of death or medical condition resulting in death, no showing of effect on substantial rights in denial of motion for funds to hire experts); Watson, 972 N.E.2d 378 (Ind. Ct. App. 2012) (Tr. Ct. did not abuse its discretion by denying D public funds to hire an expert to decipher the results of tests performed on the Data master; D's purpose for wanting an expert was only exploratory); Castor, 587 N.E.2d 1281 (death penalty sentence reversed where funds denied for psychologist for penalty phase of trial; psychologist opined that D may have been under influence of extreme mental or emotional disturbance when he committed the murder); James, 613 N.E.2d 15 (death penalty reversed where funds denied for blood spatter expert despite fact that State relied on blood spatter for their main jury argument that shooting was "execution style"); Booker, App., 790 N.E.2d 491 (in child molesting prosecution, D failed to satisfy requirements for getting public funds for expert witness as he did not show how child psychologist would be required for adequate defense); Beauchamp, App., 788 N.E.2d 881 (requiring D to show need for expert witness funds as well as demonstrating how he intended to use those experts, is not violation of equal protection under Fourteenth Amendment or equal privileges and immunities under Indiana Constitution); Jackson, App., 758 N.E.2d 1030 (Indigent murder D's request for funds to hire DNA expert for purpose of educating counsel was not specific enough to justify disbursement of public funds without some indication that such education could not be reasonably obtained by other means); Kriner, 699 N.E.2d 659 (no error in refusing D's request for expert on trace evidence where D did not meet his burden of showing need); Cox, 696 N.E.2d 853 (no abuse of discretion in denying request for funds to hire neurological expert); Reed, App., 687 N.E.2d 209 (no error in failing to grant funds to allow D to hire eyewitness identification

expert, although D was convicted solely upon testimony of one eyewitness); Newhart, 669 N.E.2d 953 (D failed to offer cogent explanation of what sort of experts should have been supplied); Tidwell, 644 N.E.2d 557 (Tr. Ct. did not err in denying D's pretrial motions requesting funds to hire investigator & psychiatrist).

TITLE: Williams v. State
INDEX NO.: Y.6.
CITE: 958 S.W.2d 186 (Tex. Ct. Crim. App. 1997)
SUBJECT: Ex parte Hearing on Motion for Funds to Hire Expert
HOLDING: An indigent D who seeks funds to hire an expert to assist in his defense should be allowed to make the required showing of need ex parte. Requiring indigent D to make his showing in an adversarial hearing forces him to disclose defense theories and work product.

Y. RIGHT TO COUNSEL

Y.6. Right to other assistance (Ake v. Oklahoma)

Y.6.a. Investigator

TITLE: Bland v. State
INDEX NO.: Y.6.a.
CITE: (10/9/84) Ind., 468 N.E.2d 1032
SUBJECT: D's right to expert - investigator
HOLDING: Tr. Ct. did not err in denying D's request for funds to employ private investigator with background in arson investigation. Here, D's attorney argued he lacked expertise to evaluate evidence, conduct competent pretrial examination & properly cross-examine state's expert witnesses. Ct. rejects D's due process/equal protection argument, which relied upon Griffin v. IL (1956), 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891. Denial of expert assistance is reviewed only for abuse of discretion. Owen 396 N.E.2d 376. Held, no abuse of discretion.

RELATED CASES: Engle 467 N.E.2d 712 (denial of pro se D's request for appointment of private investigator at public expense was not error; D who represents self must accept attendant burden/hazards, including inability to investigate because incarcerated; appointment of investigator is discretionary, *citing* Yager 437 N.E.2d 454).

Y. RIGHT TO COUNSEL

Y.6. Right to other assistance (Ake v. Oklahoma)

Y.6.b. Psychiatrist/psychologist

TITLE: Ake v. Oklahoma
INDEX NO.: Y.6.b.
CITE: 470 U.S. 68 (1985)
SUBJECT: Right to counsel -- assistance of psychiatrist
HOLDING: When State brings its judicial power to bear on indigent D in criminal proceeding, it must take steps to assure that D has fair opportunity to present his defense. This elementary principle, grounded in significant part on Fourteenth Amendment's due process guarantee of fundamental fairness, derives from belief that justice cannot be equal where, simply as result of his poverty, D is denied opportunity to participate meaningfully in judicial proceeding in which his liberty is at stake. While Ct. has not held that State must purchase for indigent D all assistance that his wealthier counterpart might buy, it has often reaffirmed that fundamental fairness entitles indigent Ds to adequate opportunity to present their claims fairly within adversary system. Ross, 417 U.S. 600. To implement this principle, Ct. has focused on identifying basic tools of adequate defense or appeal, Britt, 404 U.S. 226, & has required that such tools be provided to those Ds who cannot afford to pay for them.

Here, D was entitled to independent psychiatric evaluation at state expense to determine D's mental state at time of offense. When D has made preliminary showing that his sanity at time of offense is likely to be significant factor at trial, Constitution requires that State provide access to psychiatrist's assistance on this issue if D cannot otherwise afford one. Held, conviction reversed & remanded for new trial. Rehnquist, J., dissenting.

RELATED CASES: McWillims v. Dunn, 137 S. Ct. 1790 (2017) (Tr. Ct. denied D's rights under Ake because even though an expert evaluated D, no expert helped D evaluate neurological analysis, D's extensive medical records and translate this information into a legal strategy; no expert helped D prepare direct or cross-examination of witnesses, or testified at the judicial sentencing hearing), Hashfield, 210 N.E.2d 429 (Ct. appointed three physicians to assist D in addition to psychiatrists appointed pursuant to insanity statute); Jones, 524 N.E.2d 1284 (within Tr. Ct.'s discretion to determine whether requested service would be needless, wasteful or extravagant).

TITLE: Graham v. State
INDEX NO.: Y.6.b.
CITE: (11/29/82) Ind., 441 N.E.2d 1348
SUBJECT: D's right to expert - psychiatrist
HOLDING: Due process does not require that any expert D believes helpful to defense must be appointed at public expense. Smith v. Baldi (1953), 344 U.S. 561, 73 S. Ct. 391, 97 L.Ed. 549; Underhill 428 N.E.2d 759; Himes 403 N.E.2d 1377; Roberts 373 N.E.2d 1103. Entitlement to such assistance generally rests in discretion of Tr. Ct. Determination must be made in context of case & only clear abuse of that discretion will be deemed denial of due process. Griffin 415 N.E.2d 60; Himes. Here, D requested appointment of psychiatrist (no insanity defense; D claimed lack of ability to form requisite intent because of alcohol consumption over 5-day period). D contended equal protection; due process & effective assistance of counsel rights were denied because he could not hire & Tr. Ct. did not appoint psychiatrist. Ct. finds no substantial question existed at trial requiring expert testimony to be resolved. Held, no abuse of discretion.

TITLE: McWilliams v. Dunn
INDEX NO.: Y.6.b.
CITE: (6/19/2017), 137 S. Ct. 1790 (2017)
SUBJECT: Alabama violated mentally ill defendant's rights under Ake v. Oklahoma
HOLDING: Where a defendant's mental health is at issue, the State must provide access to a mental health expert to effectively "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake v. Oklahoma, 470 U.S. 68, 83 (1985). Here, the District Court's and Circuit court's finding that the State of Alabama met this standard is contrary to clearly established federal law.

Defendant was charged with rape and murder. Alabama's "Lunacy Commission" found he was competent to stand trial and that he was not suffering from mental illness at the time of the alleged offense. Defendant was convicted of murder, and the jury recommended the death penalty. While awaiting the sentencing hearing, the Tr. Ct. granted Defendant's request for a neurological examination, which was conducted by Dr. John Goff, a neuropsychologist employed by the State's Department of Mental Health. Dr. Goff filed his report just two days before the sentencing hearing. He concluded that Defendant was likely exaggerating his symptoms but also found genuine neurological problems. Also just before the hearing, Defendant received updated records from the Commission's evaluation and previously subpoenaed records from the Alabama Department of Correction. Defendant asked for a continuance and the appointment of an expert to review Dr. Goff's findings and the most recently produced records. The Tr. Ct. denied the request and sentenced Defendant to death. The State courts affirmed Defendant's conviction and sentence, and the federal courts found that the Alabama met its obligations under Ake.

The federal courts' finding that Alabama met its obligation under Ake is contrary to clearly established federal precedent. Even if Alabama met the first Ake requirement when it appointed Dr. Goff to examine Defendant, it failed to satisfy the requirement that an expert "assist in evaluation, preparation, and presentation of the defense." Id., 470 U.S. at 83. No expert helped evaluate Dr. Goff's report or Defendant's extensive medical records and translate this information into a legal strategy. No expert helped prepare and present arguments that might have explained that Defendant's purported malingering was not necessarily inconsistent with mental illness. No expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing.

On remand, the 11th Circuit shall determine whether the Alabama courts' error had the "substantial and injurious effect or influence" required to grant habeas relief. See Davis v. Ayala, 135 S. Ct. 2187, 2198 (2015). Held, cert. granted, opinion at 634 Fed. Appx. 698 reversed, and case remanded. Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ; Alito, J., dissenting, joined by Roberts, C.J., and Thomas and Gorsuch, JJ, arguing that majority decided the case on grounds not argued by the parties.

RELATED CASES: Ake, 470 U.S. 68 (1985) (trial court denied D's rights under Ake because even though an expert evaluated D, no expert helped D evaluate neurological analysis, D's extensive medical records and translate this information into a legal strategy; no expert helped D prepare direct or cross-examination of witnesses, or testified at the judicial sentencing hearing); Hashfield, 210 N.E.2d 429 (Ct. appointed three physicians to assist D in addition to psychiatrists appointed pursuant to insanity statute); Jones, 524 N.E.2d 1284 (within Tr. Ct.'s discretion to determine whether requested service would be needless, wasteful or extravagant).

TITLE: Palmer v. State
INDEX NO.: Y.6.b.
CITE: (12/12/85) Ind., 486 N.E.2d 477
SUBJECT: D's right to expert - psychiatrist
HOLDING: Tr. Ct. did not err in refusing to appoint expert to assist in preparation of insanity defense. Here, D filed insanity notice & Tr. Ct. appointed 3 psychiatrists to examine D. D contends denial of funds for expert to assist him was abuse of discretion because 3 Ct.-appointed psychiatrists "did not comprehend insanity statute" & conducted "cursory one-hour examination of" D. Due process requires state provide indigent Ds with access to psychiatric assistance in evaluation, preparation & presentation of defense. Ake v. OK (1985), U.S., 105 S. Ct. 1087, 84 L.Ed.2d 53. Ct. finds IN statute complies with Ake by requiring appointment of experts upon D's notice to interpose insanity defense. D has no right to receive funds to hire expert of own choosing. Ake; Norris 394 N.E.2d 144. Ct. finds IN statute complies with Ake requirement that experts be available to counsel for trial preparation. Tr. Ct. should include in appointment order that psychiatrist be available for consultation with counsel. Tr. Ct. has discretion over payment of fees for this purpose. IN statute does not require threshold showing of need & exceeds Ake in this regard. Held, no error.

RELATED CASES: Ashby 486 N.E.2d 469 (Tr. Ct. complied with Ake).

TITLE: Thomas v. State
INDEX NO.: Y.6.b.
CITE: (2/9/84) Ind., 459 N.E.2d 373
SUBJECT: D's right to expert - psychiatrist
HOLDING: Tr. Ct. did not err in denying D's request for a psychiatrist to aid him in jury selection & preparation of his death penalty trial. An accused is not constitutionally entitled to any type of expert at public expense whose help might be relevant. Appointment of experts for indigent Ds is within sound discretion of Tr. Ct. Goodwin 439 N.E.2d 595; Henson 436 N.E.2d 79; Roberts 373 N.E.2d 1103. Here, Ct. finds D has not shown any specific reason why psychiatrist was necessary; questioning of jurors & general preparation of defense were duties which could be performed adequately by his attorney. Held, no error.

Y. RIGHT TO COUNSEL

Y.6. Right to other assistance (Ake v. Oklahoma)

Y.6.c. Expert witness

TITLE: Blake/Thompson v. State
INDEX NO.: Y.6.c.
CITE: 395 Md. 213, 909 A.2d 1020 (Md. Ct. App. 2006)
SUBJECT: Maryland addresses DNA testing issues
HOLDING: The Maryland Court of Appeals (the state's highest court) held that a prisoner seeking post-conviction testing of DNA evidence has a right to notice and a hearing on prosecutors' claim that the State no longer possesses testable DNA. The Court also limited the circumstances in which a trial judge may condition post-conviction DNA testing on the retention of a portion of a sample for the State to subject to independent testing. However, the Court rejected an argument that prisoners have a right to the assistance of counsel while pursuing post-conviction DNA testing. The Court's rulings came in a pair of cases involving prisoners who were convicted of rape in the 1980s. Following their convictions, they each filed a petition to have certain evidence seized by the police subjected to DNA testing. In one case, the State responded to the prisoner's petition with an unsworn memorandum stating that the police evidence locker did not contain any evidence related to prisoner's case and the Tr. Ct. dismissed the petition for DNA testing. Court noted that while the statute Petitioner moved under presumes that evidence in fact exists, a liberty interest is involved and the Tr. Ct.'s failure to provide any notice to appellant of the State's filing for dismissal and its dismissal without affording Petitioner any opportunity to respond violated his due process rights. "Fundamental fairness requires that a petitioner be given an opportunity to respond and to challenge the State's representation." However, Court did not require an oral hearing in every case and a paper hearing will be all the process due some prisoners. The Court placed the burden on the State to prove that it is no longer in possession of DNA although statute was silent on issue, noting that prisoners generally do not have access to such information. Further, at a minimum, a motion to dismiss a DNA testing petition should be supported by affidavit and suggested that a representation that a police evidence locker does not contain testable evidence would not, even if sworn, be sufficient to sustain an order to dismiss. The Court pointed to a 1999 study by the National Institute of Justice that concluded that "finding the evidence is the most difficult part of the process" and recommended that "no final decision or notification should be made until it has been carefully verified that evidence did not or does not still exist." The report also identified a number of places, other than police evidence lockers, that testable evidence is likely to be found. For this same prisoner, the Court also denied appointment of a state-paid attorney noting that neither the Sixth Amendment nor the state constitution guarantees right to counsel in post-conviction proceedings.

In the other case, the prisoner complained that the record in his case did not support the trial judge's order that a portion of the DNA material be set aside for independent testing by the State, contending also that the Tr. Ct. lacked authority to prohibit him from presenting DNA test results if no portion of the DNA material was set aside. Court noted trial judges have the power, under the statute and their inherent authority over admission of evidence, to set reasonable conditions on the testing of DNA evidence. Additionally, the statute specifically states a condition might be the retention of a sample portion for retesting by the State. Court stated this power should be used judiciously and only when the trial judge finds that retaining a sample will leave a prisoner enough material for the initial testing. In

cases where the available DNA evidence would be entirely consumed by the prisoner's test, an order excluding evidence of the results of the prisoner's test would be "tantamount to a sanction of dismissal. Retaining a portion is a good idea but should not stand in the way of the essential purpose of the statute, which is to exonerate innocent prisoners. Court noted that where entire sample is destroyed during the prisoner's testing, prosecutors have other ways to challenge the test results such as attacking the conclusions reached by a prisoner's expert based on the test results.

TITLE: Clark v. State
INDEX NO.: Y.6.c.
CITE: (10/21/86), Ind., 498 N.E.2d 918
SUBJECT: D's right to expert - eyewitness identification
HOLDING: Tr. Ct. did not abuse discretion by refusing to appoint expert witness to testify re inherent inaccuracies involved with eyewitness testimony. Here, Ct. notes such expert was not necessary under circumstances of case to ensure that D was provided with adequate defense/fair trial. Ct. notes that no constitutional mandate exists for granting at public expense any type of expert whose help may be relevant. Engle 467 N.E.2d 712; Roberts 373 N.E.2d 1103. Appointment of expert at state expense is matter within discretion of Tr. Ct. & will be reversed only for abuse of that discretion. Graham 441 N.E.2d 1348; Yager 437 N.E.2d 454. Held, conviction affirmed.

RELATED CASES: Hopkins 582 N.E.2d 345 (it was not error to deny D's motion for funds to employ eyewitness ID expert & his instruction regarding eyewitness ID evidence. One of 4 witnesses who testified that they saw someone in victim's yard, identified D from lineup 2« months after crime. Before viewing lineup, she had learned that D, who she had known earlier, was charged with crime, & after choosing D, she asked officer "[h]ow did I do?" D requested $260 to hire expert on eyewitness ID to help prepare cross-exam of this witness & testify regarding eyewitness ID in general. Ct. found failure to fund D's request was not prejudicial enough to require reversal, although acknowledging that weight of authority favors admission of expert testimony on this issue).

TITLE: District Attorney's Office for Third Judicial District v. Osborne
INDEX NO.: Y.6.c.
CITE: (06-18-09), U.S., 08-6, 129 S. Ct. 2308
SUBJECT: No Constitutional Due Process right to evidence for Post-conviction DNA testing
HOLDING: An individual whose criminal conviction has become final does not have a federal constitutional right to gain access to evidence in State's possession so that it can be subjected to DNA testing to try to prove his innocence. DNA testing provides "an unparalleled ability" to prove innocence or guilt, but its availability "cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt." The task of writing rules to control access to DNA evidence belongs primarily to the legislature. There is no reason to constitutionalize access through the courts when elected officials are making a "prompt and considered" response to the DNA phenomenon. Held, Ninth Circuit Court of Appeals' opinion at 521 F.3d 1118 reversed and remanded. Alito, J., joined by Kennedy, J. and Thomas, J., CONCURRING, stressed possibility that DNA evidence can be contaminated and that the few testing labs that exist are already overburdened; also, a D who, "for tactical purposes, passes up the opportunity for DNA testing at trial...has no constitutional right to demand to perform DNA testing after conviction." Stevens, J., joined by Ginsburg, J. and Breyer, J., DISSENTING, said, "When absolute proof of innocence is readily at hand, a State should not shrink from the possibility that error may have occurred." Souter, J., DISSENTING, would decide case on procedural due process grounds, noting that Alaska's procedures have proven so inadequate that federal relief is warranted.

Note: Ind. Code 35-38-7-1, et seq. establishes detailed procedures to petition courts for post-conviction DNA testing and analysis in Indiana. This ruling should have limited impact given that most jurisdictions now provide inmates some means of obtaining evidence for DNA analysis.

RELATED CASES: Reid, 984 N.E.2d 1264 (Ind. Ct. App 2013) (Ds did not have Due Process right to post-conviction DNA testing, and even if they had a right to preservation of certain evidence, the DNA testing would not have produced materially exculpatory evidence as the unknown DNA profile would not prove, in and of itself, Ds' innocence as the State theorized unknown DNA found at the scene belonged to an unidentified accomplice); Skinner, 131 S. Ct. 1289 (U.S. 2011) (civil rights action pursuant to 42 U.S.C. §1983 is appropriate vehicle for prisoner to seek DNA testing of evidence).

TITLE: Harrison v. State
INDEX NO.: Y.6.c.
CITE: (1-4-95), Ind., 644 N.E.2d 1243
SUBJECT: D's right to expert - DNA tests
HOLDING: Indigent capital D was not entitled to his own expert to analyze DNA test results. Case involved use of new polymerase chain reaction (PCR) methodology, but D did not challenge admissibility of this new analysis. Expert would have testified concerning results of precise physical measurements & chemical testing that were not subject to dispute, Schultz v. State, Ind., 497 N.E.2d 531. Although Tr. Cts. in future cases have duty to assure that this type of State expert is truly neutral, defense counsel in this case consented to admission of test at pretrial conference. In future cases, it is incumbent on Tr. Cts. to assure that such experts are aware that they are not advocates for either side & that neither State nor defense has unequal access to experts, materials, or test results. Although error in this case was harmless, Ct. also noted that all defense motions should not have been denied without pretrial inquiry into admissibility of new PCR method of DNA testing. Tr. Ct. was also obligated to determine that expert witnesses were properly qualified. Held, convictions affirmed, Shepard, C.J., concurring.

TITLE: Lacey v. State
INDEX NO.: Y.6.c.
CITE: (4th Dist., 6-23-05), Ind., 829 N.E.2d 518
SUBJECT: PCR Ct. must provide hat for DNA testing
HOLDING: Petitioner was convicted in 1998 of robbery & carrying a handgun without a license with the parties agreeing that the evidence indicated that the robber wore a hat that was recovered outside the store. The PCR Ct. denied a petition to amend Petitioner's pro-se petition to include a claim that the PCR Ct. improperly denied his motion for DNA testing & the Ct. App. affirmed the decision in an unpublished decision. On transfer, S. Ct. rejected State's contention that PCR Ct. did not have subject matter jurisdiction to consider the DNA testing request, an argument first raised on the day of oral argument. Ct. found that request was not a successive petition for PCR when made while initial petition was still pending. Further, Petitioner was entitled to employ reasonable means in order to obtain evidence in support of his petition. Ct. also rejected State's contention that Ind. Code 35-38-7-1 controls case & precludes seeking of DNA testing here. The statute which establishes detailed procedures to petition the sentencing Ct. for DNA testing in murder cases did not limit access to such testing in other cases. The legislation provides certain "convicted felons greater access to DNA testing" to exonerate themselves & does not suggest that it would provide persons convicted of a crime less access than prior to its enactment. Held, transfer granted, memorandum decision of Ct. App. vacated, judgment reversed. Post-conviction Ct. ordered to deliver hat to the State Public Defender to conduct DNA testing.

RELATED CASES: District Attorney's Office for Third Judicial District v.Osborne , 129 S. Ct. 2308 (2009) (D whose criminal conviction has become final does not have a federal constitutional right to gain access to evidence in State's possession so that it can be subjected to DNA testing to try to prove his innocence).

TITLE: Newhart v. State
INDEX NO.: Y.6.c.
CITE: (7-30-96), Ind., 669 N.E.2d 953
SUBJECT: Refusal to grant *ex parte* hearing on request for experts affirmed
HOLDING: Tr. Ct. did not err in refusing to grant D *ex parte* hearing on his request for experts to aid in defense of murder charge. Defense did not offer cogent explanation of what sort of experts should have been supplied. Standard outlined in Scott v. State, 593 N.E.2d 198 (Ind. 1992), suggests that D was not deprived of anything to which he was entitled. Ind. Judicial Conduct Canon 3(B)(8) counsel against such ex parte communications. Held, conviction affirmed.

Note: Decision does not discuss fact that Canon 3(B)(8)(e) allows judge to initiate or consider any ex parte communications when expressly authorized by law to do so. There is legal support for entitlement to an ex parte proceeding, as the only way in certain cases to protect the work product privilege (TR 26(B)(4)); D's right to equal protection as guaranteed by the Fourteenth Amendment to the U.S. Constitution, & Ind. Const., Art. 1, Sec 23; the right to present an effective defense without regard to financial status as guaranteed by the Sixth Amendment & Art. 1, Sec. 12; & state & federal due process guarantees. See, e.g., Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087 (1985).

RELATED CASES: Stevens, 770 N.E.2d 739 (Tr. Cts. may, in their discretion, grant ex parte funds hearings; Ind. R. Crim. P. 24(c)(2) specifically authorizes them in capital cases).

Y. RIGHT TO COUNSEL

Y.6. Right to other assistance (Ake v. Oklahoma)

Y.6.d. Interpreter (Ind. Code 34-1-14-3)

TITLE: Arrieta v. State
INDEX NO.: Y.6.d.
CITE: (01-09-08), Ind., 878 N.E.2d 1238
SUBJECT: No right to defense interpreter absent showing of indigency
HOLDING: Tr. Ct. must always provide a court-funded proceedings interpreter to translate any non-English testimony, but solvent criminal Ds who need a defense interpreter are not entitled to a court-funded defense interpreter. In contrast to proceedings interpreters, who serve the whole court, defense interpreters benefit non-English-speaking Ds by simultaneously translating the English proceedings and assisting with attorney-client communication. The non-English speaking D relies on this interpreter to understand the trial, communicate with their attorney, and communicate with the court. Tr. Ct.s must continue to supply interpreters at public expense for indigent criminal Ds. Martinez Chavez v. State, 534 N.E.2d 731 (Ind. 1989). It is an open question whether Tr. Ct.s need to supply two interpreters, or if a proceedings interpreter may also serve as the defense interpreter for indigent Ds. Here, D failed to present any evidence contradicting his ability to pay for a defense interpreter. Held, transfer granted, Court of Appeals' opinion at 856 N.E.2d 1286 vacated, judgment affirmed.

TITLE: Diaz v. State
INDEX NO.: Y.6.d.
CITE: (3d Dist. 1/27/83) Ind. App., 444 N.E.2d 340
SUBJECT: D's right to interpreter at trial
HOLDING: Where Tr. Ct. appoints interpreter, Tr. Ct. has discretion to direct manner in which examination is conducted. Skaggs (1886), 108 Ind. 53. Cf. Jennings, App., 297 N.E.2d 909. Here, Tr. Ct. appointed Spanish-English interpreter in accord with Ind. Code 35-1-8-2 (repealed). D initially testified in Spanish through the interpreter, but soon stated he understood questions. Prosecutor asked Tr. judge to obtain interpreter's opinion as to D's understanding/use of English. Tr. Ct., after being satisfied D could understand proceedings in English, asked interpreter to stand by & assist only if needed. D now contends Tr. Ct. erred in ordering interpreter to stop. Held, no error.

TITLE: Mariscal v. State
INDEX NO.: Y.6.d.
CITE: (4th Dist., 11-24-97), Ind. App., 687 N.E.2d 378
SUBJECT: Right to interpreter - inquiry into interpreter's qualifications
HOLDING: Tr. Ct. did not commit fundamental error when it failed to inquire into interpreter's qualifications. Denial of interpreter to non-English speaking criminal D violates Due Process. Chavez, 534 N.E.2d 731. Due to importance of interpreter's function in translating Ct. proceedings to party, establishment of interpreter's qualifications & administration of oath or affirmation to make true translation is necessary. Here, Tr. Ct. administered oath to interpreter but failed to inquire into his qualifications. However, D did not object to procedure used to appoint interpreter, & in fact, affirmatively consented to appointment of interpreter. Thus, D waived issue of interpreter's qualifications. Held, conviction affirmed.

TITLE: Martinez v. State
INDEX NO.: Y.6.d.
CITE: (7/14/83) Ind., 451 N.E.2d 39
SUBJECT: D's right to an interpreter
HOLDING: Tr. Ct. did not deny D right to counsel by failing to appoint Spanish interpreter prior to trial. Here, D contends he was unable to communicate with counsel prior to trial. Ct. notes D failed to request interpreter prior to trial & presented no evidence on issue. At sentencing hearing, D read letter to Ct. expressing dissatisfaction with inmates who had interpreted for him at jail prior to trial. D failed to show anything that would have or should have been done differently in preparing defense. Considering strength of state's case, "absence of any such showing is understandable." 3d Dist. had reversed D's conviction, citing Ind. Code 35-1-8-2 [repealed]; US ex rel. Megron v. NY (CA2 1970), 434 F.2d 386; & State v. Natividad (Ariz. 1974), 526 P.2d 730 (D's right to confront accusers, to cross-examine witnesses & to assistance of constant counsel allowed jeopardized if he/she cannot understand language of Ct., witnesses, & counsel). Ind. S. Ct. apparently rejects 3d Dist.'s finding that Tr. Ct. was put on notice of significant language difficulty by defense counsel's motion filed 2 weeks before trial. Opinion at 449 N.E.2d 307 vacated. Held, conviction affirmed.

TITLE: Nur v. State
INDEX NO.: Y.6.d.
CITE: (2nd Dist., 06-06-07), Ind. App., 869 N.E.2d 472
SUBJECT: Standards for appointing interpreter
HOLDING: Tr. Ct. did not abuse its discretion in denying D's motion for a new trial based on Tr. Ct.'s failure to provide D with an interpreter. Whenever a Tr. Ct. is put on notice that a D has a significant language difficulty, the Ct. shall make a determination of whether an interpreter is needed to protect D's due process rights. A Tr. Ct. is put on notice of a potential language barrier when a D manifests significant language difficulty or when interpreter is specifically requested. Decision as to whether interpreter is needed should be based on factors such as D's understanding of spoken & written English, the complexity of proceedings, issues, & testimony, & whether, considering those factors, D will be able to participate effectively in his defense. Absent such indications, Tr. Ct. is under no obligation to inquire into D's need for an interpreter.

Here, neither D nor his attorney requested an interpreter at any time prior to his conviction. When asked whether he might have any difficulty understanding proceedings, D stated he had "a little trouble with the language" & that Somali was his native language. Ct. found this exchange insufficient to put Tr. Ct. on notice that D had a significant language difficulty. Fact that a D is originally from a foreign country, or speaks, primarily, a native language other than English, does not automatically put Ct. on notice that he might have a significant language difficulty. Record as whole does not indicate that D was unable to effectively participate in his defense because of his alleged difficulty with English. D communicated with Tr. Ct. in English, both orally & in writing, & evidence at trial showed that D communicated with native English speakers in English when orchestrating the crime. Thus, Tr. Ct.'s failure to appoint an interpreter on its own motion was not fundamental error. Held, judgment affirmed.

RELATED CASES: Gado, App., 882 N.E.2d 827 (Tr. Ct. did not abuse discretion rejecting D's contention that he could only communicate in Djerma, rare language for which it is very difficult to find an interpreter; there was evidence that the D was attempting to frustrate the process and could adequately understand English, and possibly French).

TITLE: State v. Calderon
INDEX NO.: Y.6.d.
CITE: 13 P.3d 871 (Kan. 2000)
SUBJECT: Denial of Translator During Closing Arguments Requires Reversal
HOLDING: Kansas Supreme Court holds that Tr. Ct.'s order that translator who had been provided to D during evidentiary portions of trial cease working before closing arguments violated the D's right to be present and requires reversal. Court writes that this error "implicated basic concerns of fairness," and was not subject to harmless error analysis. The state had argued that it was harmless "trial" error, and the Court responded that not all errors can be analyzed within the "trial/structural error dichotomy" set out by the U.S. Supreme Court in Arizona v. Rulminante,499 U.S. 279 (1991). Counsel had not objected at trial.

TITLE: State v. Jones
INDEX NO.: Y.6.d.
CITE: 2007 WI. App. 248, 742 N.W.2d 341 (Wis. Ct. App. 2007)
SUBJECT: Hearing-impaired indigent entitled to counsel with whom can communicate
HOLDING: Wisconsin Court of Appeals held a hearing-impaired indigent D whose appointed attorney was not allowed to withdraw despite purported problems in communicating with his client is entitled to an evidentiary hearing to determine whether his client is entitled to an evidentiary hearing to determine whether the impasse was so serious as to entitle him to a new trial. At a hearing on D's motion to withdraw, the Tr. Ct. did not ask D how his hearing impairment might have affected his ability to communicate with his lawyer, even though D had said he needed an interpreter to do so. Instead, the Tr. Ct. focused on the possibility of a sign-language interpreter at trial and elicited D's testimony that he did not think that his counsel was acting in his interests. Tr. Ct. denied the motion to withdraw, stating that D had no right to counsel of his choice, and he was not being denied his Sixth Amendment right to counsel. State v. Lomax, 432 N.W.2d 89 (Wis. 1988) made clear that an indigent D is entitled to a lawyer with whom he can communicate. Court held that the Tr. Ct. in this case failed to conduct an adequate inquiry into the communication issue and that D is entitled to a hearing on the matter in the Tr. Ct.

Y. RIGHT TO COUNSEL

Y.6. Right to other assistance (Ake v. Oklahoma)

Y.6.e. Other

TITLE: Goodwin v. State
INDEX NO.: Y.6.e.
CITE: (9/7/82) Ind., 439 N.E.2d 595
SUBJECT: D's right to other assistance
HOLDING: D's request for other assistance must be specific. Mere belief in the availability of such services is an insufficient basis upon which to order the appointment of an expert at public expense. Here, defense counsel asked for appointment of a hypnotist or other person to attempt scientific tests or administer drugs "or anything else to find out what occurred & to refresh the D's recollection." No showing was made that such services were available or would be effective. Held, no error in denial of motion.

RELATED CASES: Burch, App., 487 N.E.2d 176 (denial of request to take polygraph (for use at sentencing) at public expense was not error; D presented no evidence that polygraph would play pivotal role in ordinary sentencing hearing); Jackson, 625 N.E.2d 1219 (No error in refusing to grant D funds for mitigation ex pert & psychologist when he was being resentenced for murder after vacation of death penalty sentence on appeal. Extensive evidence was presented at original sentencing & incorporated in second sentencing. Additionally, Tr. Ct. prohibited State from presenting additional evidence at resentencing but allowed D to do so. Relatives & jailers, & D testified, & mitigation specialist did present evidence, even though not paid through Ct. funds. D was able to present voluminous record, including prior sentencing, & Tr. Ct. did not abuse discretion in denying request for funds for experts at resentencing.

TITLE: Kennedy v. Wood
INDEX NO.: Y.6.e.
CITE: (4th Dist. 9/29/82) Ind. App., 439 N.E.2d 1367
SUBJECT: D's right to blood grouping test - paternity
HOLDING: Denial of blood grouping tests to an indigent paternity D, who is unable to pay for tests & who faces state as adversary when complainant is recipient of public assistance, violates due process guarantee. Little v. Streater (1981), 452 U.S. 1, 101 S. Ct. 2202, 68 L.Ed. 2d 627. Here, indigent D appeared in paternity suit without counsel. D's request for blood test was denied. Paternity finding was based solely on testimony of mother. Held, paternity finding reversed. D must be appointed counsel & be given blood grouping test at state's expense upon retrial.

TITLE: Pittman v. State
INDEX NO.: Y.6.e.
CITE: (9/14/88), Ind., 528 N.E.2d 67
SUBJECT: Hypnotist - D's right to assistance
HOLDING: Tr. Ct. did not err in denying D assistance of hypnotist at public expense. D sought hypnotist's assistance to determine whether he had forgotten anything helpful to his defense. D presented insanity & intoxication defenses & claimed he could not remember many events from evening he allegedly committed burglary & felony murder. Tr. Ct. denied D's request, indicating that if hypnotism revived memories inducing D to plead guilty, she would have difficulty accepting plea based on unreliable evidence. D argues on appeal that this consideration contravenes Rock v. AR (1987), 483 U.S. 44, 107 S. Ct. 2704, 97 L.Ed.2d 37. Rock was charged with shooting her husband. She remembered holding gun & fighting with husband but did not remember pulling trigger. Through hypnosis, Rock remembered that gun went off when her husband bumped it, although she was not touching trigger, & ballistics expert confirmed that this was possible. Tr. Ct. in Rock excluded D's hypnotically enhanced testimony, but U.S. S. Ct. ruled, 5-4, that AR rule, per se, excluding hypnotically refreshed testimony impermissibly infringed on D's right to testify in own behalf. Here, however, D seeks hypnotist at public expense based on mere speculation that it would aid defense. Psychiatrist who examined D testified D's memory seemed to be intact & other witnesses testified that D told them what happened on evening in question. Appointment of experts at public expense is within sound discretion of Tr. Ct. Myers 510 N.E.2d 1360; Thomas 459 N.E.2d 373. Held, no abuse of discretion.

Y. RIGHT TO COUNSEL

Y.7. Choice of counsel

Y.7.a. Right to self-representation (Faretta v. California)

TITLE: Bowie v. State

INDEX NO.: Y.7.a.

CITE: (02-06-23), 203 N.E.3d 535 (Ind. Ct. App.)

SUBJECT: Defendant who chose to proceed pro se after advisements could not later claim error in allowing him to proceed pro se; improper attempted murder charge was not fundamental error when defense was insanity

HOLDING: When police were called to a domestic disturbance, Defendant fled the scene on foot and was pursued by police. He eventually fell and a gun fell out of his pocket. He retrieved the gun and pointed it at officers who fired at him. Defendant was shot three times and eventually apprehended. He was charged with and convicted at a jury trial of attempted murder, unlawful possession of a firearm by a serious violent felon, resisting law enforcement, possession of marijuana and disobeying a declaration of a disaster emergency, along with a firearm and habitual offender enhancement. Defendant was appointed a public defender but asked the court to replace his attorney. The trial court informed Defendant that the public defender's office would not appoint new counsel, so he maintained he would represent himself. Defendant was allowed to proceed pro se but then announced that he would pursue an insanity defense. He was evaluated and multiple doctors found him competent to stand trial and legally sane at the time of the shooting. He represented himself at a four-day jury trial. The trial court confirmed during the trial that he wanted to continue to proceed pro se. At the close of evidence, Defendant moved to dismiss the attempted murder charge, arguing it should have been two separate counts — one as to each officer. The trial court took the matter under advisement, but the parties never addressed the issue on the record again. The jury then found Defendant guilty as charged, and he was sentenced to an enhanced term of 57 years. On appeal, Defendant first argued that he did not validly waive his right to counsel. The Court of Appeals disagreed, pointing to the multiple questioning and advisements against proceeding pro se from both the trial court and defense counsel. He also argued his mental health status was proof that he did not understand the dangers of self-representation. But the Court of Appeals pointed to the results of the competency evaluations and to Defendant's own testimony that he was taking medication to control his mental illnesses. Defendant also renewed his challenge to the attempted murder charge on appeal, arguing the State had charged him with multiple separate offenses such that he could not be assured of jury unanimity. The Court agreed with Defendant's argument that he had been impermissibly charged with more than one offense, pointing to Lainhart v. State, 916 N.E.2d 924 (Ind. Ct. App. 2009). The Court found he had waived the claim unless he could establish fundamental error because even though he had objected to the instruction, he did not tender his own instruction. The Court found no fundamental error because the defense raised was whether Defendant was sane at the time of the offense, which was an all-or-nothing theory that the jury could accept or reject, and the jury's rejection of the insanity defense would have resulted in Defendant's conviction regardless of which acts and victim the jury chose to rely on.

TITLE: Edwards v. State
INDEX NO.: Y.7.a.
CITE: (03-17-09), 902 N.E.2d 821 (Ind. 2009)
SUBJECT: Right to self-representation - competency standard
HOLDING: On rehearing after reversal and remand by the U.S. Supreme Court in Indiana v. Edwards, 128 S. Ct. 2379, 2387-88 (2008), the Indiana Supreme Court held that the record supports Tr. Ct.'s finding that D suffered from a severe mental illness to the point where he was not competent to conduct trial proceedings by himself. The U.S. 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. Edwards, 128 S. Ct. at 2387-88. Here, in light of D's request to represent himself at his re-trial on an attempted murder charge, Tr. Ct. found D competent to stand trial, but not competent to represent himself. D was evaluated by several mental health professionals from 1999 through 2004 and was diagnosed at various points in time with schizophrenia of undifferentiated type, disorganized type schizophrenia, a delusional disorder, and a personality disorder. However, these evaluations were eighteen months prior to D's trial. And one other evaluation found that D was free of psychosis, depression, mania and confusion. Although the record contains numerous pleadings written by D that are virtually incomprehensible, several of his motions and in-court colloquies demonstrate lucidity, cooperativeness, and at least a rudimentary understanding of trial practice. However, the totality of the evidence adequately supports Tr. Ct.'s determination. Tr. Ct. had before it the record of erratic performance that gave no confidence that whatever D's state as of a given moment, it might be a transient condition.

Tr. Ct.'s ruling prohibiting D from proceeding pro se did not violate article I, section 13 of the Indiana Constitution, which guarantees an accused the right "to be heard by himself and by counsel." Although section 13 has been held to provide broader rights than the Sixth Amendment, the right to self-representation of mentally impaired persons under section 13 is no broader than that guaranteed by the Sixth Amendment. The accused's right "to be heard by himself" is not an unlimited right to conduct all trial proceedings on his own. A D's mental illness may preclude competent self-representation in the interest of a fair trial. Held, judgment affirmed.

RELATED CASE: Rickets v. State, 108 N.E.3d 416 (Ind. Ct. App 2018) (Tr. Ct. did not erroneously deny D his right to self-representation, where he had severe mental and emotional health issues that Tr. Ct. concluded would likely intensify as trial approached, generating a distinct possibility that D would come "undone" under the pressure).

TITLE: Hill v. State
INDEX NO.: Y.7.a.
CITE: (2nd Dist., 8-16-02), Ind. App., 773 N.E.2d 336
SUBJECT: D's right to represent himself -- no violation
HOLDING: Tr. Ct.'s refusal to allow D to proceed to trial in absence of State's witnesses did not deny D his Sixth Amendment right to represent himself. At pretrial conference in which D was representing himself, State requested continuance pursuant to Ind. Code 35-36-7-2 because one of its witnesses had been hospitalized. Because D agreed to stipulate to facts to which witness would testify, Ind. Code 35-36-7-2(b)(1) prohibited Tr. Ct. from granting continuance. Thus, Tr. Ct. erred when it granted State's request for continuance because it did not have discretion to postpone trial when D agreed that State could present witness's stipulated testimony.

Nevertheless, Tr. Ct.'s error did not deny D of his Sixth Amendment right to represent himself. D's right to represent himself is violated if pro se D is not allowed to preserve actual control over case he chooses to present to jury, thus pro se D must be allowed to make his own tactical decisions & to control questioning of witnesses. McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 948 (1984). While D's decision to proceed to trial without presence of witness could be considered a tactical decision, it was not a tactical decision that was central to defense that D was mounting. D preserved actual control over case that he presented to jury. In addition, fact that Tr. Ct. granted State's continuance did not deprive D of right to defend himself. A pro se litigant's right to control his defense cannot include right to control every aspect of Tr. Ct.'s conduct of trial. Rather, a pro se litigant should be treated similarly to counsel representing D. Ct. also held that Tr. Ct.'s actions, when combined, did not deny D of his right to free & complete justice under Article I, section 12 of Indiana Constitution. Held, convictions affirmed.

TITLE: Hotep--El v. State
INDEX NO.: Y.7.a.
CITE: (11/13/2018), 113 N.E.3d 795 (Ind. Ct. App 2018)
SUBJECT: D's request for self-representation denied due to his obstructionist behavior
HOLDING: Trial court did not err in denying D's request of self-representation. Trial court may deny a request for self-representation if it bases decision upon observation of actual obstructive behavior and not expected obstructive behavior. Courts weigh D's right to self-representation against Tr. Ct.'s need to maintain stability and control of the courtroom and caseload. Here, Tr. Ct. determined D engaged in deliberately obstructive behavior that threatened to undermine the proceedings of his case by claiming to be a "sovereign citizen." Held, judgment affirmed.

TITLE: Hunt v. State
INDEX NO.: Y.7.a.
CITE: (2/23/84) Ind., 459 N.E.2d 730
SUBJECT: Right to counsel - self-representation; co-counsel
HOLDING: Tr. Ct. did not err in denying D's oral motion to proceed pro se made morning of trial. Here, Ct. finds D's request was actually to act as co-counsel, which Ct. notes is "hybrid" representation to which D is not constitutionally entitled. Lock, 403 N.E.2d 1360. Tr. Ct. has discretion re such a motion. Ct. finds no abuse of discretion, pointing to untimeliness of D's motion. See Dixon, 437 N.E.2d 1318 & Russell, 383 N.E.2d 309 (failure to make timely request to represent oneself *pro se* is deemed waiver of Faretta right). Held, conviction affirmed.

TITLE: Indiana v. Edwards

INDEX NO.: Y.7.a.

CITE: 128 S. Ct. 2379, 171 L.Ed.2d 345 (2008)

SUBJECT: Mentally ill, but competent to stand trial, D can be denied *pro se* representation

HOLDING: Majority held the Constitution does not forbid States from insisting upon representation by counsel for those competent enough to stand trial but who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. Several considerations taken together lead Court to conclude that the Constitution permits a State to limit a D's self-representation right by insisting upon trial counsel when the D lacks the mental competency to conduct his trial defense unless represented. First, Court's precedent, while not answering the question, points slightly in that direction. By setting forth a standard that focuses directly upon a D's ability to consult with his lawyer, Dusky v. U.S., 362 U.S. 402 (1960) and Drope v. Missouri, 420 U.S. 162 (1975) assume representation by counsel and emphasize counsel's importance, thus suggesting that choosing to forgo trial counsel presents a very different set of circumstances than the mental competency determination for a D to stand trial. Second, the nature of mental illness - which is not a unitary concept, but varies in degree, can vary over time, and interferes with an individual's functioning at different times in different ways - cautions against using a single competency standard to decide both whether a D who is represented can proceed to trial and whether a D who goes to trial must be permitted to represent himself. Third, a self-representation right at trial will not "affirm the dignity" of a D who lacks the mental capacity to conduct his defense without the assistance of counsel and may undercut the most basic of the Constitution's criminal law objectives, providing a fair trial. The trial judge will often prove best able to make more fine-tuned mental capacity decisions, tailored to the particular D's individualized circumstances. Indiana's proposed standard, which would deny a D the right to represent himself at trial if he cannot communicate coherently with the court or a jury, is rejected because Court is uncertain how that standard would work in practice. Scalia, J., filed a dissent, in which Thomas, J., joined.

TITLE: Lockhart v. State
INDEX NO.: Y.7.a.
CITE: (5th Dist., 10-7-96), Ind. App. 671 N.E.2d 893
SUBJECT: Denial of request for hybrid representation - no error
HOLDING: Tr. Ct. did not abuse discretion in denying D's request to act as co-counsel in his defense. Ind. S. Ct. has repeatedly refused to recognize constitutional right to hybrid representation, which is right to proceed *pro se* & to be represented by counsel at same time. Carter v. State, 512 N.E.2d 158 (Ind. 1987); Myers v. State, 510 N.E.2d 1360 (Ind. 1987). Here, D failed to provide persuasive argument that he had absolute right to hybrid representation under Ind. Constitution. Case involved four counts of child molestation against single child victim, who was prepared to testify as witness. As co-counsel, D would have been entitled to participate in cross-examination of victim. Given sensitive nature of case, Tr. Ct. acted within discretion by denying D's request to act as co-counsel. Furthermore, D did not allege that his counsel was incompetent. Held, no error.

RELATED CASES: Schumm, App., 866 N.E.2d 781 (attorneys who elect to go pro se are not entitled to also retain co-counsel).

TITLE: Love v. State
INDEX NO.: Y.7.a.
CITE: (10/30/2018), 113 N.E.3d 730 (Ind. Ct. App 2018)
SUBJECT: Denial of right to self-representation affirmed for D with many physical ailments
HOLDING: D with many physical ailments requested to represent himself. Trial court denied D's request. On appeal, defendant argued even though he had many physical ailments, he was still able to effectively communicate and conduct his defense. Court found D's "actions spoke louder than his words" and that he used his ailments to delay and disrupt the proceedings. Court of Appeals affirmed Tr. Ct.'s finding that under the totality of the circumstances, D's self-representation should be terminated. Courts must balance the right to self-representation against the State's interest in preserving the orderly processes of criminal justice and courtroom decorum.

TITLE: Marshall v. State
INDEX NO.: Y.7.a.
CITE: (1/7/2022), 180 N.E.3d 411 (Ind. Ct. App.)
SUBJECT: Invalid waiver of counsel & due process violation resulting from failure to provide discovery to incarcerated defendant
HOLDING: In criminal trespass prosecution, Defendant's waiver of his right to counsel was not knowing, voluntary, and intelligent, and his inability to get his case file while in jail violated his right to fundamental fairness and due process of law. After rescinding his request for a public defender at a pretrial conference, Defendant informed the trial court that he had not received any of the court filings or documents related to his case. The prosecutor and trial court assured Defendant that he would receive access to discovery in the jail. And when Defendant indicated that he wished to proceed pro se, the trial court did not inform him of any of the dangers and disadvantages of self-representation. At trial, Defendant again stated that he had not received any witness statements, affidavits, or information the court had instructed the prosecutor to provide to him. The trial court stated that "by choosing to represent yourself and being in custody it made it difficult for you having access to that" but "that's a choice that you have made." In Griffin v. State, 59 N.E.3d 947 (Ind. 2016), the Indiana Supreme Court noted, "[i]t is quite possible that the State could violate a pro se prisoner's due process rights by providing discovery solely in a format it knows the prisoner has no means of accessing. We hope never to see such a case." The Court of Appeals noted that the fundamental fairness requirement of the 14th Amendment "involves meaningful access to the courts, including through discovery, and through a knowing, voluntary, and intelligent waiver of the right to counsel at all significant phases of criminal proceedings, including trial and sentencing." Defendant was denied due process in this case, and the Court reversed his conviction. The Court also noted that "while the pressure on trial courts to manage cases is immense," the requirement of Judicial Conduct Rule 2.8(B) to be "patient, dignified, and courteous to litigants" is not optional, nor does it conflict with the duty imposed in Rule 2.5 "to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate." See Comment [1] to Ind. Code of Jud. Conduct, Rule 2.8.

TITLE: McCoy v. Louisiana
INDEX NO.: Y.7.a.
CITE: (5/14/2018), 138 S. Ct. 1500 (2018)
SUBJECT: D's right to control objectives of defense include deciding whether to concede guilt at trial
HOLDING: The Sixth Amendment guarantees a D the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the D the best chance to avoid the death penalty.

D was charged with murdering his estranged wife's mother, stepfather, and son. He pleaded not guilty to first degree murder, insisting that he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong. Although he vigorously proclaimed his innocence and adamantly objected to any admission of guilt, the Tr. Ct. let his attorney tell the jury that D "committed [the] three murders." Counsel's strategy was to concede that D committed the murders but to argue that his mental state prevented him from forming specific intent. D testified in his own defense, maintaining his innocence, and pressing his alibi. He was found guilty on all three counts. During the penalty phase, counsel again conceded D's guilt but urged mercy because of D's mental and emotional issues. The jury returned three death verdicts.

This case is not governed by jurisprudence regarding ineffective assistance of counsel but instead by a D's Sixth Amendment right to control the objectives of his defense. Though the Sixth Amendment guarantees the right to "assistance of counsel," a D does not surrender control entirely to counsel because an attorney, however expert, is still an "assistant." Faretta v. California, 422 U. S. 806, 819– 820 (1975). The lawyer manages the trial, but some decisions belong to the client, including whether to plead guilty. Autonomy to decide that the objective of the defense is to assert innocence belongs to the client. Refusing to plead guilty in the face of overwhelming evidence, rejecting the assistance of counsel, and insisting on maintaining innocence at the guilt phase of a capital trial are not strategic choices; they are decisions about what the D's objectives are. See Weaver v. Massachusetts, 137 S. Ct. 1899 (2017).

Here, then, when D made it clear that the objective of his defense was to maintain innocence and pursue an acquittal, his lawyer should have abided by that objective and should not have conceded guilt. Florida v. Nixon, 543 U. S. 175 (2004). Finally, D need not show prejudice because counsel's admission of D's guilt over D's objection was structural error. Held, *cert. granted*, opinion at 218 So.3d 535 reversed, and matter remanded for new trial. Ginsburg, J., joined by Roberts, C.J., and Kennedy, Breyer, Sotomayor, and Kagan, JJ. Alito, J., dissenting, joined by Thomas and Gorsuch, JJ.

RELATED CASES: Isom, 170 N.E.3d 623 (Implicitly conceding guilt is distinguishable from McCoy v. Louisiana; see full review at Y.4.b.)

TITLE: Ricketts v. State
INDEX NO.: Y.7.a.
CITE: (8/20/2018), 108 N.E.3d 416 (Ind. Ct. App 2018)
SUBJECT: No error in denying D right to self-representation
HOLDING: In Level 2 felony burglary prosecution, trial court did not erroneously deny D his right to self-representation. A trial court cannot deny a competent individual the right to represent himself. However, a D's request to act pro se can be denied when he is mentally competent to stand trial but suffers from severe mental illness to the point where he is not competent to conduct trial proceedings by himself. Edwards v. State, 902 N.E.2d 821 (Ind. 2009).

Here, D informed trial court prior to trial that he had been diagnosed with several mental illnesses and his medications were no longer effective, which he admitted could have a potential adverse effect on his ability to defend himself. Trial court was in the best position to make a first-hand evaluation of D's mental and emotional state, and Court is reluctant to second-guess its conclusion that he was not competent to represent himself at trial. Held, judgment affirmed.

TITLE: Sturdivant v. State

INDEX NO.: Y.7.a.

CITE: (9/28/2016), 61 N.E.3d 1219 (Ind. Ct. App 2016)

SUBJECT: No error in granting D's request for self-representation despite indicators of mental illness

HOLDING: In Indiana v. Edwards, 554 U.S. 164 (2008), Court recognized Tr. Ct.'s authority to insist upon representation by counsel for those defendants who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. Here, at multiple pretrial hearings over the course of 14 months, D told Tr. Ct. she wanted to waive her right to counsel and represent herself in trial for possession of methamphetamine and other offenses. On appeal after jury conviction on all counts, D (by counsel) claimed Tr. Ct. should have denied her request for self-representation, as she suffered from severe mental illness such that she was not competent to conduct trial proceedings by herself-- incapable of making knowing and intelligent waiver of right to counsel, regardless of the clarity of Tr. Ct.'s advisements and her acknowledgements in response.

Under the circumstances, some further probing by Tr. Ct. into D's mental capacity would have been appropriate. See Dowell v. State, 557 N.E.2d 1063, 1067 (Ind. Ct. App 1990). But D was not prejudiced by Tr. Ct.'s failure to inquire into her background. Because Tr. Ct. was in the best position to judge D's competency and there was no evidence she was suffering from severe mental illness (despite her bizarre statements and "incorrect and unusual legal arguments"), Tr. Ct.'s decision to allow her to conduct her own defense was not clearly erroneous. Held, judgment affirmed.

TITLE: Wheeler v. State
INDEX NO: Y.7.a.
CITE: (9/4/2014), 15 N.E.3d 1126 (Ind. Ct. App 2014)
SUBJECT: Appellate counsel not ineffective for failing to allege denial of D's right to self-representation
HOLDING: Appellate counsel was not ineffective for failing to argue D was denied his right of self-representation in contravention of Faretta v. California, 422 U.S. 806 (1975). Leading up to his trial, D informed Tr. Ct. several times that he believed his court-appointed attorneys were performing deficiently. He also mentioned he could represent himself instead. Tr. Ct. declined to dismiss D's court-appointed attorney, and he was convicted and sentenced to 35 years in prison.

Court agreed with appellate counsel's opinion that D's motions and letters did not constitute an unequivocal request for self-representation, thus this was not a strong issue for appeal. D did not – without equivocation or subsequent conduct indicating vacillation – assert his right to self-representation. Instead, it appears that D "engaged in a tactical campaign to procure counsel more to his liking." Held, denial of post-conviction relief affirmed.

TITLE: Wright v. State
INDEX NO: Y.7.a.
CITE: (05/04/2021), 168 N.E.3d 244 (Ind. 2021)
SUBJECT: Denial of D's equivocal request for self-representation affirmed - State's interest in the fairness of capital/LWOP cases
HOLDING: Defendant was charged with murder, along with other felony offenses, and after the State sought the death penalty a few months after his initial hearing, the trial court appointed new capital-qualified attorneys to represent him. Defendant was unhappy with his new counsel and notified the court he wanted to represent himself. After a lengthy colloquy with Defendant about why he wanted to represent himself, the trial court denied the motion, finding Defendant was equivocal in his request and that rather than truly wishing to represent himself, he just wanted different counsel. Defendant was convicted and sentenced to life without the possibility of parole.

The Indiana Supreme Court held the trial court's denial of Defendant's request to act as his own attorney was proper. The Court discussed the historical background of the constitutional right to self-representation, including the seminal U.S. Supreme Court case Faretta v. California, 422 U.S. 806, 816 (1975). The majority held that courts should weigh a request for self-representation with a particular focus on the State's interest in heightened reliability on the fairness of the proceedings because capital and LWOP cases have the most serious consequences for criminal defendants. As a result, trial courts should hold a presumption against waiver and in cases where the defendant is permitted to represent himself be ready to appoint standby counsel. The Court also rejected Defendant's appropriateness challenge to his LWOP sentence.

Justice Massa concurred in result with the majority because he found Defendant's waiver of counsel was equivocal. However, he agreed with the dissenting opinion that the majority's decision seems to contradict the U.S. Supreme Court's decision in Faretta. Justice Slaughter dissented for the reason noted in the concurrence and because he found Defendant invoked his right to self-representation clearly and unequivocally.

Y. RIGHT TO COUNSEL

Y.7. Choice of counsel

Y.7.a.1. Standards for

TITLE: Holifield v. State
INDEX NO.: Y.7.a.1.
CITE: (6/3/91), Ind., 572 N.E.2d 490
SUBJECT: Right to counsel -- pro se representation in joint trial
HOLDING: In trial where several Ds are being tried jointly, reversible error does to occur simply because one D gives testimony that incriminates other Ds. Averhart, 470 N.E.2d 666; Baysinger, 436 N.E.2d 96. Here, Tr. Ct. permitted one of four Ds to proceed pro se. Tr. Ct. also cautioned D on such procedure and appointed counsel to sit with and advise him throughout trial. Other Ds had counsel throughout trial.

Court held that although D's pro se representation was inept at times, possibly to point of self-incrimination, it could not say it constituted reversible error, especially in view of uncontradicted evidence supplied by State. Held, conviction affirmed.

TITLE: Houze v. State
INDEX NO.: Y.7.a.1.
CITE: (12/3/82) Ind., 441 N.E.2d 1369
SUBJECT: Right to counsel - self-representation; denial
HOLDING: Faretta v. CA (1975), 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 held counsel may not be forced on indigent D who knowingly & intelligently manifests desire to proceed pro se. D does not have right to "hybrid representation" (D represents self plus enjoys assistance of public defender). Lock 403 N.E.2d 1360; Coonan 382 N.E.2d 157; Bradberry 364 N.E.2d 1183. Here, D filed pro se motion for change of attorney & motion to act as his own counsel at trial. Ct. finds no abuse of discretion in Tr. Ct.'s denial of latter motion, *citing* finding of adequacy of Ct.-appointed attorney. Held, no error.

RELATED CASES: Equia, App., 468 N.E.2d 559.

TITLE: Jackson v. State
INDEX NO.: Y.7.a.1.
CITE: (4th Dist. 10/25/82) Ind. App., 441 N.E.2d 29
SUBJECT: Right to counsel - self-representation
HOLDING: Indigent criminal D has right to representation by legal counsel. 6th Amend.; Ind. Const. Art. 1, Section 13; Gideon v. Wainwright (1963), 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799; Moore 401 N.E.2d 676. Correlative to right of representation is right of D to waive assistance of counsel & represent self. Faretta v. CA (1975), 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562; Russell 383 N.E.2d 309. Waiver of counsel must be made voluntarily, knowingly & intelligently. Johnson v. Zerbst (1938), 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461; Morgan, App., 417 N.E.2d 1154. Waiver may not be implied from silent record. Wallace, App., 361 N.E.2d 159. Tr. Ct. must advise D of right to assistance of counsel & disadvantages of self-representation in clear & unambiguous language. Mitchell, App., 417 N.E.2d 364; McDandal, App., 390 N.E.2d 216. Appointment of standby counsel is appropriate prophylactic device when D assumes burden of conducting own defense. German 373 N.E.2d 880. Here, D was made aware of right to counsel & thoroughly informed of consequences of self-representation. D had previous experience in criminal justice system. Tr. Ct. appointed standby counsel for D, thus obviating many disadvantages. D was acquitted of one charge. Held, D's waiver of counsel was voluntary, intelligent & knowing.

RELATED CASES: Parish, 989 N.E.2d 831 (Ind. Ct. App 2013) (waiver of counsel invalid where Tr. Ct. did not advise D of dangers and disadvantages of self-representation); Hopper, 957 N.E.2d 613 (Ind. 2011) (when D pleads guilty pro se, there is no mandatory advisement regarding the pitfalls of self-representation that must be given; rather, whether an advisement is given will be one factor in considering the voluntariness of the waiver of counsel and the plea); Cihonski, App., 779 N.E.2d 1180 (Tr. Ct. did not abuse its discretion in requiring D to complete trial with hybrid representation; because hybrid representation took place as opposed to self-representation, Tr. Ct. was not required to give D standard advisements on dangers of proceeding *pro se*); Sherwood, 717 N.E.2d 131 (where D was competent to stand trial; made knowing, intelligent & voluntary waiver of his right to counsel in timely & unequivocal manner; & because he was denied actual control of case presented to jury, Tr. Ct.'s imposition of hybrid representation violated Sixth Amendment); Hardison, App., 485 N.E.2d 133 (conviction reversed where Tr. Ct. failed to advise D of disadvantages of self-representation).

TITLE: Jones v. State
INDEX NO.: Y.7.a.1.
CITE: (6/14/83) Ind., 449 N.E.2d 1060
SUBJECT: Right to counsel - self-representation; standby counsel
HOLDING: D was not denied right to self-representation where Tr. Ct. gave D (who moved to proceed pro se with assistance of writ writer from Michigan City) option of proceeding pro se with previously appointed public defender as standby counsel. "The appointment of standby counsel is clearly `the recommended procedure to preserve D's rights when he elects to represent himself.'" German 373 N.E.2d 880. See US v. Dougherty (D.C. Cir. 1972), 473 F.2d 1113. Here, D contends Tr. Ct. denied him right to self-representation. D did not move to proceed pro se without standby counsel. Held, no error.

RELATED CASES: Reed 491 N.E.2d 182 (Const L 268.1(5); Ct. rejects D's contention that Tr. Ct. denied him due process by permitting him to represent himself without also affording him direct access to witnesses & legal facilities; Ct. finds D's problems resulted from his ineffective use of standby counsel).

TITLE: Kane v. Garcia Espitia,

INDEX NO.: Y.7.a.1.

CITE: 546 U.S. 9, 126 S. Ct. 407; 163 L.Ed. 2d 10 (2005)

SUBJECT: Pro se D's right to law library access

HOLDING: *Per curiam.* Garcia Espitia chose to represent himself *pro se* at his trial in state court. On appeal, the state courts rejected his argument that lack of access to a law library violated his rights under Faretta v. California, 422 U.S. 806(1975). The 9th Circuit ordered habeas relief, holding that the right to proceed *pro se* under Faretta implies a right to law library access. Without deciding whether a *pro se* D has a right to law library access, the Court held that habeas relief was barred because Faretta did not clearly establish that right.

TITLE: Mynatt v. State
INDEX NO.: Y.7.a.1.
CITE: (8/26/2015), 42 N.E.3d 567 (Ind. Ct. App 2015)
SUBJECT: Denial of mid-trial request for counsel affirmed

HOLDING: Tr. Ct. did not abuse its discretion in denying D's mid-trial request for counsel, where on several occasions D insisted on going pro se as he highlighted his familiarity with the legal system and past success with self-representation.

At both his initial hearing and pre-trial conference, D insisted on representing himself, even after the Tr. Ct. warned him that he potentially faced a twenty-year sentence. He explained that he had represented himself in a previous robbery case, where the charges were dismissed. He said he was not worried about picking a jury. The Tr. Ct. informed him about the importance of the rules of evidence. At trial, D's efforts to impeach the State's second witness foundered, which prompted him to ask for counsel. The Tr. Ct. denied the request.

D was experienced in representing himself. See Henley v. State, 881 N.E.2d 639, 645 (Ind. 2008). He insisted many times he would represent himself, and until his ill-fated cross-examination of the second witness, he showed himself capable of doing so. Id. The trial was well underway, and appointment of counsel would have significantly delayed the trial. Id. Finally, despite his failed attempt to impeach the witness, D's past success with self-representation, knowledge of the legal system, understanding of the penalty he faced, and his college education indicated he could represent himself effectively through the rest of the trial without counsel. Id. Held, judgment affirmed.

TITLE: Nation v. State
INDEX NO.: Y.7.a.1.
CITE: (2/22/83) Ind., 445 N.E.2d 565
SUBJECT: Right to counsel - self-representation; standards
HOLDING: Although one proposing to proceed pro se should be fully advised of perils of self-representation, where D discharges retained counsel & requests to proceed pro se, it is unnecessary for the Tr. Ct. to fully advise D of his right to counsel. Opinion vacates Nation, App., 426 N.E.2d 436, on rehearing 438 N.E.2d 1003. Here, D fired his retained counsel the morning of trial. Tr. Ct. permitted counsel to withdraw & D to proceed pro se. Ct. App. held D must be expressly advised of both right to counsel & disadvantages of self-representation in clear & unambiguous language. Ind. S. Ct. finds D understood available choices & in electing to proceed pro se knowingly & intelligently waived his right to counsel. Held, no error.

RELATED CASES: Jenkins 492 N.E.2d 666 (Crim L 182, 641.4(5); where D was advised of consequences of proceeding pro se, Ct. finds no error in a variety of rulings to which D did not object because of lack of knowledge).

Y. RIGHT TO COUNSEL

Y.7. Choice of counsel

Y.7.a.2. Procedure/time for demanding

TITLE: Broadus v. State
INDEX NO.: Y.7.a.2.
CITE: (1/20/86) Ind., 487 N.E.2d 1298
SUBJECT: Right to counsel - self representation; procedure for demanding
HOLDING: Tr. Ct. did not err by refusing to allow D to represent self. Here, Ct. finds D failed to assert right clearly & unequivocally. D moved to act as his own attorney if he could also be moved to ISP for safe keeping. Tr. Ct. denied both motions. D was later transferred to ISP but did not renew motion to act as own counsel. D made several requests during trial to proceed without counsel, but these requests were untimely & Tr. Ct.'s denial of them was not abuse of discretion, given D's outbursts in Ct. (D was eventually shackled). Held, no error.

TITLE: Coleman v. State
INDEX NO.: Y.7.a.2.
CITE: (3/23/94), Ind. App., 630 N.E.2d 1376
SUBJECT: Self-representation -- hearing required prior to waiver of right to counsel
HOLDING: Right to counsel guaranteed by Sixth Amendment to United States Constitution guarantees accused right to represent himself. Faretta, 422 U.S. 806. However, election for self-representation must be made voluntarily and intelligently. Record must affirmatively disclose that D is aware of implications, consequences and risks of self-representation. Leonard, 579 N.E.2d 1294.

Tr. Ct. must conduct hearing to determine D's competency to represent himself and to establish record of waiver. Court may inquire into D's educational background, familiarity with legal procedures and general mental capabilities. However, no specific requirement to explore each of these areas is imposed upon Tr. Ct. It is sufficient if record reveals that D has been apprised of advantages of representation by counsel and pitfalls of self-representation but nevertheless voluntarily, knowingly, and intelligently chooses self-representation. Martin, 588 N.E.2d 1291.

Here, D represented himself at trial, with assistance of appointed stand-by counsel. He was advised by Tr. Ct. that he would be treated as if he were attorney and that he would be responsible for making arguments, questioning witnesses, and selecting jurors. He was also told that Court could not explain evidentiary objections to him, and that he could not testify during his final argument but was responsible for arguing merits of his defense and attacking any defects in State's case. Court held that record revealed D was adequately advised of consequences of self-representation, and that his waiver of representation by counsel was knowing and voluntary. Held, conviction affirmed; Hoffman, J., dissenting.

RELATED CASES: Hopper, 957 N.E.2d 613 (Ind. 2011) (when D pleads guilty pro se, there is no mandatory advisement regarding the pitfalls of self-representation that must be given; rather, whether an advisement is given will be one factor in considering the voluntariness of the waiver of counsel and the plea); Spears, App., 621 N.E.2d 366 (without hearing on record and additional advisement, waiver of counsel and demand to proceed pro se forms were inadequate to ensure D made knowing and voluntary waiver of right to counsel; although D signed both forms, it was impossible to determine if information in forms was explained to him and, if so, by whom).

Y. RIGHT TO COUNSEL

Y.7. Choice of counsel

Y.7.a.3. Advisements

TITLE: Dixon v. State
INDEX NO.: Y.7.a.3.
CITE: (7/30/82) Ind., 437 N.E.2d 1318
SUBJECT: Right to counsel - self-representation [SR]; time for demanding
HOLDING: A hearing on question of SR is required only if right is properly asserted by clear & unequivocal request made within reasonable time prior to first day of trial. Request for SR on morning of trial is per se untimely. Held, no error. DISSENT by Prentice contends state cannot force lawyer on criminal D. Russell 383 N.E.2d 309, dissenting opinion. Hearing on D's request required. D's right to choose, not D's right to choose rationally is what is protected. Right may be exercised on whim & caprice; Ct.'s obligation is to guarantee right is exercised knowingly & voluntarily.

RELATED CASES: Dobbins, 721 N.E.2d 867 (D failed to assert his right to self-representation in clear & unequivocal manner); Alexander 449 N.E.2d 1068.

TITLE: Dowell v. State
INDEX NO.: Y.7.a.3.
CITE: (1st Dist. 8/6/90), Ind. App., 557 N.E.2d 1063
SUBJECT: Right to self-representation - waiver of counsel; advisements
HOLDING: D did not knowingly, voluntarily, & intelligently waive right to counsel. D twice rejected services of Ct.-appointed lawyer, & at least twice more indicated that he wanted to represent himself. Ct. App. finds that D made clear & unequivocal request to proceed pro se, but did not knowingly, voluntarily, & intelligently waive right to counsel because Tr. Ct. did not fully explain to him consequences of self-representation. Faretta v. California (1975), 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562. While valid waiver may be established by particular facts & circumstances surrounding case, including background, experience, & conduct of accused, it was not established here. Jackson, App., 441 N.E.2d 29. Ct. App. goes on to offer guidelines to Tr. Cts. as to advisements & inquiry necessary to establish knowing, intelligent, & voluntary waiver. Ds must know nature of charges against them, including lesser included offenses, as well as possible defenses & mitigating circumstances. Ds should be advised that they will be held to same standards as attorney as to law & procedure, be specifically informed of numerous trial skills which attorneys possess & be warned that if they choose to proceed pro se they cannot later claim ineffective assistance of counsel. Finally, Tr. Ct. should inquire into D's educational background & familiarity with legal procedures & rules of evidence, &, if circumstances warrant, into D's mental capacity.

Note: Guidelines in Dowell not mandatory, nor retroactive, see Leonard 579 N.E.2d 1294, at Y.7.a.3.

RELATED CASES: Taylor, 944 N.E.2d 84 (Ind. Ct. App 2011) (D's request to proceed pro se was unequivocal where he told judge he wanted to fire his lawyer "so I can go pro se" and his subsequent pro se filings indicated he exercised his Sixth Amendment right to proceed pro se); Logan, App., 693 N.E.2d 1331 (D's conduct at initial hearing & trial, specific language that he used, & his experience with judicial system provided sufficient basis that D knowingly waived right to counsel).

TITLE: Henson v. State
INDEX NO.: Y.7.a.3.
CITE: (1st Dist., 11-14-03), Ind. App., 798 N.E.2d 540
SUBJECT: Waiver of right to counsel - hybrid representation
HOLDING: D, who proceeded at trial pro se with benefit of stand-by counsel, knowingly, voluntarily & intelligently waived his right to counsel despite the absence of any of the guidelines Tr. Cts. are encouraged to use in advising a D of the dangers related to self- representation. Although guidelines are not mandatory, Tr. Ct. must acquaint the D with advantages to attorney representation & drawbacks of self-representation. Leonard v. State, 579 N.E.2d 1294 (Ind. 1991); Jones v. State, 783 N.E.2d 1132 (Ind. 2003).

In this case, D's hybrid representation was akin to proceeding pro se & Tr. Ct., therefore, was required to ensure D's waiver of counsel was knowing & voluntary. In reaching its conclusion, Ct. relied on Carter v. State, 512 N.E.2d 158 (Ind. 1987), as basis to determine nature of representation in hybrid representation situations - pro se or counseled. While counsel conducted voir dire & did closing, D was responsible for all other aspects of pre-trial & trial. Sidebar discussion also indicated that assisting counsel would have tactically attempted to admit other evidence into record if he was lead counsel. When reviewing a Tr. Ct.'s decision to allow self-representation, factors to be considered are: 1) the Ct.'s inquiry into the D's decision; 2) other evidence establishing whether the D understood the dangers & pitfalls of self-representation; 3) the D's background & experience; & 4) the context in which the D proceeded pro se. "Absent exceptional circumstances," an advisement of warnings as to self-representation is a condition precedent to an invocation of self-representation. Miller v. State, 795 N.E.2d 468 (Ind. Ct. App 2003).

Ct. found exceptional circumstances here in that D openly stated the reason he wanted to proceed pro se & the record indicated he & his public defender had discussed his desire to proceed pro se. Ct. also found that D, as a prisoner, had previous experience with legal system & advising counsel stated he knew D well & felt that he could adequately represent himself as well as any inmate. Ct. also considered fact that if any problems arose during trial, D had assisting counsel available. Lastly, Ct. concluded D apparently had a tactical reason to represent himself because he thought his public defender had a conflict of interest. Due to all these factors, D's waiver of right to counsel was knowing & voluntary. Held, judgment affirmed.

TITLE: Leonard v. State
INDEX NO.: Y.7.a.3.
CITE: (09/27/91), Ind., 579 N.E.2d 1294
SUBJECT: Right to counsel - waiver
HOLDING: Guidelines set forth in Dowell v. State (1990), Ind. App., 557 N.E.2d 1063, to determine knowing, intelligent, & voluntary waiver of right to counsel, while appropriate & preferable, are not mandatory, granting transfer of Ct. App. decision at 573 N.E.2d 463, & affirming D's conviction. Ct. App. had found advisements given to D before he proceeded without counsel would have been sufficient before Dowell but determined that Dowell applied retroactively & required strict compliance.

S. Ct. looked at advisements given & found Tr. Ct. followed its controlling precedent adequately, especially German 373 N.E.2d 880, & Kindred 521 N.E.2d 320. Ct. found that guidelines of Dowell should be followed to establish waiver, but do not constitute rigid mandate of inquiries which must be made. Ct. also found Ct. App.'s concern about D's competence was addressed by psychiatric examinations & did not require finding of lack of proper waiver. Held, transfer granted & conviction affirmed.

RELATED CASES: Greer, App., 690 N.E.2d 1214 (Tr. Ct. not required to make inquiries into D's educational background and familiarity with legal procedures).

TITLE: Rice v. State
INDEX NO.: Y.7.a.3.
CITE: (07-24-07), Ind. App., 874 N.E. 2d 988
SUBJECT: Layperson's failure to attend scheduled Ct. date is not direct contempt
HOLDING: Tr. Ct. erred in holding D in direct contempt for missing a scheduled plea agreement & sentencing hearing. Whereas Cts. can punish acts of direct contempt without formal charges or evidentiary hearings, acts of indirect contempt require appointment of a special judge & other due process protections. Direct contempt includes actions occurring near the Ct., interfering with the business of the Ct., of which the judge has personal knowledge. Although an attorney's failure to appear at a scheduled Ct. date can constitute direct contempt, a layperson's failure does not. Williams v. State ex rel. Harris, 690 N.E.2d 315 (Ind. Ct. App 1997). Thus, the contempt citation was reversed. Further, when D was arrested & eventually had his plea agreement & sentencing hearing, the Tr. Ct. erred by allowing D to waive counsel & proceed without first advising him of the disadvantages of proceeding without an attorney. Thus, D did not knowingly, intelligently, & voluntarily waive his right to an attorney. Held, judgment reversed.

RELATED CASES: Bellamy, 952 N.E.2d 263 (Ind. Ct. App 2011) (distinguishing Rice, Ct. held that, despite D's status as a layperson, Tr. Ct. properly found him in direct contempt for failure to timely appear for trial after receiving an express prior warning from Tr. Ct. that such a failure would result in a contempt finding).

TITLE: U.S. v. Bailey
INDEX NO.: Y.7.a.3.
CITE: 675 F.2d1292 (D.C. Cir. 1982)
SUBJECT: Self representation -- advisements required prior to waiver of counsel
HOLDING: Supreme Court held for first time in Faretta, 422 U.S. 806, that D has constitutional right to dispense with assistance of counsel and to represent himself; this makes judge bound by constitutional considerations to grant request for self-representation if it appears that choice of that right is made competently and intelligently. Although D need not himself have skill and experience of lawyer in order to competently and intelligently choose self-representation, he should be made aware of dangers and disadvantages of self-representation, so that record will establish that he knows what he is doing and that his choice is made with eyes open. Here, in original trial on merits, D earnestly sought, and succeeded in obtaining, Tr. Ct.'s permission to represent himself. Court declined to vacate prior appointment of counsel, and directed that counsel serve as standby counsel sitting with appellant at counsel table. This can only be interpreted as speaking of problems likely to be encountered in course of self-representation. Court held that judge, by so declining, recognized D's constitutional right of self-representation. Held, conviction affirmed.

RELATED CASES: Hopper, 957 N.E.2d 613 (Ind. 2011) (when D pleads guilty pro se, there is no mandatory advisement regarding the pitfalls of self-representation that must be given; rather, whether an advisement is given will be one factor in considering the voluntariness of the waiver of counsel and the plea); Rice, App., 874 N.E.2d 988 (D who was not advised of consequences of self-representation prior to pleading guilty unrepresented did not voluntarily waive right to counsel); Graves, 503 N.E.2d 1258 (if D waives counsel, trial judge must establish record showing D was made aware of consequences of waiver).

TITLE: Von Moltke v. Gillies
INDEX NO.: Y.7.a.3.
CITE: 332 U.S. 708 (1948)
SUBJECT: Right to counsel -- advisements required prior to waiver
HOLDING: Waiver of constitutional right to assistance of counsel is of no less importance to accused who must decide whether to plead guilty than to accused who stands trial. Constitutional right of accused to be represented by counsel invokes, of itself, protection of Tr. Ct., in which accused -- whose life or liberty is at stake -- is without counsel. This protecting duty imposes serious & weighty responsibility upon trial judge of determining whether there is intelligent & competent waiver by accused. Johnson, 304 U.S. 458. To discharge this duty properly in light of strong presumption against waiver of constitutional right to counsel, Glasser, 315 U.S. 60, judge must investigate as long & as thoroughly as circumstances of case before him demand. Fact that accused may tell him that he is informed of his right to counsel & desires to waive this right does not automatically end judge's responsibility. To be valid, such waiver must be made with apprehension of nature of charges, statutory offenses included within them, range of allowable punishments thereunder, possible defenses to charges & circumstances in mitigation thereof, & all other facts essential to broad understanding of whole matter. Judge can make certain that accused's professed waiver of counsel is understandingly & wisely made only from penetrating & comprehensive examination of all circumstances under which such request is tendered.

Here, there was only routine inquiry into D's waiver of counsel, followed by signing of standard written waiver of counsel. D persistently sought legal advice from all of very limited number of people she was permitted to see during period of incarceration before her guilty plea was entered. Ct. held that record showed that when D pled guilty, slightest deviation from Court's routine procedure would have revealed D's perplexity & doubt, because testimony of all witnesses pointed unerringly to existence of uncertainty which was obviously just below surface of D's statements to judge. This case shows that routine inquiries may be inadequate although Constitution does not require that under all circumstances counsel be forced upon D. Carter, 329 U.S. 173. Held, denial of writ of habeas corpus reversed & remanded.

RELATED CASES: Catt, 437 N.E.2d 1001 (D was told he was charged with misdemeanor when charge was, in fact, felony; held, waiver of counsel was not knowing & intelligent).

Y. RIGHT TO COUNSEL

Y.7. Choice of counsel

Y.7.a.4. Termination of

TITLE: Koehler v. State
INDEX NO.: Y.7.a.4.
CITE: (10/27/86) Ind., 499 N.E.2d 196
SUBJECT: Self-representation - termination of
HOLDING: Tr. Ct. abused discretion by refusing D's request for counsel following battery conviction but before habitual offender proceeding began. Here, D was appointed standby counsel, who offered him advice & occasionally handled motions or objections. Standby counsel could have proceeded with habitual offender proceeding without disadvantage to other participants in trial. Ct. notes different result may be possible when D does not have standby counsel prepared to assume representation without interruption of proceedings & when D's reassertion of right to counsel does not occur at natural break in proceedings. See Pickens v. State (Wis. 1980), 292 N.W.2d 601. Ct. sets forth relevant factors to be considered in ruling on D's to request to change from self-representation to counsel-representation: (1) D's prior history in substitution of counsel/desire to change from self-representation to counsel-representation; (2) reason set forth for request; (3) length & stage of trial proceedings; (4) disruption or delay reasonably expected to ensue from granting motion; & (5) likelihood of D's effectiveness in defending against charges if required to continue to act as own attorney. People v. Elliott (Cal. App. 1977), 139 Cal. Rptr. 205. Ct. notes D had failed miserably as defense counsel during battery trial & there was no reason to believe he would have fared any better during habitual proceeding. Held, habitual conviction reversed; remanded for new proceeding.

RELATED CASES: Henley, 886 N.E.2d 639 (Tr. Ct.'s failure to consider the Koehler factors before denying a pro se D's request for counsel is not per se reversible error; the appellate court will examine the record and apply the factors; here, denial of D's request for stand-by counsel to deliver closing was proper); Goble, App., 766 N.E.2d 1 (Tr. Ct. abused its discretion in refusing to allow pro se D's standby counsel to conduct direct examination of him & closing argument); Kelley, 470 N.E.2d 1322 (filing of motions pro se does not constitute request to proceed pro se or with hybrid representation); Minneman, 466 N.E.2d 438 (Court does not have to grant continuance to D who elects to dismiss his counsel and to proceed pro se on morning of trial).

Y. RIGHT TO COUNSEL

Y.7. Choice of counsel

Y.7.b. Right to/role of attorney-advisor

TITLE: Goble v. State
INDEX NO.: Y.7.b.
CITE: (2-8-02), Ind. App., 766 N.E.2d 1
SUBJECT: Right to counsel violation - request for assistance of standby counsel
HOLDING: Tr. Ct. abused its discretion in refusing to allow pro se D's standby counsel to conduct direct examination of him & closing argument. In considering D's request to change from self-representation to representation by standby counsel, Tr. Ct. should consider following factors: (1) D's prior history in substitution of counsel & in desire to change from self- representation to counsel-representation, (2) reasons set forth in D's request, (3) length & stage of trial proceedings, (4) any disruption or delay in trial proceedings which might be expected to ensue if request is granted, & (5) likelihood of D's effectiveness in defending against charges if required to continue to act as own attorney. Koehler v. State, 499 N.E.2d 196 (Ind. 1986).

Tr. Ct. clearly considered length & stage of proceedings, recognizing that trial was almost complete & that D had done rather well in representing himself; however, Ct. failed to consider D's reasons for request & that there would be minimal delay in granting D's request. D requested that standby counsel be allowed to conduct direct examination of him due to inherent difficulty in questioning himself & that standby counsel be allowed to conduct closing argument due to his fatigue. Analysis of factors in conjunction with Tr. Ct.'s failure to advise D of dangers & disadvantages of self-representation leads to conclusion that Tr. Ct. violated D's Sixth Amendment right to counsel. Held, convictions reversed.

RELATED CASES: Stamper, App., 809 N.E.2d 352 (Tr. Ct. erred in denying D's request for appointment of attorney to represent him at his sentencing hearing; see full review at Y.2.f).

TITLE: Reed v. State
INDEX NO.: Y.7.b.
CITE: (4/7/86) Ind., 491 N.E.2d 182
SUBJECT: Role of attorney - advisor
HOLDING: Ct. rejects D's contention that Tr. Ct. denied him due process by permitting him to represent himself without also affording him direct access to witnesses & legal facilities. Here, Tr. Ct. appointed standby counsel for D, & ordered counsel to provide D with legal materials & to be available to file necessary motions & other pleadings. Ct. finds source of D's difficulty was fact his incarceration created difficulty in subpoenaing & deposing witnesses. "Any problem [D] may have had would have been nonexistent if he had used his standby counsel properly. The purpose of standby counsel is to lessen barriers resulting from incarceration, & it provides [D] with opportunity to improve quality of his self-representation. See Engle [467 N.E.2d 712]." Held, no denial of due process of law.

RELATED CASES: Maisonet 579 N.E.2d 660 (not error to deny D's request to have co-counsel available to "look up a little case history for me...," where counsel D requested was unavailable & D did not express interest in having another attorney appointed. It was also not error to deny D's request for co-counsel at commencement of habitual offender stage of proceeding, because even if request was considered desire to give up right to represent himself, there was no counsel prepared to assume representation without delay in proceedings).
No Cases

Y. RIGHT TO COUNSEL

Y.7. Choice of counsel

Y.7.c. Right to counsel of one's choice

TITLE: Alexander v. State
INDEX NO.: Y.7.c.
CITE: (6/17/83) Ind., 449 N.E.2d 1068
SUBJECT: Right to counsel of one's choice
HOLDING: Tr. Ct. did not err in denying D's Ct.-appointed attorney's motion to withdraw from case filed 4 days before trial where D showed neither abuse of discretion nor harm because of something his attorney did or did not do. Vacendak 431 N.E.2d 100. Here, counsel's motion alleged there was an "effective barrier" to attorney-client relationship & that motion was not made for purposes of delay. Ct. notes indigent D has no absolute right to counsel of own choosing. Harris 427 N.E.2d 658; Duncan 412 N.E.2d 770. Failure to permit appointed counsel to withdraw is reviewable only for abuse of discretion. Id. An untimely request made during or just before start of trial is properly denied (policy: D may not disrupt administration of justice by continually moving for change of counsel). Id. Bare allegation of lack of communication is insufficient to show abuse of discretion; showing of harm is required. Vacendak. Held, no error.

RELATED CASES: Luck, 466 N.E.2d 451 (three weeks prior to trial too late where trial had been set for six months and no evidence presented by D to detail reasons for discontent with attorney); Jefferson, 484 N.E.2d 22 (thirteen days prior to trial too late where trial had already been delayed by D and excuse for delay was weak); Galloway, App., 656 N.E.2d 1204 (no error in denying D's request that he be appointed new counsel seven days prior to trial date; D failed to show prejudice); Carpenter 486 N.E.2d 1007 (no abuse of discretion in denial of motion to withdraw, made several months before trial, where "various procedures to bring case to trial were already in progress;" D showed no prejudice); Jackson 483 N.E.2d 1374 (no error in denial of D's motion for change of counsel made morning of trial; D refused to proceed with counsel & was allowed to make opening statement complaining of incompetence of Ct.-appointed lawyer; lawyer did represent D at trial over D's objection); Smith 474 N.E.2d 973 (Crim L 641.10(1)).

TITLE: Barham v. State
INDEX NO.: Y.7.c.
CITE: (10/18/94), Ind. App., 641 N.E.2d 79
SUBJECT: Right to counsel -- failure to grant request for counsel of choice
HOLDING: Right to counsel of D's choice is essential component of Sixth Amendment right to counsel, Nichols, 841 F.2d.1485, and D should be afforded fair opportunity to secure counsel of his own choice. Powell, 287 U.S. 45. Right to privately retain counsel of choice derives from D's right to determine type of defense he wished to present. Mendoza-Salgado, 964 F.2d.993. In criminal cases, right to retain counsel of choice becomes question of fundamental fairness, denial of which may rise to level of constitutional violation. Collins, 920 F.2d.619.

Here, seven days before trial date, D filed pro se motion requesting new attorney because he was not satisfied with his public defender's performance. Two days later, private counsel entered her appearance and filed motion requesting continuance to allow her to prepare for trial; judge denied appearance and request for continuance. On day of trial D filed pro se motion requesting continuance to allow private counsel to re-enter her appearance and prepare for trial. Court denied motion and D was convicted. On appeal, D claimed that Tr. Ct. violated his Sixth Amendment right to be represented by counsel of choice when it denied his private counsel's appearance and request for continuance.

Ct. noted that this case differs from others in which issue of right to representation by counsel of choice is bound inextricably with continuance motion. Here, new counsel had been retained when D filed for continuance. Ct. held that Tr. Ct. unreasonably and arbitrarily interfered with D's right to retain counsel of choice where judge pro tem had earlier advised D that attorney was free to appear and could file for continuance. Also, Tr. Ct. subsequently denied appearance and continuance motion filed five days before trial date, no showing was made that attorney could not be prepared by trial date, D had caused no prior delays and did not request speedy trial, D was in jail and did not benefit from continuance, and D had informed Tr. Ct. that his family had just obtained counsel. Held, conviction reversed and remanded for new trial.

RELATED CASES: Washington, App., 902 N.E.2d 280 (distinguishing Barham, Ct. noted D failed to notify Tr. Ct. court, with any certainty, of the identity of his allegedly hired private counsel, and, as of the morning of trial, no attorney, other than his previously assigned public defender, had filed an appearance on D's behalf); Young, Ill., 565 N.E.2d 309 (reversible error to preclude D from replacing counsel where, on morning of first day of trial, public defender informed Tr. Ct. D wished to replace him with private counsel; D had received bail money four days earlier and intended to use it to hire private counsel, and private counsel advised court he was available and willing to enter his appearance).

TITLE: Carter v. State
INDEX NO.: Y.7.c.
CITE: (8/25/87) Ind., 512 N.E.2d 158
SUBJECT: Right to counsel of one's choice
HOLDING: Tr. Ct. did not err in denying D's motions for new counsel which were based on counsel's race & D's mere allegations of attorney misconduct. D does not have an absolute right to counsel of his own choosing, Alexander 449 N.E.2d 1068 (see card at Y.7.c), & D may not arbitrarily compel Tr. Ct. to discharge competent counsel. Irvin 291 N.E.2d 70. Race or ethnic factors are not legitimate considerations. See Mitchell v. Thompson (S.D. N.Y. 1944), 56 F. Supp. 683; People v. Fitzgerald (1972), 105 Cal. Rptr. 458. Here, D also alleged that he feared counsel would reveal D's confidences to police & prosecutor. D said his lack of confidence arose from counsel's suggestion that D represent himself. Counsel explained that this suggestion was due to D's legal experience & knowledge of witnesses & stated that he was confident he could represent D adequately. D presented no other bases for allegations. Held, Tr. Ct. did not err in denying D's request for change of counsel.

TITLE: Dickson v. State
INDEX NO.: Y.7.c.
CITE: (3/22/88), Ind., 520 N.E.2d 101
SUBJECT: Right to counsel of one's choice -- discretionary continuance
HOLDING: Tr. Ct. did not err in denying D's motion for continuance filed on day before trial, to allow private counsel to prepare for trial. Motion for continuance based upon alleged need to have more time for trial preparation is matter of Tr. Ct. discretion, is generally not favored without showing of good cause and will be granted only in furtherance of justice. Menifee, 512 N.E.2d 142. To demonstrate abuse of discretion in failing to find good cause, Tr. Ct.'s record must reveal that D was prejudiced by Tr. Ct.'s failure to grant continuance. Spangler, 498 N.E.2d 1206.

Here, D's public defender filed motion for continuance eight days before trial because he had insufficient time to prepare defense; motion was denied. On day before trial, D renewed motion for continuance and to replace his public defender with private counsel who would accept case on condition that continuance would be granted to allow him to prepare for trial. State responded that witnesses had arrived or were scheduled to arrive from various parts of country and that they had difficulty keeping in contact with witness who was D's friend. Prosecutor argued that D had twelve months to employ private counsel and had changed his theory of defense. Tr. Ct. *overruled* D's motion for continuance.

Court held that, considering length of time before trial and fact that D's counsel was able to interview witnesses before trial, there was no abuse of discretion. Moreover, D had not shown, nor did record reflect, how he was prejudiced by denial of motion for continuance. Held, judgment affirmed, cause remanded on other grounds.

TITLE: Luis v. U.S.
INDEX NO.: Y.7.c.
CITE: (3/30/2016), 136 S. Ct. 1083 (U.S. 2016)
SUBJECT: Pretrial freeze of untainted assets violated 6th amend. right to counsel
HOLDING: The plurality opinion held that D's Sixth Amendment right to counsel was violated when the Tr. Ct. froze her financial assets that were untainted by criminal activity, which prevented D from hiring her counsel of choice.

The government charged D with fraudulently obtaining nearly $45 million through crimes related to health care. Because D had already spent most of that money, the government asked the Tr. Ct. to freeze her untainted $2 million for future payment of fines and restitution. See 18 U. S. C. §1345. The District Court granted the request and the Eleventh Circuit affirmed.

Granting the government's request to freeze the assets violated D's Sixth Amendment right to counsel. While the government's concern to secure funds for payment of fines and restitution is legitimate, that concern is outweighed by D's fundamental right to hire counsel of her choice. Caplin & Drysdale v. United States, 491 U. S. 617, 624 (1989); Powell v. Alabama, 287 U.S. 45, 68 (1932); Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938).

Both the plurality and Justice Thomas distinguished Caplin & Drysdale, 491 U. S. 617, and United States v. Monsanto, 491 U. S. 600, 616 (1989). Those cases involved property that was forfeitable because it was the fruit of the crime or contraband. The property here is distinguishable because it was legitimately owned but forfeitable as a substitute for illegitimate but dissipated assets. Held, cert. granted, Eleventh Circuit opinion at 564 Fed. Appx 493 vacated, and case remanded. Breyer, J., joined by Roberts, C.J., and Ginsburg and Sotomayor, JJ; Thomas, J., concurring in judgment; Kennedy, J., dissenting, joined by Alito, J.; Kagan, J., dissenting.

TITLE: United States v. Sellers
INDEX NO.: Y.7.c.
CITE: (05-19-11), 645 F.3d 830 (7th Cir. 2011)
SUBJECT: Denial of Sixth Amendment right to choice of counsel
HOLDING: The Sixth Amendment grants a D the right to assistance of counsel, including the right, when the D has the means to retain his own attorney, to be represented by counsel of choice. See United States v. Gonzalez-Lopez, 548 U.S. 140 (2006). Here, D was charged with drug and gun offenses. D then retained an attorney. The retained attorney asked an associate to appear as secondary counsel. The retained attorney never filed an appearance, and the associate, whom D did not hire, acted as D's attorney. The district court repeatedly denied D's request for a continuance to allow D to be represented by his chosen counsel. The district court stated further that once D's desired counsel takes over, counsel must "take the case as they find it."

The right to counsel of D=s choice is not absolute, as Tr. Ct. can legitimately balance the right to counsel of choice against the demands of its calendar. However, Tr. Ct. must consider the whole of the circumstances surrounding the request for continuance. Retained counsel only asked his associate for assistance as second chair. The associate of retained counsel was unprepared for trial, not as a delay tactic, but because he genuinely expected retained counsel to step in as promised. Further, even if the associate was prepared for trial, he was not hired by D. The inconvenience of pushing a trial back a month or so can easily be outweighed by a D's interest in having counsel of choice. By the court not granting a continuance, D was left with the options of representing himself pro se, continuing with counsel he did not want who knew only little of the case, or continuing with counsel of his choice that would have to "take the case as [he] finds it" (go to trial without any knowledge of the case). Therefore, his right to choose counsel was stripped, forcing him to go on with the proceedings without prepared counsel of his choice. Held, judgment and sentence vacated, and case remanded.

TITLE: Smith v. State
INDEX NO.: Y.7.c.
CITE: (1st Dist. 8/2/83) Ind. App., 452 N.E.2d 160
SUBJECT: Right to counsel of one's choice; continuance to obtain
HOLDING: Tr. Ct. did not violate non-indigent D's 6th Amend. rights by denying continuance upon counsel's notification of schedule conflict where counsel should have advised Ct. of conflict at an earlier date, new counsel who tried D's case was co-counsel in case causing conflict, new counsel had 10 days to prepare for D's LSD-dealing trial & delay had been caused already by original trial which resulted in mistrial. Here, Colman represented D in first trial which resulted in a mistrial. On 10/16, D was arraigned; new trial date set for 12/8. On 12/1, Colman advised Ct. of conflict. Attorney Loftman, Colman's partner, represented D at voir dire on 12/8 & trial on 12/14. Ct. employs test set forth in US v. Burton (D.C. Cir. 1978), 584 F.2d 485, to find D was not prejudiced in being denied counsel of his choice. Burton *cites* 9 factors to be considered: (1) length of requested delay; (2) other continuances requested; (3) inconvenience to trial actors; (4) legitimate reason for delay; (5) D's contribution to circumstances giving rise to request for continuance; (6) co-counsel; (7) identifiable prejudice to D's case if continuance denied; (8) complexity of case; (9) other relevant factors. Held, no error.

RELATED CASES: German, 373 N.E.2d 880 (Court may refuse to allow D to replace his counsel during or immediately before trial); Parr, 504 N.E.2d 1014 (while accused should have opportunity to secure counsel of his choice when he is financially able to do so, imperative he exercise right of selection at appropriate stage of proceeding); Sparks, 537 N.E.2d 1179 (no abuse of discretion by limiting out-of-state attorney's participation in D's defense; attorney not allowed privilege of examining witnesses or arguing to Court; however, allowed to sit at counsel table during trial and confer with Ds lead attorney, and offer insight and advice).

TITLE: U.S. v. Gonzalez-Lopez
INDEX NO.: Y.7.c.
CITE: 548 U.S. 140 (2006)
SUBJECT: Denial of counsel of choice, federal court admission
HOLDING: Respondent hired an attorney to represent him on a federal drug charge, but the district court denied the attorney's application for admission *pro hac vice* on the ground that he had violated a professional conduct rule and then, with one exception, prevented Respondent from meeting with the attorney throughout the trial. Majority held that the Tr. Ct.'s erroneous deprivation of a criminal D's choice of counsel entitles him to reversal of his conviction. Court rejected government's contention that the violation of the Sixth Amendment is not complete unless a D can show that substitute counsel was ineffective within the meaning of Strickland v. Washington, 466 U.S. 668 (1984) or the D can demonstrate that substitute counsel's performance, while not deficient, was not as good as what his counsel of choice would have provided, creating a "reasonable probability that . . . the result . . . would have been different." Id. Government contended that the right to counsel is afforded to ensure that the accused receives a fair trial, and that a trial is not unfair unless a D has been prejudiced. The right to counsel of choice, however, commands not that a trial be fair, but that a particular guarantee of fairness be provided -- to wit, that the accused be defended by the counsel that he believes to be best. Cf. Crawford v. Washington, 541 U.S. 36 (2004). The Sixth Amendment violation is not subject to harmless-error analysis. Erroneous deprivation of the right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as >structural error." Sullivan v. Louisiana, 508 U.S. 275 (1993). It defies analysis by harmless error standards because it affects the framework within which the trial proceeds and is not simply an error in the trial process itself. Arizona v. Fulminante, 499 U.S. 279 (1991). Nothing in the Court's opinion casts any doubt or places any qualification upon its previous holdings limiting the right to counsel of choice and recognizing Tr. Ct.'s authority to establish criteria for admitting lawyers to argue before them. But this is not a case a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a D's first choice of counsel. Held, judgment of the Court of Appeals affirmed, and remanded for further proceedings; Alito, J., with whom the Chief Justice, Kennedy, and Thomas JJ. join, dissenting would have D show *some* evidence that the Tr. Ct.'s erroneous ruling adversely affected the quality of assistance that the D received as the Sixth Amendment does not guarantee a non-indigent D has the right to the counsel of his choice, but rather it guarantees the right to have the assistance that the D's counsel of choice is able to provide.

Y. RIGHT TO COUNSEL

Y.7. Choice of counsel

Y.7.d. Right to substitute counsel

TITLE: Carter v. State
INDEX NO.: Y.7.d.
CITE: (8/25/87) Ind., 512 N.E.2d 158
SUBJECT: Right to substitute counsel
HOLDING: Tr. Ct. did not err in denying D's motions for new counsel which were based on counsel's race & D's mere allegations of attorney misconduct. D does not have an absolute right to counsel of his own choosing, Alexander 449 N.E.2d 1068 (see card at Y.7.c), & D may not arbitrarily compel Tr. Ct. to discharge competent counsel. Irvin 291 N.E.2d 70. Race or ethnic factors are not legitimate considerations. See Mitchell v. Thompson (S.D. N.Y. 1944), 56 F. Supp. 683; People v. Fitzgerald (1972), 105 Cal. Rptr. 458. Here, D also alleged that he feared counsel would reveal D's confidences to police & prosecutor. D said his lack of confidence arose from counsel's suggestion that D represent himself. Counsel explained that this suggestion was due to D's legal experience & knowledge of witnesses & stated that he was confident he could represent D adequately. D presented no other bases for allegations. Held, Tr. Ct. did not err in denying D's request for change of counsel.

TITLE: Jones v. State
INDEX NO.: Y.7.d.
CITE: (6/14/83) Ind., 449 N.E.2d 1060
SUBJECT: Right to substitute counsel
HOLDING: Tr. Ct. did not err in refusing to allow D to switch attorneys immediately prior to trial. German 373 N.E.2d 880; Magley 335 N.E.2d 811. Here, D fired his public defender 3 days before trial; counsel's motion to withdraw was denied. D's oral motion for continuance to obtain new attorney made at trial was denied. Denial of untimely request for change of counsel is not error absent showing of prejudice. Vacendak 431 N.E.2d 100. Ct. finds no prejudice. Tr. Ct. was justified in denying motion because: D's reason for wanting new attorney was that his attorney once was a prosecutor; no evidence D could obtain new counsel; lateness of request. Held, no error.

RELATED CASES: Gilliam, App., 650 N.E.2d 45 (no error in denying D's pro se request for change of counsel on day of trial, where D failed to show that his right to fair trial was prejudiced); Parr 504 N.E.2d 1014 (Tr. Ct. did not abuse discretion by denying continuance to secure private counsel; case contains good discussion of case law).

TITLE: Spinks v. State
INDEX NO.: Y.7.d.
CITE: (7/23/82) Ind., 437 N.E.2d 963
SUBJECT: Right to substitute counsel - public defender in place of private counsel
HOLDING: Ct. may refuse D's pro se request for removal of private counsel & appointment of public defender where record shows no discharge by D of private counsel, no renewal of request until Motion to Correct Error, no inability to afford private counsel, & no allegation of ineffective assistance of private counsel. See Lindley 426 N.E.2d 398. Held, Tr. Ct. did not abuse discretion in denying D's request.

Y. RIGHT TO COUNSEL

Y.8. Waiver of counsel

TITLE: Belmares-Bautista v. State
INDEX NO.: Y.8
CITE: (12-22-10), Ind. Ct. App, 938 N.E.2d 1229
SUBJECT: Waiver of right to counsel - Spanish advisements
HOLDING: Where D does not challenge the accuracy of advisements and waiver forms in Spanish, fact that English translation is not in record does not invalidate waiver of right to counsel. The State bears the burden of proving that a D was made aware of his right to assistance of counsel and knowingly, voluntarily and intelligently waived his right. Brewer v. Williams, 430 U.S. 387 (1977). If the record establishes that the D can read, the D's signing a written advisement can be sufficient to inform a D of his right discussed in the advisement and to establish that the D waived those rights. Maloney v. State, 684 N.E.2d 488, 490 (Ind. 1997). When a D claims that his guilty plea was not voluntary and intelligent despite signing an advisement of rights, the D bears the burden of showing that he could not read the advisements or that the signature was produced by coercion or misapprehension. An advisement in a language that the D can read and understand is presumptively valid whether in English or another tongue.

Here, D, who was from Mexico, signed a Spanish-language document captioned "DELITOS MENORES." There was no English translation in the record. At the initial hearing, D claimed he was able to read and understand his rights and that he wanted to represent himself. At a pretrial conference, D signed a Spanish-language document captioned "AVISO Y RECONOCIMIENTO." There was no English translation in the record, and Tr. Ct. did not discuss the document with D. D represented himself at a bench trial. The fact that D signed an advisement of rights and claimed he could read and understand the advisement was sufficient to show he voluntarily and intelligently waived his right to counsel. Court distinguished this case from the cases in which D claims that the advisements were inaccurate. Held, judgment affirmed.

TITLE: Blinn v. State
INDEX NO.: Y.8.
CITE: (3d Dist. 10/27/82) Ind. App., 441 N.E.2d 49
SUBJECT: Right to counsel - waiver; advisements
HOLDING: Tr. Ct. must thoroughly examine facts & circumstances before compelling D to proceed unassisted at trial. Merely making D aware of constitutional right to counsel is insufficient. Tr. Ct. has duty to establish record showing waiver of counsel was voluntary, knowing & intelligent. Here, Tr. Ct. made no inquiry into D's ability to retain private counsel. Record fails to show intelligent waiver. At trial on amended information (held 3 days after charge amended), D moved for continuance to secure counsel & requested a Ct.-appointed attorney. Tr. Ct. denied motion. Ct. finds cursory inquiry into D's financial status at MCE hearing did not cure error. Held, conviction reversed & cause remanded.

RELATED CASES: Van Donk, App., 676 N.E.2d 349 (conviction reversed where record was devoid of advisement of dangers & disadvantages of proceeding pro se); Brickert, App., 673 N.E.2d 493 (Tr. Ct. did not err in failing to apprise D of dangers of self-representation, because such advisement under these circumstances would have been superfluous); Frederick, App., 658 N.E.2d 941 (under totality of circumstances, D demonstrated knowing, voluntary, & intelligent waiver of counsel); Seniours, App., 534 N.E.2d 793 (Decision involves advisements necessary before D goes to trial pro se. D did not want to go without attorney, but Ct. refused to appoint him one, saying he had not made sufficient effort to obtain private counsel. Conviction was reversed, however, because before forcing D to go to trial pro se, Tr. Ct. did not adequately advise him of dangers of doing so).

TITLE: Brickert v. State
INDEX NO.: Y.8.
CITE: (1st Dist., 11-15-96), Ind. App., 673 N.E.2d 493
SUBJECT: Waiver of right to counsel - frustrating judicial process
HOLDING: Tr. Ct. did not err in denying D's motion for continuance on day of trial, requiring him to proceed pro se, where circumstances unequivocally established that D had delayed hiring attorney for over year in attempt to frustrate judicial process. Right to counsel is constitutional right of fundamental importance which cannot be waived except by D himself. Fitzgerald v. State, 254 Ind. 39, 257 N.E.2d 305 (1970). Nevertheless, waiver of right to counsel may be established by D's conduct. Houston v. State, 553 N.E.2d 117 (Ind. 1990). Here, at all times, D indicated that he wished to have particular private counsel represent him. D never claimed that he lacked funds with which to hire private counsel. Despite having received continuance to obtain counsel, D let entire year go by without hiring attorney. Ct. held that this conduct can only be interpreted as deliberate attempt to frustrate judicial process & avoid being brought to trial. Held, judgment affirmed; Najam, J., dissenting.

TITLE: Broome v. State
INDEX NO.: Y.8.
CITE: (5th Dist., 11-14-97), Ind. App., 687 N.E.2d 590
SUBJECT: Right to counsel - waiver; failure to request speedy trial at pre-trial conference
HOLDING: Tr. Ct. did not err when it failed to respond to D's speedy trial request, & D's counsel was not ineffective by failing to request speedy trial at pre-trial hearing. When D is represented by counsel & attempts to file pro se motion, it is within Tr. Ct.'s discretion to accept & respond to it or to strike it. Attorney shall abide by client's decisions concerning objectives of representation & shall consult with client as to means by which they are to be pursued. Indiana Professional Conduct Rule 1.2(a). Here, D who was represented by counsel claimed that he made pro se motion when he requested speedy trial at pre-trial hearing. Because Tr. Ct.'s ability to ignore pro se motion falls within its discretion to accept or strike motion, there was no error in ignoring D's request. In addition, filing of speedy trial motion is tactical issue, related to means of representation, & is therefore duty for which D's attorney is responsible. Thus, failure of D's attorney to move, at D's request, for speedy trial was consistent with prevailing professional norm expressed in Professional Conduct Rule 1.2(a) & was within range of effective assistance of counsel. Held, conviction affirmed.

NOTE: On transfer at 694 N.E.2d 280, Ct. held that there may exist circumstances in which defense counsel's refusal or neglect to file speedy trial motion specifically requested by D could constitute deficient performance, but such circumstances did not exist here.

RELATED CASES: Hill, App., 773 N.E.2d 336, *reh'g granted* 777 N.E.2d 795 (D was charged with delay even though he personally objected to continuance; counsel did not object & therefore waived issue).

TITLE: Carter v. State
INDEX NO.: Y.8.
CITE: (8/25/87) Ind., 512 N.E.2d 158
SUBJECT: IAC - hybrid representation
HOLDING: D, who was granted hybrid representation & who defined public defender's responsibilities & had final say on all trial decisions, waived right to allege IAC. Correlative to 6th Amend. right to counsel is right to appear pro se, Faretta v. CA (1975), 422 U.S.806; D who appears pro se, however, cannot assert 6th Amend. claim of IAC. Id. When D is represented by counsel, counsel has "power to make binding decisions of trial strategy in many areas." Id. Because this D substantially controlled his defense, obtaining discovery, filing pre-trial motions, arguing before Tr. Ct., &, more important, making trial decisions against advice of co-counsel, his form of representation was most like pro se with standby counsel. "Had counsel been a true advocate within the meaning of the 6th Amend., rather than a tool for implementing Carter's self-representation, Carter certainly would have been entitled to present this claim." Held, D who represents himself with standby counsel has waived his right to subsequently raise IAC.

RELATED CASES: Sherwood, 717 N.E.2d 131 (where D was competent to stand trial; made knowing, intelligent & voluntary waiver of his right to counsel in timely & unequivocal manner; & because he was denied actual control of case presented to jury, Tr. Ct.'s imposition of hybrid representation violated Sixth Amendment).

TITLE: Drake v. State
INDEX NO.: Y.8.
CITE: (4th Dist.; 10-28-08), Ind. App., 895 N.E.2d 389
SUBJECT: Waiver of counsel - D with questionable mental illness
HOLDING: D did not voluntarily, knowingly, and intelligently waive his right to counsel. Court considers four factors when determining whether a knowing and intelligent waiver of counsel occurred: (1) the extent of the court's inquiry into the D's decision, (2) other evidence in the record that establishes whether D understood the dangers and disadvantages of self-representation, (3) D's background and experience, and (4) the context of D's decision to proceed pro se. Poynter v. State, 749 N.E.2d 1122, 1126 (Ind. 2001). Here, Tr. Ct. warned D that "there are several procedural matters when you are trying a case that you won't know what to do. . . you don't have the expertise to select a jury for example." Also, Tr. Ct. warned that D could not simultaneously represent himself and claim that he has no idea what is going on during the proceedings. But Tr. Ct. did not advise D of any other disadvantages of proceeding without counsel or any of the advantages that counsel could provide. Moreover, D's only prior contacts with the criminal justice system were three guilty pleas to misdemeanors during which he was represented. Also, Tr. Ct. originally granted a motion for competency evaluation, which was withdrawn by D when proceeding pro se. D's father believed D suffered from manic depression and was a "conspiracist in his thought process." But D's decision to proceed pro se was tactical in nature because he thought the public defender worked with the prosecutor and he would not be advised of everything if he was represented.

A Tr. Ct. does not have to order a competency evaluation every time a D asserts his or her right to proceed without counsel. But, the sparse record, coupled with D's questionable mental capacity, leads to conclusion that Tr. Ct. should have inquired further in D's background, education, and abilities. Thus, D did not make a voluntary, knowing, and intelligent waiver of his right to counsel. Held, judgment reversed.

NOTE: In dicta, Court of Appeals suggests sixteen advisements and inquiries that should be conducted before a D is permitted to proceed pro se.

TITLE: Geiger v. State
INDEX NO.: Y.8.
CITE: (3rd Dist., 12-11-97), Ind. App., 688 N.E.2d 1298
SUBJECT: Waiver of counsel - knowingly & intelligently
HOLDING: D did not knowingly & intelligently waive his right to counsel. When D decides to proceed pro se, record must demonstrate that D is fully aware of nature, extent & importance of right he has waived & possible consequences thereof. Wallace, App. 361 N.E.2d 159. Even if record lacks necessary inquiries or warnings, D will have waived his right to counsel knowingly & intelligently if D fails to obtain attorney for purpose of frustrating judicial process & avoiding trial, or if D's background, experience & conduct enable him to competently forego right to counsel.

Here, Tr. Ct. told D that he had a right to appointed attorney if he could no longer afford his attorney. Subsequently, D's attorney withdrew from case due to D's inability to pay him. Although D failed to appear twice for pre-trial hearings, D did not request continuances to obtain attorney & represented himself with aid from stand-by attorney. When Tr. Ct. learned that D was no longer represented by counsel, it had duty to make inquiries or warnings to D, which it failed to do. In addition, there was no indication that D took any action to avoid trial, D's experience with criminal justice system & his conduct in representing himself were, by themselves, insufficient to reflect knowing & intelligent decision to proceed pro se. Because record did not reflect that D was made fully aware of importance of his right to assistance of counsel or of potential consequences associated with representing himself, D did not knowingly & intelligently waive his right to assistance of counsel. Held, conviction reversed; Hoffman, J., concurring.

RELATED CASES: Castel, App., 876 N.E.2d 768 (Tr. Ct. erred in failing to inform D of her right to counsel at misdemeanor trial).

TITLE: Godinez v. Moran
INDEX NO.: Y.8.
CITE: 509 U.S. 389, 113 S. Ct. 2680 (1993)
SUBJECT: Standard for waiver of right to counsel
HOLDING: Due process does not require that standard for competency to plead guilty & waive right to counsel be higher than or different from competence to stand trial. Standard is whether D has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" & has "a rational as well as factual understanding of the proceedings against him." D who goes to trial also faces important decisions, so there is no reason for higher standard for Ds who choose to end case with guilty plea. Waiver of right to counsel requires no higher functioning than does decision to waive other constitutional rights. Relevant issue is competence to waive counsel, not to self-representation. Waiver must be more than "competent," however; it must be knowing & intelligent. Blackmun & Stevens, JJ., DISSENT.

RELATED CASES: Westbrook, 384 U.S. 150 (although D received hearing on issue of his competence to stand trial, he was entitled to hearing or inquiry into issue of his competence to waive his constitutional right to assistance of counsel; where it did not appear, he had received such hearing, judgment in murder should be vacated & case remanded for further proceedings).

TITLE: Hagy v. State
INDEX NO.: Y.8.
CITE: (5th Dist., 09-13-94), Ind. App., 639 N.E.2d 693
SUBJECT: Waiver of right to counsel - probation violation (PV) hearing
HOLDING: Where in PV hearing, Tr. Ct. did not advise D of dangers of self-representation, D did not knowingly, intelligently & voluntarily waive right to counsel. D appeared without counsel to respond to PV allegation. When Ct. asked about attorney, D didn't know, & case was continued. At continued hearing, without counsel, D agreed to intensive supervision, but subsequently new allegation of violation was filed. At hearing on that PV, Tr. Ct. advised D she was entitled to counsel, & could have appointed counsel if she were indigent. D was then given appointed counsel, & probation was continued. When State again filed notice of noncompliance, D appeared without counsel, & when questioned, said she would obtain private counsel. At continued hearing, D still had no counsel, & when asked if she were representing herself, she said yes. Hearing proceeded & probation was revoked. Whenever D proceeds to trial without counsel, record must reflect proper waiver of counsel. D who chooses self-representation must be made aware of the dangers & disadvantages. State argued that because of D's background, experience & conduct, she impliedly waived right to counsel by proceeding pro se, relying on Leonard, 579 N.E.2d 1294. However, in Leonard, D was explicitly warned of dangers of self-representation. Here, D was 19-year-old high school dropout who was never advised of dangers before saying she would represent herself. Held, judgment reversed.

Note: Staton, J., concurring, emphasized that even though PV hearing is in nature of civil proceeding, it is analogous to sentencing hearing where rights can be lost; thus, full advisement of dangers of self-representation is still required.

RELATED CASES: Silvers, 945 N.E. 2d 1274 (Ind. Ct. App 2011) (where Tr. Ct. did not accompany any of his inquiries with a clear statement of D's right to counsel and did not present appointed counsel as an option, State failed to prove that D's decision to proceed pro se and admit the probation revocation was voluntary and intelligent); Butler, 951 N.E.2d 255 (Ind. Ct. App 2011); Cooper, App., 900 N.E.2d 64 (where D unequivocally expressed desire to waive counsel and admit to probation violation, his waiver was knowingly and intelligently made, despite Tr. Ct.'s failure to advise D of the pitfalls of self-representation); Eaton, App., 894 N.E.2d 213 (record did not establish that D waived his right to counsel, and even assuming waiver, he was not adequately advised before doing so); Bell, App., 695 N.E.2d 997 (failure to ascertain voluntariness of decision to proceed without counsel at probation revocation required reversal); Greer, App., 690 N.E.2d 12314 (when probationer who proceeds pro se chooses to admit rather than challenge his alleged PV, his knowing, intelligent, & voluntary waiver of counsel may be established even if record does not show that he was warned of pitfalls of self-representation).

TITLE: Hart v. State
INDEX NO.: Y.8.
CITE: (6/21/2017), 79 N.E.3d 936 (Ind. Ct. App 2017)
SUBJECT: No advisement about dangers of self-representation - conviction reversed
HOLDING: Because the Tr. Ct. failed to advise Defendant about the dangers of self-representation, his waiver of counsel was not knowing, intelligent, and involuntary, so his conviction for invasion of privacy was reversed.

Before trial, Defendant told the Tr. Ct. he did not want court-appointed counsel, but then he failed to obtain his own counsel in the months that followed. A week before trial, Defendant filed a motion for a continuance, requesting more time to obtain counsel. The Tr. Ct. denied the motion, and Defendant represented himself at trial. At no point, did the Tr. Ct. warn Defendant about the dangers of self-representation.

For a defendant's waiver of counsel to be knowing and intelligent, a Tr. Ct. must warn him about the "dangers and disadvantages of self-representation." Poynter v. State, 749 N.E.2d 1122 (Ind. 2001) Gilmore v. State, 953 N.E.2d 583, 592 (Ind. Ct. App 2011); Kowalskey v. State, 42 N.E.3d 97, 106 (Ind. Ct. App 2015). Because the Tr. Ct. failed to do so, Defendant did not knowingly, intelligently, and voluntarily waive his right to counsel, verbally or through his conduct. Held, conviction reversed and matter remanded for new trial.

RELATED CASES: Hart, Ind., 749 N.E.2d 1122 (Because trial court failed to advise D about dangers of self-representation, his waiver of counsel was not knowing, intelligent, and involuntary, so conviction for invasion of privacy was reversed); Parish, 989 N.E.2d 831 (Ind. Ct. App 2013) (waiver of counsel invalid where Tr. Ct. did not advise D of dangers and disadvantages of self-representation); A.A.Q., 958 N.E.2d 808 (Ind. Ct. App 2011) (even though Tr. Ct.'s advisement fell below "better practices," juvenile and his parents knowingly and intelligently waived the juvenile's right to counsel); Jackson, 868 N.E.2d 494 (a D's intentional & inexcusable absence from trial can serve as a knowing, voluntary & intelligent waiver of the right to counsel); Henson, App., 798 N.E.2d 540 (D, who proceeded at trial *pro se* with benefit of stand-by counsel, knowingly, voluntarily & intelligently waived his right to counsel despite the absence of any of the guidelines Tr. Cts. are encouraged to use in advising a D of the dangers related to self-representation; see full review at Y.7.a.3); Miller, App., 789 N.E.2d 32 (Tr. Ct. failed to adequately determine whether D's waiver of right to counsel was knowing & intelligent; on rehearing at 795 N.E.2d 468, Ct. *clarified* that, absent exceptional circumstances, an adequate Tr. Ct. advisement is a prerequisite to a knowing & intelligent waiver of right to counsel); Ellerman, App., 786 N.E.2d 788 (Tr. Ct. adequately advised D of dangers & disadvantages of self-representation & did not err in permitting D to represent himself at trial); Balfour, App., 779 N.E.2d 1211 (D's right to counsel was violated when Tr. Ct. forced D to go to trial pro se without having first advised him of dangers & disadvantages of self-representation); J.W., App., 763 N.E.2d 464 (Juvenile Ct. erroneously conducted fact-finding hearing by allowing defense counsel to withdraw after Juvenile D informed Ct. that he wished to have counsel during hearing; D was never adequately advised of nature, extent, & importance of right to counsel & dangers of self-representation); Moreno, App., 760 N.E.2d 240 (generally, judge can require uncooperative D to proceed to trial pro se, but not where judge did not conduct adequate inquiry into waiver or give proper warnings); Slayton, App., 755 N.E.2d 232 (facts & circumstances did not warrant finding of knowing & intelligent waiver of counsel).

TITLE: Hawkins v. State
INDEX NO.: Y.8.
CITE: (2/19/2013), 982 N.E.2d 997 (Ind. 2013)
SUBJECT: D's failure to appear at trial was not waiver of his right to counsel
HOLDING: A D's absence from trial does not constitute a waiver of the right to counsel in every case. Jackson v. State, 868 N.E.2d 494 (Ind. 2007). Here, unlike in Jackson, record did not support a finding that D's failure to appear at trial constituted a knowing, voluntary or intelligent waiver of his right to counsel. D's public defender sought to withdraw before his November 7, 2011 trial date. Tr. Ct. told D of his attorney's request, that there would be a hearing October 19 and his failure to appear will result in his arrest and withdrawal of the public defender. D, who lived in North Carolina, appeared by telephone. That hearing was rescheduled after technical difficulties, and Tr. Ct. did not tell him that the motion to withdraw would be granted if he didn't appear at the new hearing. D did not appear at the October 26 hearing, his attorney was allowed to withdraw, and he was not in court for his November 7 trial. A deputy prosecutor was alerted that D was on his way but his bus from North Carolina wasn't due in until the afternoon. Tr. Ct. proceeded with trial, where D was convicted. He later explained to the court from jail that he couldnt' afford transportation for both the October 26 hearing and his trial, so he chose to attend the trial and didn't think he would arrive after the trial started in the morning. Although Court did not approve of D's actions as a D facing criminal charges, his behavior did not rise to the "egregious misbehavior" that resulted in a trial in absentia in Jackson. Thus, it was inappropriate to trial him in absentia without representation. Held, transfer granted, Court of Appeals' opinion at 970 N.E.2d 762 vacated, conviction reversed.

TITLE: Houston v. State
INDEX NO.: Y.8.
CITE: (4/24/90), Ind., 553 N.E.2d 117
SUBJECT: Right to counsel - waiver; refusal to cooperate
HOLDING: D who refused to cooperate with 3 Ct.-appointed lawyers, & who was advised he could retain private counsel or proceed pro se with 3d lawyer in advisory role, knowingly & intelligently waived counsel by proceeding pro se. D's 1st Ct.-appointed counsel withdrew because he could not get along with D, & his 2d lawyer withdrew because D did not want him. When D refused to cooperate with 3d lawyer, Tr. Ct. noted that case had been pending for nearly 2 years & would go to trial without continuances. D agreed to retain private counsel, & Tr. Ct. warned him that if he failed to do so he would proceed with advisory council only. D failed to retain counsel, & before trial began Tr. Ct. advised D that he could either represent himself with 3d lawyer in advisory role, or 3d lawyer could represent him with what little preparation he had undertaken. D represented himself with advice from 3d lawyer. On appeal, D argues that Tr. Ct. denied him right to fair trial by limiting his Ct.-appointed lawyer to advisory role. D's repeated refusal to cooperate with Ct.-appointed counsel & failure to retain private counsel enabled him to frustrate judicial process & avoid being brought to trial. D was adequately warned that if he chose not to retain counsel, he would have to represent himself with only advisory council. When D failed to retain counsel, he was offered new option of having Ct.-appointed counsel represent him, with minimal preparation. From these facts, Ct. App. presumes waiver of counsel & election to proceed pro se. Ct. further finds that waiver was knowing & intelligent because Tr. Ct. adequately advised D of his options. D who proceeds pro se must accept resulting hazards. Held, conviction affirmed.

RELATED CASES: Gilmore, 953 N.E.2d 583 (Ind. Ct. App 2011) (because D never had a hearing during which he was warned that if his obstreperous behavior persists, the Tr. Ct. will find that he has chosen self-representation by his own conduct and the dangers and disadvantages of proceeding pro se, D did not waive his right to counsel through his conduct; judgment reversed).

TITLE: Iowa v. Tovar
INDEX NO.: Y.8.
CITE: 541 U.S. 77 (2004)
SUBJECT: Right to counsel, guilty plea advisements, pro se Ds
HOLDING: In 1996, Tovar waived his right to counsel and pled guilty to misdemeanor OWI. In 1998, represented by counsel, he pled guilty to a second misdemeanor OWI. In 2001 he was again arrested for OWI, and facing a felony charge because of the prior convictions, moved the Tr. Ct. to bar the use of his uncounseled 1996 conviction to aggravate the instant charge to a felony.

The Iowa Supreme Court held that the 6th Amendment requires a Tr. Ct., before accepting an uncounseled guilty plea, to advise the pro se D that there are defenses to criminal charges that may not be known to laypersons, that waiving counsel entails a risk that a viable defense will be overlooked, and that waiving counsel means losing the opportunity to obtain an independent opinion on whether it is wise to plead guilty under the law and facts of the case.

The U.S. Supreme Court held that the admonitions in question are not required by the Federal Constitution but noted that States are free to adopt "by statute, rule or decision any guides to the acceptance of an uncounseled plea they deem useful."

RELATED CASES: Hopper, 957 N.E.2d 613 (Ind. 2011) (when D pleads guilty pro se, there is no mandatory advisement regarding the pitfalls of self-representation that must be given; rather, whether an advisement is given will be one factor in considering the voluntariness of the waiver of counsel and the plea).

TITLE: Jackson v. State
INDEX NO.: Y.8.
CITE: (4th Dist. 10/25/82) Ind. App., 441 N.E.2d 29
SUBJECT: Right to counsel - waiver; advisements
HOLDING: Indigent criminal D has right to representation by legal counsel. 6th Amend.; Ind. Const. Art. 1, Section 13; Gideon v. Wainwright (1963), 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799; Moore, 401 N.E.2d 676. Correlative to right of representation is right of D to waive assistance of counsel & represent self. Faretta v. CA (1975), 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562; Russell 383 N.E.2d 309. Waiver of counsel must be made voluntarily, knowingly & intelligently. Johnson v. Zerbst (1938), 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461; Morgan, App., 417 N.E.2d 1154. Waiver may not be implied from silent record. Wallace, App., 361 N.E.2d 159. Tr. Ct. must advise D of right to assistance of counsel & disadvantages of self-representation in clear & unambiguous language. Mitchell, App., 417 N.E.2d 364; McDandal, App., 390 N.E.2d 216. Appointment of standby counsel is appropriate prophylactic device when D assumes burden of conducting own defense. German, 373 N.E.2d 880. Here, D was made aware of right to counsel & thoroughly informed of consequences of self-representation. D had previous experience in criminal justice system. Tr. Ct. appointed standby counsel for D, thus obviating many disadvantages. D was acquitted of one charge. Held, D's waiver of counsel was voluntary, intelligent & knowing.

TITLE: Kimberling v. State
INDEX NO.: Y.8.
CITE: (4th Dist. 3/29/90), Ind. App., 556 N.E.2d 1331
SUBJECT: Right to counsel - waiver; failure to cooperate
HOLDING: Tr. Ct. violated D's right to counsel under Ind. Const., Art. 1, Sec. 13, by forcing D to proceed pro se after Ct.-appointed counsel withdrew due to D's failure to cooperate. D tendered guilty plea to 1 count pursuant to plea agreement & was informed that he must attend sentencing hearing & consult with Ct.-appointed counsel prior to hearing. D failed to do these things, & Tr. Ct. granted counsel's motion to withdraw & rejected D's guilty plea & set matter for trial. D appeared in Tr. Ct. on day of next scheduled hearing, although somewhat after hearing itself, & requested that new counsel be appointed for him. Tr. Ct. rejected this request, & at trial, Tr. Ct. again refused to appoint counsel & D proceeded pro se. Ct. App. finds basis for reversal in Ind. Const. In Fitzgerald, 257 N.E.2d 305, Ind. S. Ct. noted heavy burden borne by state in proving waiver of right to counsel, despite usual unwillingness to reward litigant for own misconduct. Here, D did not waive right to counsel by failing to appear at sentencing hearing, since record does not show that he was advised of possible consequences of proceeding pro se & knowingly & voluntarily chose to do so. Neither did D waive right by allegedly failing to cooperate with counsel, since Tr. Ct. has other means, including contempt powers, to prevent D from thwarting criminal justice system through delay. D requested counsel at first opportunity after Tr. Ct. withdrew appointment of public defender. He further stated to Tr. Ct. at beginning of trial that he could not afford to hire attorney. Tr. Ct.'s denial of D's request for counsel was erroneous. Held, reversed & remanded for new indigency hearing & new trial.

RELATED CASES: Puckett, App., 843 N.E.2d 959 (D resisted advice given by counsel at his plea hearing, & his counsel subsequently withdrew prior to sentencing; D appeared *pro se* during sentencing, but record was void of any evidence that D knowingly & voluntarily waived his right to be represented by counsel at his sentencing hearing).

TITLE: Kirkham v. State
INDEX NO.: Y.8.
CITE: (1st Dist. 7/7/87) Ind. App., 509 N.E.2d 890
SUBJECT: Waiver of right to counsel
HOLDING: D did not knowing & voluntarily waive his right to counsel. Here, D appeared for mass reading of rights in initial hearing. At hearing, D was given acknowledgment of rights form, which he read, initialed each right, & signed. Tr. Ct. asked D if he had any questions re his rights & he said no. D pled not guilty. He represented himself at a bench trial & was found guilty of criminal recklessness. Indigent D is guaranteed right to counsel. 6th Amend.; Ind. Const. Art. 1, Section 13; Jackson 471 N.E.2d 258. Right applies to misdemeanors as well as to felony offenses. [Citations omitted.] If D elects to represent self, it must be shown that D knowingly/voluntarily waived right to be represented by counsel. [Citations omitted.] Tr. judge must establish record showing that D was made aware of nature, extent & importance of right, & consequence of waiving it. Merely making D aware of constitutional right is insufficient. [Citations omitted.] Record shows Tr. Ct. failed to adequately discharge its responsibility to advise D of consequences of self-representation. Held, conviction reversed & cause remanded for new trial.

TITLE: Kowalskey v. State

INDEX NO.: Y.8.

CITE: (7/30/2015), 42 N.E.3d 97 (Ind. Ct. App 2015)

SUBJECT: Waiver of counsel - no evidence supporting conclusion D engaged in obstreperous conduct

HOLDING: Tr. Ct. erred in finding that D, by his conduct, waived or forfeited his right to counsel. D's first appointed counsel withdrew *citing* a conflict, and a second withdrew *citing* a breakdown in communication. Tr. Ct. warned D before appointing third counsel that if his obstreperous behavior persisted, the court could find that he had chosen to represent himself. D wrote a letter to Tr. Ct. requesting that it try to obtain possibly exculpatory video evidence he said his third public defender refused to seek but that he didn't want a different attorney. A day after D sent the letter, the public defender moved to withdraw, *citing* a breakdown in communication.

Citing the test for waiver of counsel under Gilmore v. State, 953 N.E.2d 583 (Ind. Ct. App. 2011), Court held that record did not establish that D, in sending his letter to the Tr. Ct., engaged in obstreperous conduct or behavior. D stated in a subsequent hearing that he did not want a new lawyer, that he was stressed and wrote the letter because his suppression hearing was scheduled for a week later. Moreover, Tr. Ct. never advised D of the dangers and disadvantages of self-representation, which weighs heavily against a finding of a knowing and intelligent waiver. Poynter v. State, 749 N.E.2d 1122 (Ind. 2001). Held, judgment reversed and remanded.

RELATED CASES: Vonhoene, 165 N.E.3d 630, (Ind. Ct. App. 2021) (a defendant has the right to counsel at each critical stage of a criminal matter, unless the defendant relinquishes that right by waiver, forfeiture, or forfeiture with knowledge).

TITLE: Kroegher v. State
INDEX NO.: Y.8.
CITE: (9-17-02), Ind. App., 774 N.E.2d 1029
SUBJECT: Waiver of right to counsel - voluntary where D fires attorneys & is adequately advised
HOLDING: D's waiver of counsel was voluntary. Prior to D's decision to proceed pro se, he was represented by two attorneys. His first attorney withdrew due to breakdown in communication, & second attorney withdrew pursuant to D's request. D then attempted to retain third attorney but failed to remain in contact or pay retainer fee. D argued that he proceeded pro se because he felt he had no choice due to fact that none of attorneys he had talked to wanted to take case to trial, but rather encouraged plea agreement. In response, Tr. Ct. reiterated dangers & disadvantages of self-representation & D stated he understood, but again felt he had no other choice. Further, D had money to hire attorney & never requested that one be appointed. At trial, after attempting to cross-examine State's first witness, D was appointed standby counsel by suggestion of judge.

Other Cts. have determined that D may waive right to counsel by firing attorneys or failing to retain counsel if he has financial ability to do so. United States v. Irorere, 228 F.3d 816 (7th Cir. 2000). Here, D did not make concerted effort to hire another attorney after second attorney withdrew, D was adequately advised of dangers of self-representation, & record revealed that D was ably assisted by standby counsel, particularly in light of fact that he was acquitted of rape & burglary charges. Under facts & circumstances, D's wavier of counsel was voluntary. Held, judgment affirmed.

TITLE: Maggard v. State
INDEX NO.: Y.8.
CITE: (1/7/85) Ind., 472 N.E.2d 888
SUBJECT: Waiver of counsel - knowingly/intelligently given
HOLDING: Tr. Ct. erred in not allowing D to withdraw his guilty pleas. Here, Ct. finds D's waiver of counsel was not made knowingly or intelligently. At arraignment Tr. Ct. told D he was charged with rape & asked D if he wanted to be represented by counsel. D said no. Judge started to read information & prosecutor told judge there were 3 informations. Also, after D's waiver of counsel, several legal issues arose (deadly weapon, sentences) & were resolved by judge & prosecutor. Ct. finds case similar to Catt, App., 437 N.E.2d 1001 (judge misinformed D that charge was misdemeanor rather than felony). Misinformation re charges robbed waiver of counsel of necessary knowing quality. Legal questions asked by D "likewise undermine waiver." Held, remanded. DISSENT by Givan, joined by Hunter.

TITLE: McKeown v. State
INDEX NO.: Y.8.
CITE: (3d Dist. 6/25/90), Ind. App., 556 N.E.2d 3
SUBJECT: Waiver of counsel - advisements
HOLDING: Tr. Ct. erred in failing to properly advise D on record of consequences of waiver of right to counsel. D was charged with multiple counts of driving while suspended, & Tr. Ct. found D to be indigent & appointed counsel. Counsel later informed Tr. Ct. that D had means to obtain private counsel, & new determination was made that D was not indigent. Tr. Ct. then withdrew public defender & reset pre-trial & trial dates to give D time to obtain counsel. D informed Tr. Ct. that he would not be obtaining counsel, indicating that he could not afford an attorney & would not get one. Record does not indicate that Tr. Ct. informed D of consequences of his choice to proceed pro se. Both U.S. & Ind. constitution's guarantee right of criminal D to waive counsel & represent self. Kirkham, App., 509 N.E.2d 890. Tr. Ct. must determine that such waiver is knowing & voluntary & must establish record showing that D was made aware of nature, extent, & importance of right to counsel & of consequences of waiving it. Merely making D aware of right to counsel is not sufficient. Id. Here, record contains no indication that Tr. Ct. informed D of consequences of waiving right to counsel. Consequently, D's waiver was not knowing & voluntary. Held, reversed & remanded for new trial. Hoffman, J., CONCURS IN RESULT.

TITLE: Nation v. State
INDEX NO.: Y.8.
CITE: (2/22/83) Ind., 445 N.E.2d 565
SUBJECT: Right to counsel - waiver; advisements
HOLDING: Although one proposing to proceed pro se should be fully advised of perils of self-representation, where D discharges retained counsel & requests to proceed pro se, it is unnecessary for the Tr. Ct. to fully advise D of his right to counsel. Opinion vacates Nation, App., 426 N.E.2d 436, on rehearing 438 N.E.2d 1003. Here, D fired his retained counsel the morning of trial. Tr. Ct. permitted counsel to withdraw & D to proceed pro se. Ct. App. held D must be expressly advised of both right to counsel & disadvantages of self-representation in clear & unambiguous language. Ind. S. Ct. finds D understood available choices & in electing to proceed pro se knowingly & intelligently waived his right to counsel. Held, no error.

RELATED CASES: Coleman, App., 630 N.E.2d 1376 (Waiver of right to counsel was knowing, intelligent, & voluntary, because Ct. adequately advised D of pitfalls of self-representation); Phillips 441 N.E.2d 201 (Crim L 641(1); held, D's waiver of counsel was knowing & voluntary).

TITLE: Poynter v. State
INDEX NO.: Y.8.
CITE: (6-21-01), Ind., 749 N.E.2d 1122
SUBJECT: Considerations for determining waiver of right to counsel
HOLDING: Tr. Cts. need not necessarily appoint counsel for every D who fails to implement an intention to employ counsel, nor need they unreasonably indulge D who repeatedly fails to cooperate with appointed counsel, but importance of right to counsel cautions that Tr. Cts. should at minimum reasonably inform such Ds of dangers & disadvantages of proceeding without counsel. When determining knowing & voluntary waiver of right to counsel, reviewing Ct. should consider: 1) extent of Tr. Ct.'s inquiry into D's decision; 2) other evidence in record that establishes whether D understood dangers & disadvantages of self-representation; 3) background & experience of D; & 4) context of D's decision to proceed *pro se*. United States v. Hoskins, 243 F.3d 407 (7th Cir. 2001).

Here, at initial hearing & first pre-trial conference, D asserted that he was going to retain private counsel. At second & final pre-trial conference, D reiterated that he was going to retain counsel but had not had time to do so, & Tr. Ct. told D twice that regardless of whether he retained attorney, he needed to "be prepared for trial" on next Ct. date. At next Ct. date, which was five & one-half months after charge was filed, Tr. Ct. held bench trial with D acting *pro se*. Although Tr. Ct. determined that D was advised of his trial rights & did tell D of procedural outcome if he failed to secure counsel, it did not at any time advise D on dangers & disadvantages of self-representation. Although D chose to work & sleep rather than take time to hire attorney, his conduct did not result in gross delays or clearly intend manipulation of process. Thus, facts & circumstances of this case did not warrant finding a knowing & intelligent waiver of D's right to counsel. Held, transfer granted, judgment reversed & remanded for new trial.

RELATED CASES: Hart, 79 N.E.3d 936 (Ind. Ct. App 2017) (because Tr. Ct. failed to advise D about dangers of self-representation, his waiver of counsel was not knowing, intelligent, and involuntary, so conviction for invasion of privacy was reversed), Parish, 989 N.E.2d 831 (Ind. Ct. App 2013) (waiver of counsel invalid where Tr. Ct. did not advise D of dangers and disadvantages of self-representation); A.A.Q., 958 N.E.2d 808 (Ind. Ct. App 2011) (even though Tr. Ct.'s advisement fell below "better practices," juvenile and his parents knowingly and intelligently waived the juvenile's right to counsel); Jackson, 868 N.E.2d 494 (a D's intentional & inexcusable absence from trial can serve as a knowing, voluntary & intelligent waiver of the right to counsel); Henson, App., 798 N.E.2d 540 (D, who proceeded at trial *pro se* with benefit of stand-by counsel, knowingly, voluntarily & intelligently waived his right to counsel despite the absence of any of the guidelines Tr. Cts. are encouraged to use in advising a D of the dangers related to self-representation; see full review at Y.7.a.3); Miller, App., 789 N.E.2d 32 (Tr. Ct. failed to adequately determine whether D's waiver of right to counsel was knowing & intelligent; on rehearing at 795 N.E.2d 468, Ct. *clarified* that, absent exceptional circumstances, an adequate Tr. Ct. advisement is a prerequisite to a knowing & intelligent waiver of right to counsel); Ellerman, App., 786 N.E.2d 788 (Tr. Ct. adequately advised D of dangers & disadvantages of self-representation & did not err in permitting D to represent himself at trial); Balfour, App., 779 N.E.2d 1211 (D's right to counsel was violated when Tr. Ct. forced D to go to trial pro se without having first advised him of dangers & disadvantages of self-representation); J.W., App., 763 N.E.2d 464 (Juvenile Ct. erroneously conducted fact-finding hearing by allowing defense counsel to withdraw after Juvenile D informed Ct. that he wished to have counsel during hearing; D was never adequately advised of nature, extent, & importance

of right to counsel & dangers of self-representation); Moreno, App., 760 N.E.2d 240 (generally, judge can require uncooperative D to proceed to trial pro se, but not where judge did not conduct adequate inquiry into waiver or give proper warnings); Slayton, App., 755 N.E.2d 232 (facts & circumstances did not warrant finding of knowing & intelligent waiver of counsel).

TITLE: Scheneke v. State
INDEX NO.: Y.8
CITE: (11-13-19), Ind. Ct. App., 136 N.E.3d 255
SUBJECT: Failure to warn D of dangers of proceeding pro se resulted in denial of right to counsel
HOLDING: Where defendant filed a motion for indigent counsel but failed to appear at a hearing to consider that motion, trial court improperly denied his motion and required that he proceed pro se without giving sufficient warning about the perils of self-representation, and by not inquiring as to his indigency. The State conceded and Appellate Court found that without inquiry into Defendant's indigency or discussion of the perils of self-representation, Defendant did not knowingly, voluntarily, and intelligently waive his right to counsel.

TITLE: Spears v. State
INDEX NO.: Y.8.
CITE: (4th Dist., 10-28-93), Ind. App., 621 N.E.2d 366
SUBJECT: Waiver of counsel form insufficient to show waiver
HOLDING: Without hearing on record & additional advisement, Waiver of Counsel & Demand to Proceed Pro Se forms were inadequate to ensure D made knowing & voluntary waiver of right to counsel. At D's initial hearing on misdemeanor charge, he requested pauper attorney. After Tr. Ct. denied request, D said he wanted to proceed without counsel, & court informed him of various trial rights. Later, D was ordered to attend status of counsel hearing. No hearing on record was held that day, but D signed two pre-printed documents, Waiver of Attorney & Demand to Proceed Pro Se. Waiver form had D's name, birthday & place of birth, charges & maximum penalties, rights entitled to, & noted he completed fifth grade & could write & understand English but could not read English. Form also stated: "I DECLARE THAT I DO NOT WANT TO BE DEFENDED BY AN ATTORNEY IN THIS CASE." Demand form contained D's name & that he had completed other form. Form also indicated Ct. purportedly advised D that, as pro se litigant, he would be held to same standards as attorney, that attorney possessed skills he didn't have, & that court advised against course of action. D eventually represented self & was convicted. Right to counsel can be relinquished only by knowing, voluntary, & intelligent waiver. To properly determine if waiver is made, court must conduct hearing to determine D's competency to represent himself & make record of waiver establishing that he was aware of nature, extent & importance of right & consequences of waiving it. Dowell, 557 N.E.2d 1063, Kirkham, 509 N.E.2d 890. Although D signed both forms, it was impossible to determine from record if information in forms was explained to him, & if so, by whom. This was particularly important because D did not read English. Held, reversed & remanded for new trial.

TITLE: U.S. v. Goldberg
INDEX NO.: Y.8.
CITE: 67 F.3d 1092 (3d Cir. 1995)
SUBJECT: Right to Counsel - waiver by conduct
HOLDING: Third Circuit determines framework for determining whether criminal D has waived right to counsel by conduct. Such waiver is hybrid concept which allows Tr. Ct. to deprive D of right to counsel on basis of conduct less egregious than would warrant forfeiture. Waiver by conduct cannot occur unless D has been warned of consequences of conduct and risks of proceeding pro se.

TITLE: Wilson v. State

INDEX NO.: Y.8.

CITE: (1/30/2018), 94 N.E.3d 312 (Ind. Ct. App 2018)

SUBJECT: Ineffective assistance of appellate counsel - failure to raise unknowing waiver of counsel argument

HOLDING: Appellate counsel was ineffective for failing to argue that D, who proceeded pro se, was not properly advised of the dangers and disadvantages of self-representation as required by Faretta v. California, 422 U.S. 806 (1975) and Poynter v. State, 749 N.E.2d 1122 (Ind. 2001). The Tr. Ct. failed to ensure D's waiver of counsel was knowing, voluntary and intelligent by not asking any questions to ensure those requirements were met. Although neither D nor his stand-by public defender advised appellate counsel of this issue, which was developed during pre-trial hearings, such hearings are part of the record and appellate counsel had a duty to obtain and thoroughly review the entire record. Inasmuch as the Tr. Ct. made no Poynter advisement, it is highly likely the Court of Appeals would have reversed had appellate counsel raised this citically important issue. An unknowing waiver of counsel argument on appeal would have been stronger than the insufficient evidence argument raised by appellate counsel. Thus, D was prejudiced by his appellate counsel's ineffective representation, and the presence of standby counsel did not waive the Tr. Ct.'s duty to ensure his waiver of counsel met the necessary requirements. Court chastised Tr. Ct.'s "egregious lack of knowledge" on the right to proceed pro se and the procedures for waiving the right to counsel and advised the judge to review relevant caselaw "without delay." Held, denial of post-conviction relief reversed and remanded for further proceedings.

TITLE: Wirthlin v. State
INDEX NO.: Y.8.
CITE: (4/11/2018), (Ind. Ct. AppIN 2018)
SUBJECT: Erroneous denial of motion to withdraw guilty plea -invalid waiver of right to counsel
HOLDING: D did not knowingly, intelligently, and voluntarily waive his right to counsel at the initial or guilty plea hearings, thus as a result, Tr. Ct. erred in denying his motion to withdraw his guilty plea. D appeared pro se at his initial hearing on three Level 6 drug-related charges and requested a speedy trial, indicating multiple times he was not sure if he would hire an attorney. D expressed a desire to resolve his case quickly by pleading guilty so he could take care of his ailing father. That same day he began plea negotiations with the prosecutor and agreed, without consulting an attorney, to plead guilty to a possession charge and one count of dealing. He also signed a document regarding his rights at the guilty plea stage, including the right to counsel. At the plea hearing, D told the judge he understood that he was waiving his right to counsel and Tr. Ct. accepted the guilty plea and sentenced him to an aggregate four years, with 16 months suspended to probation. Approximately seven months later, D, by counsel, moved to withdraw his plea, arguing it was based on "his misunderstanding that a waiver of counsel was necessary to quickly resolve the case." The Tr. Ct. denied the motion, finding D had been advised of his right to counsel orally and in writing.

Ind. Code § 35-35-1-1 states that a guilty plea "shall not be accepted from a D unrepresented by counsel who has not freely and knowingly waived his right to counsel." See also Laffler v. Cooper, 566 U.S. 156 (2012) (holding that plea negotiations are a critical stage to which right to counsel applies). Here, D never explicitly waived his right to counsel orally, but only said he was "not sure" what he would do about an attorney. More than once, D indicated that he was unable to afford an attorney, and despite the fact that he did not explicitly request appointment of a public defender, Tr. Ct. erred by improperly burdening him with the obligation to do so.

Similarly, D's signature on written forms advising him of his right to counsel also did not constitute explicit and thorough waivers. Rather, those documents were boilerplate advisement of rights that "do not, and cannot, suffice to fulfill the Tr. Ct.'s responsibility to ensure knowing, intelligent, and voluntary waiver of counsel." Further, the Tr. Ct. never inquired into D's "decision" to waive his right to counsel, nor did it work with D when he expressed confusion and uncertainty about the process. Thus, D did not knowingly, intelligently, and voluntarily waive his right to counsel and it was necessary to grant his motion to withdraw the plea to correct a manifest injustice, namely, that he was denied the effective assistance of counsel. Ind. Code § 35-35-1-4(c). Held, judgment reversed and remanded with instructions to withdraw D's plea, vacate his convictions and sentence and to continue the proceedings.

Y. RIGHT TO COUNSEL

Y.9. Interference with Right to Counsel

TITLE: Barham v. State
INDEX NO.: Y.9.
CITE: (4th Dist., 10-18-94), Ind. App., 641 N.E.2d 79
SUBJECT: Interference with Right to Counsel
HOLDING: Tr. Ct. interfered unreasonably & arbitrarily with D's 6th Amendment right to retain counsel of his choice by denying private counsel's appearance. Seven days before trial, D filed pro se motion requesting new attorney, expressing dissatisfaction with public defender's performance. At hearing, D explained that his family had just obtained private counsel. Judge Pro Tem denied motion & indicated that if new counsel entered her appearance, continuance might not be granted. Without conducting hearing, Presiding Judge denied new counsel's appearance & request for continuance; however, there was no showing new counsel could not be prepared for trial by scheduled date. Decision discusses federal decisions characterizing right to counsel of choice as essential component of 6th Amendment right to counsel. State failed to respond to D's argument that Tr. Ct. violated his right to be represented by counsel of choice by denying private counsel's appearance. Ct. distinguished cases relied on by State where right to counsel of choice was bound inextricably with continuance motion, where private counsel had not been obtained prior to continuance motion & trial, & where continuance motion was made on day of trial, Dickson, Ind., 520 N.E.2d 101; Parr, Ind., 504 N.E.2d 1014; Vancendak, Ind., 431 N.E.2d 100. Here, D retained private counsel who entered appearance five days before trial & did not condition her representation of D on Ct.'s grant of continuance. New counsel indicated she could have been prepared for trial on scheduled date & that D had caused no prior delays. These facts distinguish case from U.S. v. Hampton, 7th Cir., 457 F.2d 299, where Tr. Ct. properly denied last-minute motion to withdraw & continuance from D who was not prepared to substitute new counsel. Held, conviction reversed & remanded for new trial.

TITLE: Legal Services Corp. v. Velazquez
INDEX NO.: Y.9.
CITE: 531 U.S. 533, 121 S. Ct. 1043, 149 L.Ed.2d 63 (2001)
SUBJECT: Right to counsel, First Amendment
HOLDING: The Government may not subsidize legal representation for poor clients and attach restrictions which alter the attorney's traditional role. Since 1996, Congress has prohibited Legal Services Corporation from funding organizations that represent clients in efforts to challenge existing welfare law. Grantees cannot continue representation in a welfare matter even where a constitutional or statutory validity challenge becomes apparent after representation is well under way. Held, the restrictions on legal representation violate the First Amendment. Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the attorneys' traditional role. The Government may not design a subsidy to affect such a serious and fundamental restriction on the advocacy of attorneys and the functioning of the judiciary. An informed, independent judiciary presumes an informed, independent bar. However, the instant restriction prevents LSC attorneys from advising the courts of serious statutory validity questions. It also threatens severe impairment of the judicial function by sifting out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry.

Y. RIGHT TO COUNSEL

Y.9. Interference with Right to Counsel

Y.9.a. In general (see also S.6.a)

TITLE: Ferguson v. Georgia
INDEX NO.: Y.9.a.
CITE: 365 U.S. 570 (1961)
SUBJECT: Right to counsel -- barring direct examination of D is denial of assistance of counsel
HOLDING: Fourteenth Amendment ensures D's right to have his counsel question him to elicit his statement. Although in this case D was tried for capital offense & was represented by employed counsel, Court's decision does not turn to these facts, as Fourteenth Amendment also applies in case of accused tried for non-capital offense or represented by appointed counsel. Held, conviction reversed & remanded; Frankfurter & Clark, JJ., concurring.

RELATED CASES: Perry, 488 U.S. 272 (denying D opportunity to consult with counsel during fifteen-minute recess does not deny D effective assistance of counsel); Brooks, 406 U.S. 605 (requiring that D be first defense witness constitutes actual or constructive denial of assistance of counsel).

TITLE: O'Neill v. State
INDEX NO.: Y.9.a.
CITE: (5th Dist. 08/20/92), Ind. App., 597 N.E.2d 379
SUBJECT: Right to counsel - requiring defense counsel to testify
HOLDING: It was not reversible error or violation of D's Sixth Amendment right to counsel, for Tr. Ct. to require defense counsel to testify as to the authenticity of documents used to establish prior convictions for habitual offender determination. When counsel objected to documents as being improperly certified, Tr. Ct. sent defense counsel & prosecutor to examine original documents, & then had defense counsel testify as to authenticity. Ct. found that while this was not really good practice, it did not materially interfere with counsel's role as advocate, Barteau, J., dissenting.

TITLE: Trotter v. State
INDEX NO.: Y.9.a.
CITE: (9/6/90), Ind., 559 N.E.2d 585
SUBJECT: Right to counsel - interference; limiting consultation so that D could be returned to prison each night
HOLDING: Fact that D's time for consultation with counsel was limited so that D could be transported to & from prison 80 miles away during trial did not interfere with D's 6th Amend. right to counsel. D was charged with multiple counts in connection with prison riot. Tr. Ct. twice denied D's motions for transfer to county jail to facilitate preparations for trial, & ultimately ordered D transported to county jail 1/2 day before trial for attorney consultation. Tr. Ct. further ordered that D & his attorney were entitled to 1 hour consultation prior to trial each day, & 1 hour after trial concluded each day, after which D was returned to prison. Tr. Ct. agreed to order D transported back to county on days when trial was not in session. D alleges that Tr. Ct. interfered with his 6th Amend. right to counsel, *citing* Herring v. New York (1975), 422 U.S. 853, 95 S. Ct. 2550, 45 L.Ed.2d 593 in which U.S. S. Ct. struck down statute giving Tr. Ct.'s in non-jury criminal trials authority to deny counsel opportunity to make summation of evidence. Here, counsel was not prevented from making any argument. D also *cites* Geders v. US (1976), 425 U.S. 80, 96 S. Ct. 1330, 47 L.Ed.2d 592, in which Ct. found improper interference where Tr. Ct. ordered D not to consult with counsel during overnight recess between D's direct & cross-exam. Here, Tr. Ct. did not prohibit D from consulting with counsel, but merely limited time for such consultation. D also had full opportunity to consult with counsel during trial, as well as on days when trial was not in session. Under these circumstances, Tr. Ct.'s order did not deprive D of effective assistance of counsel. See Lucas 499 N.E.2d 1090; Hurley 446 N.E.2d 1326. Held, convictions affirmed.

TITLE: U.S. v. Amlani
INDEX NO.: Y.9.a.
CITE: 111 F.3d 705 (9th Cir. 1997)
SUBJECT: Interference with Right to Counsel -- Prosecutor's Disparagement of Attorney
HOLDING: Showing that D fired original counsel of choice because of prosecutor's disparaging remarks about him is sufficient to establish violation of 6th Amendment right to counsel. D need not prove that replacement counsel was incompetent. Neither does it matter that attorney was present and able to refute remarks when they were made. Right to counsel of choice may be limited in several ways. It is not so limited, however, that mere availability of replacement counsel allows government effectively to veto D's choice of counsel by intentionally undermining his confidence through disparagement. Appropriate remedy would be vacation of conviction and remand for new trial with counsel of choice.

Y. RIGHT TO COUNSEL

Y.9. Interference with Right to Counsel

Y.9.c. Invasion of lawyer-client relationship

TITLE: Ingram v. State
INDEX NO.: Y.9.c.
CITE: (12-20-01), Ind. App., 760 N.E.2d 615
SUBJECT: Right to counsel violation - State rebutted presumption of prejudice
HOLDING: Although D's Sixth Amendment right to counsel was violated, there was no actual prejudice. Police videotaped interview with D including private attorney-client conferences, but Tr. Ct. found that State successfully rebutted presumption of prejudice. U.S. v. Morrison, 449 U.S. 361 (1981). There is split in Cts. regarding which party bears burden of persuasion for showing or rebutting prejudice in cases of Sixth Amendment violations, but here State demonstrated sufficient evidence to rebut presumption of prejudice. D argued he was prejudiced because State conducted most of investigation after videotaping where they learned defense strategy & D's theory of setup. State showed that investigation was well underway prior to interview & there were clear indications that D voluntarily gave police information on theory of setup. While police actions were not condoned, Tr. Ct.'s decision was not clearly against logic & effect of facts & circumstances. Held, denial of motion to dismiss affirmed.

TITLE: Pinkton v. State
INDEX NO.: Y.9.c.
CITE: (2nd Dist., 4-21-03), Ind. App., 786 N.E.2d 796
SUBJECT: Claim of denial of right to counsel & fair trial - invited error
HOLDING: Tr. Ct. did not improperly inject itself into D's trial thereby depriving him of his rights to counsel & fair trial. At trial, after parties rested, D's attorney informed Tr. Ct. that D was not happy with attorney's decision to not explore some inconsistencies in State's witness's pretrial statements & trial testimony. Attorney explained that he believed raising issue would be detrimental to D's defense. Tr. Ct. explained that jury & witnesses could be brought back in & D indicated that is what he wanted done, despite repeated warnings by judge & attorney that it was going against defense strategy. D responded to warnings by stating that he wanted to go against strategy, wanted to pursue line of questioning, & that he would be totally responsible for whatever happened. On appeal, D argued that Tr. Ct.'s actions stripped his attorney of control of case, overrode his trial counsel's stated strategy, & damaged defense. However, he was advised that such course of action was detrimental to strategy & that it was not wise decision, to which D insisted that court recall witnesses. Therefore, D invited any alleged error. Held, judgment affirmed.

TITLE: Shillinger v. Haworth
INDEX NO.: Y.9.c.
CITE: 70 F.3d 1132 (10th Cir. 1995)
SUBJECT: Interference with Right to Counsel - Per Se Violation
HOLDING: Intentional intrusion by prosecution into defense camp, which is not justified by any legitimate state interest, is per se violation of 6th amendment, regardless of whether any specific harm from intrusion is shown. Here, D was guarded by deputy during pretrial sessions with counsel. Prosecutor obtained information from deputy regarding these sessions and used specific instances of coaching by defense counsel to impeach credibility of D at trial. In Weatherford v. Bursey (1977), 429 U.S. 545, U.S. S. Ct. refused to find per se violation of 6th amendment right to counsel whenever state intentionally intrudes into attorney-client relationship. Here, 10th Circuit finds that, unlike in Weatherford, intrusion did not serve any legitimate state interest. When state becomes privy to confidential communications due to purposeful intrusion into attorney-client relationship, 10th Cir. finds that prejudice may be presumed. Third Circuit has also held that purposeful intrusion without legitimate purpose is per se violation, while First, Sixth, and Ninth have held that something more must be shown. Seventh Circuit has not addressed this issue.

TITLE: State ex rel. Jones v. Knox Superior Ct.
INDEX NO.: Y.9.c.
CITE: (5-10-00), Ind., 728 N.E.2d 133
SUBJECT: Removal of court-appointed counsel
HOLDING: Where court-appointed counsel requested that they be allowed to withdraw as D's counsel if relief they sought was not provided, Tr. Ct. was not without authority to remove attorneys. One week before trial, attorneys moved to exclude State's DNA evidence on grounds that State had been late in providing it in discovery; in alternative, attorneys moved for continuance. After Tr. Ct. denied request for continuance, attorneys filed motion to reconsider or, in alternative, to withdraw as counsel. Attorney's motion began as mock letter to D & criticized Tr. Ct.'s order. Tr. Ct. reconsidered its earlier ruling & granted continuance. While it denied defense attorney's motion to withdraw, Tr. Ct. *sua sponte* removed them from case because of what Tr. Ct. considered "insulting & absolutely improper" remarks about Ct. in their motion to reconsider.

In seeking Writ of Prohibition & Mandamus to have attorneys reinstated as appointed counsel, D argued that if language of motion to reconsider was improper & inappropriate, remedies available to Tr. Ct. included contempt & referral to Disciplinary Commission, but not removal of counsel. Although Ct. noted that it is generally of view that Tr. Ct. is limited in its authority to remove criminal D's Ct. appointed counsel, Ct. would not define that authority in this case because attorneys had previously indicated desire to withdraw in their motion to reconsider. Where party voluntarily adopts certain form of procedure or agrees to manner in which its rights are submitted for determination in Tr. Ct., party will not be permitted to complain on appeal that ruling in conformity therewith was erroneous. State ex rel. Randall v. Long, 237 Ind. 389, 146 N.E.2d 243 (Ind. 1957). Held, D's petition for Writ of Prohibition & Mandamus to reinstate appointed counsel denied.

TITLE: Strong v. State
INDEX NO.: Y.9.c.
CITE: (5/22/89), Ind., 538 N.E.2d 924
SUBJECT: Right to counsel -- interference in attorney-client relationship
HOLDING: Merely requiring D's lawyer to testify does not alone constitute material interference with his function as advocate. Freeman, 519 F.2d 67. Here, Tr. Ct. permitted State to call D's lead counsel to stand to read portion of transcribed statement relating to State witness's ability to differentiate between truth and lie. At all times during counsel's testimony, co-counsel remained and actively served as trial counsel for D. Lead counsel's testimony occurred during competency hearing outside presence of jury. D argued that requiring lead counsel to testify on behalf of State permitted State to use defense counsel's work product and trial preparation and thereby directly infringed upon D's right to effective assistance of counsel. Court held that requiring counsel to testify did not constitute material interference with his function as advocate or operate to deprive D of fair trial because testimony occurred out of presence of jury and D's co-counsel remained present and actively participated. Held, convictions for murder and criminal confinement affirmed, convictions for reckless homicide, battery causing serious bodily injury, and neglect of dependent causing serious bodily injury reversed on other grounds.

RELATED CASES: O'Neill, App., 597 N.E.2d 379 (not reversible error for Tr. Ct. to 1) order defense counsel and prosecutor to clerk's office to compare original of prior felony conviction against photocopy, and 2) require D's counsel to testify to authenticity of document outside presence of jury, even though there was no other co-counsel to object to defense counsel's testimony; Court noted it will not encourage Tr. Ct.s to require testimony of defense counsel; Barteau, J., dissenting in part, because unwilling to countenance spectacle of defense counsel being both investigator for State and its inculpating witness, while leaving client totally unrepresented).

TITLE: Taylor v. State

INDEX NO.: Y.9.c.

CITE: (3/30/2016), 49 N.E.3d 1019 (Ind. 2016)

SUBJECT: Remedy for eavesdropping on attorney-client communications - presumptive taint rather than blanket suppression

HOLDING: Law enforcement and prosecutor's eavesdropping on a criminal suspect's pre-interrogation consultation with his lawyer betrayed public trust and violated Federal and State constitutional rights to counsel. The right to counsel under either Constitution goes hand-in-hand with attorney-client privilege, which recognizes the necessity of a D conferring privately with counsel. The State's egregious intrusion is presumptively prejudicial, but does not require blanket suppression of all testimony from witnesses who pleaded the Fifth Amendment about their actions. Lafler v. Cooper, 132 S. Ct. 1376, 1388-89 (2012). Rather, the State can rebut the presumption by disproving prejudice beyond a reasonable doubt for every item of tainted evidence and testimony.

Court acknowledged that the eavesdroppers' invocation of the Fifth Amendment will make it exceedingly difficult for the State to carry that heavy burden. But the officers may yet have an independent basis for certain limited testimony, such as routine evidentiary foundation for unsuppressed exhibits. On those matters, their credibility may be sufficiently "collateral" that neither their Fifth Amendment privilege nor the suspect's confrontation or cross-examination rights will be materially impaired. But because testimonial taint can be subtle and difficult to detect, the State must prove an independent basis beyond a reasonable doubt for the entire substance of each witness's testimony.

Held, transfer granted, Court of Appeals' opinion at 35 N.E.3d 287 vacated, blanket suppression of testimony reversed and remanded with instructions to determine as to each presumptively tainted witness whether State has proven beyond a reasonable doubt an independent source for that witness's testimony without implicating the witness's Fifth Amendment privilege and therefore without derogating D's right of confrontation.

Y. RIGHT TO COUNSEL

Y.10. Public Defenders

TITLE: Alford et. Al v. Johnson County Commissioners
INDEX NO.: Y.10.
CITE: (12/29/2017), 92 N.E. 653 (Ind. Ct. App 2017)
SUBJECT: Dismissal of Johnson County Public Defender suit affirmed
HOLDING: Tr. Ct. did not abuse its discretion by granting the Respondent's Motion to Dismiss, as Alford and other public defender clients failed to state a claim upon which relief could be granted. Motions to dismiss for failure to state a claim are properly granted only when the allegations present no possible set of facts upon which the complainant can recover. Magic Circle Corp. v. Crowe Horwath, LLP, 72 N.E.3d 919, 922-23 (Ind. Ct. App 2017). Here, public defender clients alleged that the system in Johnson County systematically deprived indigent people of the right to counsel and that the rights of indigent criminal Ds are being ignored in Johnson county because the attorneys assigned as public defenders by the trial judges are burdened by unmanageable caseloads and are, therefore, not providing actual assistance of counsel as required by the constitutions. The public defender clients sued the judges who contract with public defenders, the public defenders and the county commission that pay the public defenders. In support of the lawsuit, the public defender clients set forth specific examples of deficient performance. While the Court of Appeals does not minimize the allegations of deficient representation, the specific instances do not establish a systematic deprivation of constitutional rights. The system, through the specific language of the contracts, requires the public defenders not to accept any more case assignments or a greater workload than that which can be handled competently and managed with "reasonable diligence and promptness." Ind. Prof. Conduct Rule. 1.3, cmt. 2. The complaint does not allege that the judges have systematically compelled the public defenders to accept excessive workloads. Although the Johnson County public defender system may not employ enough attorneys under contract as public defenders, the complaint does not request greater appropriation to the Commission to hire additional public defenders. As such, the public defender clients have failed to state a claim upon which relief can be granted. Held, judgment of the Tr. Ct. dismissing the complaint is affirmed.

TITLE: F.T.C. v. Superior Court Trial Lawyers Assoc.
INDEX NO.: Y.10.
CITE: 593 U.S. 411, 110 S. Ct. 768, 107 L.Ed.2d 851 (1990)
SUBJECT: Public defender strike - unfair trade practices
HOLDING: Concerted action by regularly appointed public defenders who refused to accept further appointments until hourly rates were raised constituted classic restraint of trade violating Sherman Act. Fact that lawyers sought to establish reasonable price for their services is irrelevant. Fact that lawyer's objective was enactment of favorable legislation is equally unavailing. 1st Amend. does not provide defense. 1st Amend. provides protection for boycott, which is nonviolent, politically motivated, & designed to force governmental/economic change. NAACP v. Claiborne Hardware (1982), 458 U.S. 886, 102 S. Ct. 3409, 73 L.Ed.2d 1215. However, here, immediate objective was to increase price lawyers/boycotters would be paid for their services. Nor is exception to per se rules of antitrust law justified because of "expressive component" of boycott; there is nothing unique about boycott, here, to merit exemption. Antitrust laws are violated even where there is no proof that conspirators have "market power;" every horizontal arrangement among competitors poses some threat to free market. Boycott here was not harmless; it almost produced crisis in administration of criminal justice when it achieved economic goal. Held, boycott violated antitrust laws. Case remanded for further proceedings. Brennan, joined by Marshall, CONCURRING & DISSENTING; Blackman, CONCURRING & DISSENTING.

TITLE: Obregon v. State
INDEX NO.: Y.10.
CITE: (3rd Dist., 12-22-98), Ind. App., 703 N.E.2d 695
SUBJECT: Imposition of public defender fee - conflicting statutes
HOLDING: Tr. Ct. did not err in imposing public defender fee in excess of amount specifically stated in Ind. Code 35-33-7-6(c). Statute provides for $100 fee for felony when Tr. Ct. finds that D is able to pay part of representation by assigned counsel. However, Ind. Code 35-33-8-3.2 states without ambiguity that publicly paid costs of representation may be deducted from D's cash bond prior to remittance. Facts of this case fit squarely within latter statute notwithstanding $100 fee provided by Ind. Code 35-33-7-6. Held, judgment affirmed; Garrard, J., concurring in result.

RELATED CASES: Stanley, App., 755 N.E.2d 708 (Tr. Ct. abused discretion in ordering D to reimburse county where record contained no findings regarding actual cost of defense services rendered & no findings or calculations regarding how trial Ct. arrived at conclusion that D could reimburse county $6,000, given fact that his average weekly salary was $300-$400); Turner, App., 755 N.E.2d 194 (where D posted no bond & was incarcerated following his arrest through conclusion of his trial, Tr. Ct. exceeded its statutory authority when it assessed D a reimbursement fee of more than $100).

TITLE: Johnson v. State
INDEX NO.: Y.10.
CITE: (06-08-11), 948 N.E.2d 331 (Ind. 2011)
SUBJECT: Duty to investigate complaints about public defender's neglect of case
HOLDING: In Class A felony child molesting prosecution, D failed to establish that his trial counsel was burdened by a conflict of interest sufficient to trigger the Sixth Amendment duty of inquiry under Holloway v. Arkansas, 435 U.S. 475 (1978) or Cuyler v. Sullivan, 446 U.S. 335 (1980). D complained that his public defender (PD) was neglecting his case and did not interview certain unidentified beneficial witnesses. The trial judge passed the complaint to the county public defender's office. Neither the judge nor D took further action prior to trial, and there were no objections during the trial or the sentencing hearing. Court held D in this ordinary case of attorney neglect failed to allege even a potential conflict of interest under Cuyler.

Court agreed the complaints about PD's neglect of case should be addressed by the county PD's office rather than the Tr. Ct. However, since the PD in the present case had a known history of neglecting his clients, judges under these circumstances should do more than simply pass the complaint along. Where there is a track record of the professional conduct complained of, there is a duty at minimum to receive assurances that the complaint has been properly addressed by the PD's office. This duty stems not from the Sixth Amendment, but from the Court's supervisory powers and Tr. Ct. judge's inherent authority over the parties and proceedings before it.

However, even though the judge failed to receive assurances in this case, this did not prejudice D because there is nothing to suggest that the outcome would have been different if the judge followed up. Held, transfer granted, Court of Appeals' opinion at 928 N.E.2d 893 on this issue vacated, conviction affirmed.

RELATED CASES: Jackson, 992 N.E.2d 926 (Ind. Ct. App 2013) (because D cited no evidence to substantiate conflict-of-interest claim that trial counsel was "helping" the State, Tr. Ct. had no duty to inquire about potential conflict; court was not required to appoint alternate counsel as it adequately advised D about dangers of proceeding *pro se*).

TITLE: State ex rel. Jones v. Knox Superior Ct.
INDEX NO.: Y.10.
CITE: (5-10-00), Ind., 728 N.E.2d 133
SUBJECT: Removal of court-appointed counsel
HOLDING: Where court-appointed counsel requested that they be allowed to withdraw as D's counsel if relief they sought was not provided, Tr. Ct. was not without authority to remove attorneys. One week before trial, attorneys moved to exclude State's DNA evidence on grounds that State had been late in providing it in discovery; in alternative, attorneys moved for continuance. After Tr. Ct. denied request for continuance, attorneys filed motion to reconsider or, in alternative, to withdraw as counsel. Attorney's motion began as mock letter to D & criticized Tr. Ct.'s order. Tr. Ct. reconsidered its earlier ruling & granted continuance. While it denied defense attorney's motion to withdraw, Tr. Ct. *sua sponte* removed them from case because of what Tr. Ct. considered "insulting & absolutely improper" remarks about Ct. in their motion to reconsider.

In seeking Writ of Prohibition & Mandamus to have attorneys reinstated as appointed counsel, D argued that if language of motion to reconsider was improper & inappropriate, remedies available to Tr. Ct. included contempt & referral to Disciplinary Commission, but not removal of counsel. Although Ct. noted that it is generally of view that Tr. Ct. is limited in its authority to remove criminal D's Ct. appointed counsel, Ct. would not define that authority in this case because attorneys had previously indicated desire to withdraw in their motion to reconsider. Where party voluntarily adopts certain form of procedure or agrees to manner in which its rights are submitted for determination in Tr. Ct., party will not be permitted to complain on appeal that ruling in conformity therewith was erroneous. State ex rel. Randall v. Long, 237 Ind. 389, 146 N.E.2d 243 (Ind. 1957). Held, D's petition for Writ of Prohibition & Mandamus to reinstate appointed counsel denied.

TITLE: Woolf v. State

INDEX NO.: Y.10.

CITE: (1st Dist. 10/26/89), Ind. App., 545 N.E.2d 590

SUBJECT: Right to counsel - juvenile; parents not liable for counsel fees when juvenile not adjudicated delinquent

HOLDING: Because juvenile petition was dismissed, D's parents were not liable for cost of Ct.-appointed counsel. State brought juvenile petition alleging that D had committed sexual battery. Tr. Ct. appointed 4 different attorneys, in succession, then ultimately dismissed petition because it was "too old." D's counsel billed Tr. Ct. for what Tr. Ct. considered "excessive" number of hours, & Tr. Ct. ordered 1/3 of fees paid from county funds, entering judgment against D & his parents for remainder. Tr. Ct. later vacated this ruling & ordered counsel to look to D's parents for payment, rather than authorizing payment from county funds. When a child is alleged delinquent, Tr. Ct. is required to appoint counsel, after considering whether child has counsel & whether child has waived right to counsel. Ind. Code 31-6-7-2(a); Adams, App., 411 N.E.2d 160. While county is to pay cost of any services ordered by Tr. Ct. for any child, parent or guardian is ultimately responsible for cost of services ordered for child adjudicated to be delinquent or in need of services, unless he/she is unable to pay, payment would force unreasonable hardship on family, or justice would not be served by ordering payment. Ind. Code 31-6-4-18. Here, because petition alleging D to be delinquent was dismissed, so that D was not in fact adjudicated delinquent, D's parents could not be held responsible for attorney fees, & county retains full responsibility for them. Held, reversed & remanded with instructions to determine reasonable fee.

TITLE: Kimball v. State
INDEX NO.: Y.10.
CITE: (2/28/85) Ind., 474 N.E.2d 982
SUBJECT: Public defenders - adequate preparation
HOLDING: On petition to transfer. Second district erred in determining Tr. Ct. erred in denying continuance & ordering trial to begin with D represented by "somebody from PD office" when original PD had schedule conflict. Transfer granted & second district opinion (468 N.E.2d 242) vacated. Adequacy of time allowed for preparation is determined on case-by-case basis, considering totality of circumstances, including complexity of issues, necessity of interviewing witnesses/pretrial motions & whether D is able to assist in preparation. Marshall 438 N.E.2d 986; Jones, App., 371 N.E.2d 1314. Ind. S. Ct. finds 1/2-day continuance sufficient preparation time (state called only one witness; original PD made pre-trial motions, received discovery & interviewed witness; PD at trial stated he had adequate time to prepare & vigorously cross-examined witness/victim). Held, D not deprived of effective assistance of counsel.

TITLE: Majors v. State
INDEX NO.: Y.10.
CITE: (12/6/82) Ind., 441 N.E.2d 1375
SUBJECT: State Public Defender - mandatory representation
HOLDING: PC 1, Section 9(a) forecloses Tr. judge from appointing counsel other than State Public Defender for petitioner in post-conviction proceeding. Here, deputy moved to be released from appointment & for appointment of other counsel because D wished her to raise ineffectiveness of another deputy from same office who had represented him at PCR hearing. PCR judge denied motion. D argued denial of motion placed Public Defender in untenable position of arguing her own ineffectiveness, prohibited by the Code of Professional Responsibility, or refusing to argue all of D's allegations, in direct contravention of Dixon, App., 284 N.E.2d 102. Ct. finds denial of motion supported by Dixon which holds Public Defender is not entitled to withdraw as counsel for D in appeal from denial of PCR simply because deputy believes appeal is frivolous. Dixon held PC 1 Section 9 mandates State Public Defender to represent pauper D from denial of PCR without exception. Ct. declines to recognize an exception here. Held, no error in denying withdrawal. CONCURRING IN RESULT, Prentice does not agree rule precludes Tr. judge from appointing counsel other than State Public Defender. Prentice interprets rule to say absent clear showing State Public Defender cannot or probably would not adequately represent D, there is no duty to appoint other counsel. However, Prentice finds D's allegation does not state prima facie case.

Y. RIGHT TO COUNSEL

Y.12. Attorney Fees

Y.12.a. In general

TITLE: F.T.C. v. Superior Court Trial Lawyers Assoc.
INDEX NO.: Y.12.a.
CITE: 593 U.S. 411, 110 S. Ct. 768, 107 L.Ed.2d 851 (1990)
SUBJECT: Public defender strike - unfair trade practices
HOLDING: Concerted action by regularly appointed public defenders who refused to accept further appointments until hourly rates were raised constituted classic restraint of trade violating Sherman Act. Fact that lawyers sought to establish reasonable price for their services is irrelevant. Fact that lawyer's objective was enactment of favorable legislation is equally unavailing. 1st Amend. does not provide defense. 1st Amend. provides protection for boycott, which is nonviolent, politically motivated, & designed to force governmental/economic change. NAACP v. Claiborne Hardware (1982), 458 U.S. 886, 102 S. Ct. 3409, 73 L.Ed.2d 1215. However, here, immediate objective was to increase price lawyers/boycotters would be paid for their services. Nor is exception to per se rules of antitrust law justified because of "expressive component" of boycott; there is nothing unique about boycott, here, to merit exemption. Antitrust laws are violated even where there is no proof that conspirators have "market power;" every horizontal arrangement among competitors poses some threat to free market. Boycott here was not harmless; it almost produced crisis in administration of criminal justice when it achieved economic goal. Held, boycott violated antitrust laws. Case remanded for further proceedings. Brennan, joined by Marshall, CONCURRING & DISSENTING; Blackman, CONCURRING & DISSENTING.

Y. RIGHT TO COUNSEL

Y.12. Attorney Fees

Y.12.b. Reasonble compensation

TITLE: Lowery v. State
INDEX NO.: Y.12.b.
CITE: (11/28/84) Ind., 471 N.E.2d 258
SUBJECT: Attorney fees
HOLDING: Judge Boles did not abuse his discretion in limiting attorney fees in capital trial to $15,000; attorneys failed to prove amount was unreasonable compensation for services rendered/expenses paid. Here, attorney was paid $11,561 for first trial & $7,268 for appeal resulting in reversal. These fees were calculated at $40/hour. Upon retrial, attorneys estimated fees/expenses would be $15,000. Boles informed original venue judge (Gollmitzer) of estimate & promised additional funds would be requested in advance. Attorneys contend $15,000 estimate was based on $40/hour rate, which had been approved by Gollmitzer. Judge may consider all facts/circumstances known to him/her & may judicially notice what constitutes a reasonable fee & is not bound to accept evidence presented by requesting attorneys. [Citations omitted.] Ct. compares amount paid for first trial to $15,000 (which Boles was to include appeal, which attorneys denied), notes "second trial would not entail same effort & expenses, such as discovery & interviews of witnesses, expended on first trial" & finds Boles did not abuse his discretion. Held, affirmed. Hunter CONCURS IN RESULT without opinion.

TITLE: State v. Young
INDEX NO.: Y.12.b.
CITE: 143 N.M. 1, 172 P.3d 138 (N.M. 2007)
SUBJECT: Right to counsel implicated by low pay to public defenders
HOLDING: New Mexico Supreme Court held the compensation offered to defense attorneys in a complicated capital case was so low that it deprived the accused of their Sixth Amendment right to counsel. The case involved multiple Ds in the murder of a prison guard during a riot. Due to conflicts, the public defender's office was required to contract with private attorneys to represent some of the Ds. Their initial contracts called for representation through trial for a flat fee of $46,500 for first-chair attorneys and $23,000 for second-chair attorneys. By all accounts, the case represented one of the most complicated murder prosecutions in the state's history. The legislature appropriated only half the amount sought by each capital defense team to cover the estimated costs of compensating counsel through the end of trial, and the attorneys refused to sign the new contracts, instead moving to withdraw because they could not provide constitutionally adequate representation. They provided evidence that the contract fees, when converted to an estimated hourly rate, would be less than they $73 per hour they pay in overhead. Tr. Ct. denied the motions to withdraw. Court affirmed the denial of the withdrawal motions but held that the inadequate compensation offered to capital counsel deprived their clients of their Sixth Amendment right to the effective assistance of counsel.

Y. RIGHT TO COUNSEL

Y.14. Withdrawal by Counsel (Ind. Code 35-36-8-2)

TITLE: Strong v. State
INDEX NO.: Y.14.
CITE: (5th Dist., 04-27-94), Ind. App., 633 N.E.2d 296
SUBJECT: No error in denial of withdrawal of counsel for conflict
HOLDING: Tr. Ct. did not err in refusing to grant defense counsel's motion to withdraw or for continuance to subpoena surprise witness. Although defense had moved for discovery of names & addresses of State's witnesses it did not intend to call at trial, prosecution did not supply him with name of confidential informant (CI) until day before trial. When revelation was made, counsel moved to withdraw because he was representing CI in another criminal case, but Tr. Ct. denied motion, as well as motion for continuance to subpoena CI. Although Ct. agreed defense counsel should never have been put in position, it found no reversible error because it found no prejudice to D's case. There was no indication counsel knew anything of his other client's involvement in this case, had gained any confidential information as result of representation, or that he was prevented from defending D in any way because of other representation. Ct. also found no error in denial of continuance because although D alleged CI's testimony was important, Ct. found no evidence his testimony would have benefitted D.

RELATED CASES: Bronaugh, 942 N.E.2d 826 (Ind. Ct. App. 2011) (Tr. Ct. may refuse a motion to withdraw if it determines that there will be a resultant delay in the administration of justice, Moore, 557 N.E. 2d 665 (Ind. 1990); moreover, D failed to demonstrate he was prejudiced by attorney's continued representation); Boesel, App., 596 N.E.2d 261 (Tr. Ct. abused discretion by allowing D's third court-appointed counsel to withdraw following voir dire and after jury impaneled; even when Tr. Ct. frustrated by D's lack of cooperation and even when withdrawal may be possible under Ind. Code 35-36-8-2(b)(3)); Slocumb, App., 568 N.E.2d 106, modified on other grounds, 573 N.E.2d 427 (no manifest necessity to withdraw where client failed to appear for trial and failed to bring documents); Conn, 535 N.E.2d 1176 (withdrawal permitted where co-counsel in state of readiness, additional week left for further preparation, and counsel was party to dissolution action set for hearing on same trial date).

TITLE: Wright v. State
INDEX NO.: Y.14.
CITE: (1st Dist., 3-22-96), Ind. App., 663 N.E.2d 210
SUBJECT: Denial of Motion to withdraw - no error
HOLDING: Tr. Ct. did not abuse discretion in denying public defender's motion to withdraw as D's appellate counsel. *Citing* conflicts of interest with D, public defender stated that disagreement developed between herself & D regarding how to handle appeal, & that D had recently filed legal malpractice action against her alleging that she failed to advise & assist him at his trial. However, in its order denying public defender's motion to withdraw, Tr. Ct. found that: 1) malpractice claim against public defender was frivolous because D insisted that defense attorney not interfere with his trial in any way; 2) because public defender was present as stand- by counsel during D's trial, she was in best position to evaluate merits of appeal; 3) Clark County Public Defender's Office complied with standards of State Public Defender Commission, thus any appointment of state public defender would cause substantial delay & unnecessary public expense; & 4) it was extremely unlikely that D would be satisfied with any appointed counsel because of his contempt towards attorneys. Ct. recognized public defender's concern that she may be placed in untenable position of arguing her own ineffectiveness on appeal but noted that by agreeing to proceed pro se & explicitly warning public defender not to interfere in his trial, D waived any ineffective assistance of counsel claim for appeal. Dack v. State, 457 N.E.2d 600 (Ind. Ct. App 1983). Regarding D's insistence on asserting frivolous issues on appeal, Ct. noted that appellate counsel need not raise issue on appeal that in her professional judgment appears frivolous or unavailing. Held, no error.