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Betancourt v. Willis, 814 F.2d 1546 (11th Cir. 1987) Counsel ineffective for inducing defendant to enter into a plea agreement by telling defendant that the judge had agreed to reduce his sentence at a later time to ensure that it was commensurate with the federal sentences of the co-defendants, but counsel failed to memorialize the plea agreement and neglected to put it on record.

Commonwealth v. Rondeau, supra at 414-415 Id. at 415-416 & n.7. The Massachusetts Supreme Judicial Court has reversed a conviction on the basis of ineffective assistance of counsel where defense counsel should have been a witness in the matter as she was the only person who could refute a version of the defendant's statement that the Commonwealth intended to offer. The court held that counsel's continued representation of defendant past the point after which she should have realized that she should testify (over a year) was a violation of applicable lawyers' ethic rules and that "The conflict lies in the fact that the client's interests would be better served by having the attorney testify while the attorney's interests would be better served by not testifying." The Supreme Court in Strickland did concede that:

"Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. (citations omitted).

The Strickland Court also focused upon the conduct of the defendant in assessing the reasonableness of defense counsel's actions (or inaction). As the Court recognized,

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. 691

A key factor in deciding the extent to which investigation is reasonably necessary, in the Strickland Court's view, is when the defendant has done or communicated to his or her counsel:

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"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."

In 1985, the Supreme Court, in ***Evitts v. Lucey***, 469 U.S. 387 (1985) settled the question whether a criminal defendant is entitled to the Sixth Amendment's guarantee of effective representation of counsel on a first appeal as of right. --- The Court answered this question in the affirmative, finding that the two lines of cases relied on were dispositive of the issue:

"In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that - like a trial - is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant - like an unrepresented defendant at trial - is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation on an appeal as of right - like nominal representation at trial - does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all."

Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), the United States Supreme Court expressly concluded that a criminal defense attorney's conflict of interest in representing a client may in some circumstances constitute ineffective assistance of counsel under the Sixth Amendment; ... "That this is indicative of Stewart's struggle to serve two masters cannot seriously be doubted." Id. 75 (emphasis added); On the record as described above, the Supreme Court found it clear that Stewart was engaged in representing conflicting interests and found further that such conflictive representation was unconstitutional: " Even as we have held that the right to the

assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment ... so are we clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired." The Supreme Court added that "[t]here is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest the additional burden of representing another party may conceivably impair counsel's effectiveness." Additionally, the Supreme Court concluded that it was unnecessary "[t]o determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske ... [t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Hence, Glasser's conviction was set aside by the Supreme Court as obtained as a consequence of ineffective assistance of counsel, vocative of his Sixth Amendment right to conflict-free representation. Subsequent United States Supreme Court decisions have reaffirmed every criminal defendant's right under the Sixth Amendment to conflict-free representation by counsel. See *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct.1708, 64L. Ed. 2d 333 (1980). The important issue remains, however, whether such conflictive situations were raised prior to or at trial or, in contrast, only after the trial concluded.

Holloway v. Arkansas, supra, 435 U.S. 490 -491. As the Holloway Court explained:

"[I]n a case of joint representation of conflicting interests the evil-it bears repeating-is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from [494 U.S. 1039 , 1045] the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options,

tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require"

Iowa Supreme Court has ruled "a conflict exists when an attorney is placed in a situation conducive to divided loyalties."

Other state and federal courts have concluded that presenting or failing to present a particular argument at sentencing constitutes ineffective assistance of counsel. See e.g., ***Jansen v. U.S.***, 369 F.3d 237 (3d Cir 2004) (counsel's failure to argue that some or all of the drugs found on Jansen's person were for personal The Court of Appeal, Scotland, J., held that: (1) plea agreement was subject to specific enforcement, and (2) effect of specific enforcement would be to require prosecutor to move for dismissal. Use was unreasonable performance and prejudiced the defendant; Jansen consistently maintained that these were for his own use, and since possession for personal use should not constitute relevant conduct on a possession with intent to distribute charge, even a small reduction in the quantity of drugs would have lowered Jansen's offense level for sentencing).

Kimmelman v. Morrison, 477 U.S. 365 (1986) The restrictions on federal habeas review of Fourth Amendment claims do not apply to Sixth Amendment claims of ineffective assistance of counsel even though the principal allegation of inadequate representation relates to counsel's failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment. In order to succeed on the merits of the claim, however, the defendant must establish that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. The Court relied, in part, on the reasoning that "[a] layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case." Id. at 378 (citation omitted). Likewise, the Court reasoned that "[t]he constitutional rights of criminal defendants are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." Id. at 380. Counsel in this case failed to file the motion to suppress because he was unaware of the search or the evidence. The Court held that counsel's failure

to conduct any discovery because of a belief the state was obliged to provide inculpatory information was unreasonable and "betray a startling ignorance of the law-or a weak attempt to shift blame for inadequate preparation." Id. at 385. In other words, counsel failed to investigate or make a reasonable decision not to investigate through discovery. "Such a complete lack of pretrial preparation puts at risk both the defendant's right to an 'ample opportunity to meet the case of the prosecution,' and the reliability of the adversarial testing process." Id. (citations omitted). In addition, the state's argument that counsel's failure to investigate was reasonable because of the relative importance or unimportance of the evidence involved is "flawed." Id. "At the time Morrison's lawyer decided not to request any discovery, he did not-and, because he did not ask, could not-know what the State's case would be. While the relative importance of [the evidence] . . . is pertinent to the determination whether [the defendant] was prejudiced by his attorney's incompetence, it sheds no light on the reasonableness of counsel's decision not to request any discovery."

Kyles v. Whitley, 514 U.S. 419 (1995). The "touchstone" of the prejudice test in ineffective assistance of counsel claims is "a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict..., but whether ... he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. at 434. Likewise, the prejudice test of Strickland "is not a sufficiency of evidence test." Id. Furthermore, the resulting prejudice from counsels' errors must be "considered collectively, not item-by-item." Id. at 436.

Lamb v. State, 472 S.E. 683, 685 (Ga. 1996) "The test is whether the representation deprived either defendant of the undivided loyalty of counsel, i.e., did counsel slight one defendant to favor the other?"

Lockhart v. Fretwell, 506 U.S. 364 (1993), "The 'prejudice' component of the *Strickland* test does not implicate these concerns. It focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *Id.*, at 687 ... Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."

On federal habeas appeal, the Sixth Circuit Court concluded that Ohio Court of Appeals had unreasonably applied Cronic, and reversed Hunt's conviction. Prejudice is presumed where a

defendant is denied the presence of counsel at a critical stage of the prosecution, and "[t]he pretrial period constitutes a 'criminal period' because it encompasses counsel's constitutionally imposed duty to investigate the case.

Lopez v. Scully, 58 F.3d 38, 41-43 (2d Cir. 1995). Plea induced by counsel's threats and misinformation.

MacDonald v. State, 778 A.2d 1064 (Del. 2001). "Counsel ineffective where counsel conducted no investigation, including failing to even question the defendant, & instead just informed the defendant that he had no choice but to plead guilty to conspiracy & solicitation charges. Counsel had only examined the probable cause sheet supporting the defendant's arrest. Prejudice found because the plea agreement secured no direct benefit to the defendant."

Magana v. Hofbauer, 263 F.3d 542, 550 (6th Cir. 2001). Assessing Magana's testimony under the proper standard, the court determined that Magana had shown a reasonable probability that, but for counsel's erroneous advice, he would have pled guilty. The case was reversed and remanded for a plea hearing so that Magana could consider the State's original plea offer. The court noted that if the prosecutor offered a plea in excess of the original ten years, it would create "a rebuttable presumption of prosecutorial vindictiveness." *See id.* at 1209.

The Illinois Supreme Court also found counsel's conduct to have been prejudicial, rejecting the prosecution's argument that "in order to establish prejudice, the defendant must show a reasonable probability that the trial judge would have accepted the plea agreement." Rather, given "the disparity between the 12-year, mandatory minimum sentence which defendant faced and the 4-year plea offer; and most importantly, defense counsel's uncontradicted affidavit that defendant rejected the plea offer because of counsel's erroneous advice, we conclude that defendant has established a reasonable probability that he would have accepted the plea offer, absent his attorney's deficient performance."

A majority of Georgia Supreme Court ruled that defense counsel was ineffective when she failed to follow up on defendant's complaint to her that he had already been tried in a prior proceeding on some of the current charges to which she advised him to plead guilty. The majority concluded that "other than a cursory into the city court proceedings, counsel utterly failed to research an devaluate evidence of the elements of the city court offense or the facts underlying it," resulting in her giving defendant "misleading advice."

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Other courts, as well, have concluded that counsel's ignorance of or failure to inform defendant of the law applicable to the decision to plead guilty in ineffective assistance.

Mayo v Henderson, 13 F3d 528, 532 (2d Cir. 1994). Failure to present significant and obvious issues — (ignored issues must be stronger than those presented). Choosing to argue particularly weak appellate issues that had little chance of success.

Miller v. Anderson, 255 F.3d 455, the Seventh Circuit determined that what is termed "counsel's fumbles" were such a clear example of ineffective assistance that court not only reversed Miller's state court conviction but sent a copy of its opinion to the Indiana attorney disciplinary authorities for their consideration of counsel's deficient representation. Miller was convicted of rape, torture, and murder, and sentenced to death. There were no witnesses to the events, and the defendant was convicted largely on the contradictory testimony of the state's main witness, who had entered a guilty plea in return for the state's promise not to seek the death penalty against him, and who had an extensive criminal background. Evaluating counsel's conduct throughout trial, Judge Posner concluded that "there were no bright spots in his representation."

Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988). The court held that counsel's performance constituted a complete breakdown of the adversarial system: counsel "did not simply make poor strategic choices; he acted with reckless disregard for his client's best interests and, at times, apparently with the intention to weaken his client's case. Prejudice, whether necessary or not, is established under any applicable standard." Although [defendant] may be guilty of several horrible crimes, the state court might not have accepted his guilty plea if his counsel had actively advocated his interests. Id. at 629.

People v. Butler, 94 A.D.2d 726, 726 (2d Dept. 1983). Counsel's ignorance of applicable law.

People v. Donovan, 184 A.D.2d 654, 655 (2d Dept. 1992); *People v. Gugino*, 132 A.D.2d 989, 989-90 (4th Dept. 1987); *People v. Sanin*, 84 A.D.2d 681, 682-83 (4th Dept. 1981). Failure to demand a suppression hearing (Mapp) on physical evidence seized from accused.

People v. Droz, 39 NY2d 457, 462; (1976); *People v La Bree*, 34 NY2d 257, 259 (1974); *People v Van Wie*, 238 AD2d 876, 877 (4th Dept. 1997); *People v AliBaba*, 179 AD2d 725, 728-29 (2d Dept. 1992); *see also People v Bennett*, 29 NY2d 462, 466 (1972). Right

to counsel includes right to have counsel conduct appropriate investigations), and *Deluca v Lord*, 77 F3d 578, 584 (2d Cir.).

People v. Morgan, 141 A.D.2d 928, 929-30 (3d Dept. 1988); *People v. Detling*, 73 A.D.2d 937-937-38 (2d Dept. 1980); *People v. Gugino*, 132 A.D.2d 989-989-90 (4th Dept. 1987); *People v. Sanin*, 84 A.D.2d 681, 682-83 (4th Dept. 1981). Failure to demand a suppression hearing (Huntley) on voluntariness of statement.

People v. Reed, 152 A.D.2d 481, 481 (1st Dept. 1981). Failure to communicate accurate information about plea negotiations.

People v. Roy, 122 A.D.2d 482, 483-484 (3d Dept. 1986). Failure to place understanding of plea on the record and failure to advise client that he was not entitled to specific performance of a plea agreement.

Powell v. State, 287 U.S. 45, 71, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932) (emphasis added). The Powell court added: "The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the claim spirit of regulated justice but to go forward with the haste of the mob."

The Alaska Court of Appeals, in contrast, uses a Strickland-type two-prong test for ineffective assistance of counsel under its state constitution, but the prejudice prong Alaska has adopted is "significantly less demanding" for a defendant to meet than the test set forth by the United States Supreme Court in Strickland. As the Alaska Court of Appeals has explained: "whereas [Alaska Supreme Court decisional law on the prejudice prong] requires only that the accused create a reasonable doubt that counsel's incompetence contributed to the conviction, Strickland requires that a 'reasonable probability' of a different outcome be established."

Risher v. State, 523 P.2d 421 (Alaska 1974). The Risher Court expressly concluded that where the performance standard is met, "all that is required additionally is [for the defendant] to create a reasonable doubt that the incompetence contributed to the outcome." 523 P.2d (footnote omitted). See also *State v. Simpson*, 946 P.2d 890, 892 (Ak. Ct. App. 1997).

The Cuyler decision requires that a defendant who argues that he or she has received ineffective assistance of counsel by reason of a conflict of interest not raised by counsel until

after the trial has concluded demonstrate the existence of an "actual conflict." The case interpreting this requirement have established a number of different verbal tests to assess whether this requirement has been met. *U.S. v. Carr*, 80 F.3d 413 (10th Cir. 1996).

The Cuyler Court forcefully concluded that: "This Court's decisions establish that a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment. ... Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. ... When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty. ... A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. We may assume with confidence that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. ... Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a [446 U.S. 335, 345] distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers." A lawyer who is privately retained generally has the confidence of the client, who after all, has made a conscious choice of counsel. The client's desire to retain the lawyer gives the lawyer's persuasion greater standing with the client; the threat of withdrawal may be enough to discourage any inclination of the client to engage in impropriety to demand it of the lawyer.

State v. Carter, 270 Kan. 426, 14 P.3d 1138 (2000). The court concluded that "Viewing [counsel's] conduct as part of a trial strategy or tactic is to ignore the obvious. By such conduct defense counsel was betraying the defendant by deliberately overriding his plea of not guilty." As the court continued, "[t]he decision to enter a plea of guilty or not guilty to a criminal charge lies solely with the defendant. It is a fundamental constitutional right guaranteed to a defendant, and defense counsel's imposing a guilt-based defense against Carter's wishes violated his Sixth Amendment right to counsel and denied him a fair trial."

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State v. Burns, 6 S.W.3d 453 (Tenn. 1999) Counsel ineffective in murder case for failing to investigate and present evidence...

State v. Duncan, 265 Neb. 406, 657 N.W.2d 620 (2003); *State v. Brouillate*, 265 Neb. 214, 655 876 (2003); *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002); *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2002); *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000). "In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt."

State v. Faust, 265 Neg. 845, 660 N.W. 2d 844 (2003). "An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt." *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003); *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). To be admissible in evidence, the accused's statement must be shown by the state to have been freely and voluntarily given and not to have been the product of any promise or inducement, direct or indirect, no matter how slight.

State v. Henderson, 93 P.3d 1231 (Mont. 2004). "Counsel ineffective for failing to adequately consult with client, investigate, or conduct any research prior to advising defendant to plead guilty. Counsel, 'did nothing more than request a plea agreement & facilitate the conviction of his client without a trial.'"

The Utah Supreme Court found ineffective assistance of counsel was rendered during an appeal of a defendant's conviction and subsequent death penalty where defense counsel breached his duty of loyalty to his client. Defense counsel represented the defendant in ***State v. Holland***, 876 P.2d 357 (Utah 1994) during his capital homicide trial and his several appeals. Id. 358.

The court forcefully started adhering to the duty of loyalty is mandated both by the Utah Rules of Professional Conduct and the Sixth Amendment right to effective assistance of counsel for criminal defendants. Id. at n.3.

State v. Miller, 278 Mont. 231, 924 P.2d 690, 692 (1996). The Montana Supreme Court has applied the Strickland standards to the question whether or not counsel was ineffective for failing to tell defendant that he had the right to appeal his sentence.

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State v. Osborn, 250 Neb. 57, 547 N.W.2d 139 (1996). A person who is aggrieved by a statement taken from him which is claimed to be involuntary may move for suppression of that statement.

State v. Preston, *673 S.W.2d 1 (Mo. banc 1984),* The Missouri Supreme Court has found counsel to be constitutionally ineffective where, inter aili, he failed to conduct a proper investigation of police reports or to interview witnesses in a capital case. As the court noted, counsel's "efforts to investigate the facts of this case were perfunctory, at best. There is no reasonable professional judgment that would support trial counsel's failure to investigate and interview key witnesses..." Moreover, the court concluded, "a proper investigation of this case would have brought out substantial weaknesses in the prosecution's case that defense counsel never even attempted to investigate or pursue...Defense counsel did not know enough about this evidence to make a reasoned decision not to use it." Not only was such a failure to investigate unreasonable under the circumstances, but defendant was prejudiced thereby, "Had the jury been presented with all the evidence that would have been discovered if defense counsel had conducted a proper investigation," the court concluded "there 'is a reasonable probability that [they] would have had a reasonable doubt' as to whether Butler committed the murder."

State v. Scott, 230 Wis. 2d 643, 602 N.W. 2d 296 (Ct. App. 1999). The Wisconsin Court of Appeals has concluded that defense counsel was ineffective for failing to request specific performance of a plea agreement negotiated with the prosecution. Defendant pleaded guilty to three different chages in exchange for a commitment by the prosecution to recommend concurrent prison time. But, at the sentencing hearing, after a new prosecutor was assigned to the case, the State withdrew from the agreement (after the defendant had pleaded no contest) and offered a different post-plea agreement in which the prosecutor would recommend consecutive prison terms. Defendant's counsel talked with defendant about this turn of events, but neither sought withdrawal of the plea nor specific performance of the plea agreement. Indeed, she never told defendant that the later possibility was open to him.

The Court of Appeals agreed with defendant that this inaction on counsel's part was ineffective assistance. Counsel's failure to move to enforce the plea agreement and her failure to even tell defendant about this possibility, the court ruled, "is tantamount to and constitutes deficient performance." Id. at 303. Even though the sentencing court is not bound by the prosecutor's recommendations, the court also found that defendant was

prejudiced by defense counsel's inaction. Because counsel neglected to inform defendant of the possibility of enforcing the agreement, the court concluded that defendant "was deprived of a proceeding that was fundamentally fair. Therefore, the fairness of the process itself is suspect.

State v. Sexton, 709 A.2d 288 (N.J. Super. Ct. App. Div. 1998), aff'd, 733 A.2d 1125 (N.J. 1999). Court found both prosecutorial misconduct and ineffective assistance which created the "real potential for an unjust result." Court required reversal as cumulative error...with the prosecutorial misconduct and the ineffective assistance of counsel.

The Third Circuit Court of Appeals, for example, has concluded that an "actual conflict of interest is evidence if, during course of the representation, the defendants' interests diverge with respect to a material factual or legal issue or to a court of action."

The Fourth Circuit Court of Appeals has adopted a test which focuses more on defense counsel's actions: "When the attorney is actively engaged in legal representation which requires him to account to two masters, an actual conflict exists when it can be shown that he took action on behalf of one." See The First Circuit Court of Appeals has established a two-part test: In order to establish an actual conflict of interest, the petitioner must prove two elements. First, he must demonstrate that some plausible alternative defense strategy or tactic might have been pursued ... Second, he must establish that the alternative defense was inherently in conflict with the attorney's other loyalties or interests. See *Brien v. U.S.*, 795 F.2d 10, 15 (1st Cir. 1982). See also *U.S. v. Rodriquez Rodriquez*, 929 F. 2d 747 (1st Cir. 1991).

The Fourth Circuit Court of Appeals - Virginia has taken the position that "[a]n actual conflict of interest occurs in circumstances where a layer's interests are such that it is reasonable to believe that she or he would be tempted to act in a manner inimical to the client's best interests." *Reckmeyer v. U.S.*, 709 F. Supp. 680, 688 (E.D. Va. 1989), affd, 900 F. 2d 257 (4th Cir. 1990).

The Fifth Circuit Court recognized that the Strickland court endorsed Cuyler's presumption of prejudice where a defendant demonstrates that counsel was subject to an actual conflict of interest and also demonstrates that the conflict adversely affected counsel's performance:

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"In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed.Rule Crim.Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest." *Cuyler v. Sullivan*.

However, the Fifth Circuit Court reasoned that Cuyler addressed counsel's representation of multiple clients with conflicting interests, and that "[t]he Supreme Court has not expanded Cuyler's presumed prejudice standard beyond cases involving multiple representation."

The court distinguished conflict involving an attorney's personal interests. Primarily, where a lawyer is influenced by concerns of self-interest, the duty of loyalty becomes synonymous with the duty to perform competently. Potential matters of self-interest include "matters involving payment of fees and security for fees; the use of information gained while representing a client; a lawyer's status as a witness; and a lawyer's actions when exposed to malpractice claims." The Fifth Circuit viewed these considerations to be ones ultimately of attorney competence—the province of the Strickland decision.

The court also reasoned that where a defendant's interests are compromised by his or her counsel's loyalty to another client, the defendant "has had no real lawyer secured to him by the Sixth Amendment." But where the defendant's interest are compromised by counsel's personal interests, the consequences of the resulting breach of loyalty "range from wholly benign to devastating." *Beets v. Scott*, 65 F.3d 1258, 1271 (5th Cir. 1995).

The Seventh Circuit has articulated a test for reasonable conduct, "whether appellate counsel failed to present significant and obvious issues on appeal... Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1986). See also Kurina v. Thieret, 853 F.2d 1409, 1417 (7th Cir. 1988); Battles v. Chapman, 269 Ga. 702, 506 S.E.2d 838, 841 (1998) ("The presumption of effective assistance of counsel can be overcome only when the ignored issues was so clearly stronger than the errors presented that the tactical decision must be deemed an unreasonable one which only an incompetent attorney would have adopted.")

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Other courts have found that counsel's failure to raise or preserve an issue on appeal establishes prejudice and constitutes ineffective assistance of counsel.

The Seventh Circuit *found* ineffective assistance of counsel where defendant's attorney effectively testified against his client during a hearing at which the defendant sought to withdraw his guilty plea. In ***U.S. v. Ellison***, 798 F.2d 1102 (7th Cir. 1986), the defendant pleaded guilty to charges of kidnapping, carrying a firearm in a crime of violence, and other charges in exchange for dismissal of the remaining charges. Three days prior to sentencing, the defendant filed a Rule 32(d) motion, seeking to withdraw his guilty plea. At the hearing, the defendant claimed that his decision to plead guilty was based on counsel's representation that he (counsel) had to continue to work with federal prosecutions in the future and would prefer not to "make waves" over a case with little chance of success. Id at 1103-04.

At the hearing, although still representing, the defendant, counsel denied making the statements at issue to him. The Seventh Circuit determined that this action created an actual conflict of interest in the attorney, who stated at the hearing that "'the content of [defendant's allegations] contains some information which, if true, would, quite frankly in my opinion, be tantamount to malpractice in [sic] my part.'" As this statement shows, the court reasoned, "counsel was not able to pursue his client's best interest free from the influence of his concern about possible self-incrimination." Id. at 1107. Not only did this constitute deficient attorney performance, but for all practical purposes, the defendant was rendered without counsel at this hearing.

The Ninth Circuit Court of Appeals has concluded that "[a]n actual, as opposed to a potential, conflict [is] one which in fact adversely affects the lawyer's performance." *U.S. v. Hearst*, 638 F.2d 1190, 1994 (9th Cir. 1980). *See also Morris v. State of Cal.*, 966 F.2d 448, 455 (9th Cir. 1991).

The Ninth Circuit Court has found on at least two occasions that counsel's numerous deficiencies amounted to cumulative prejudice. Most recently, in *Harris By and Through Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995) the court held that counsel's numerous deficiencies – at least eleven – cumulatively prejudiced the defendant. In so holding, the court relied strongly on Strickland's emphasis on the fundamental fairness of the proceeding and the seriousness of the numerous errors.

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"We do not hesitate to conclude that there is a reasonable probability that absent the deficiencies, the outcome of the trial might well have been different. Indeed, the plethora and gravity of counsel's deficiencies rendered the proceedings fundamentally unfair." *Strickland*, 466 U.S. at 1438-39.

The court concluded that analysis of the individual prejudicial effect of each deficiency was unnecessary. Id. 1439. the court noted, however, that it did not "rule out" that some of the deficiencies were individually prejudical.

Similarly, in *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992) the Ninth Circuit Court held that the cumulative effect of counsel's errors at the penalty phase of a murder defendant's trial amounted to prejudice to the defendant. The court reasoned:

"We do not need to decide whether these deficiencies alone meet the prejudice standard because other significant errors occurred that, considered cumulatively, compel [a finding of prejudice.]"

Counsel's deficiencies included: (1) failure to investigate and prepare adequately for trial; (2) failure to consult adequately with [defendant]; (3) failure to investigate adequately [defendant's] mental and emotional status; (4) failure to challenge the admissibility of [defendant's] statements made before [trial], regarding the events of the murder; (5) failure to conduct proper voir dire; (6) failure to object to evidence; (7) failure to propose, or except to, jury instructions; (8) failure to raise or preserve meritorious issues in appellate proceedings; (9) advice to make statement to prosecutor; (10) decision to call [defendant] to testify at trial; and (11) closing argument in the guilt phase." Id. at 1438.

The court rejected the government's contention that because he risked a significantly longer prison term if he went to trial and was convicted, the defendant was not prejudiced by the erroneous advice. Instead, the court found that the defendant's testimony at the evidentiary hearing before the district court showed that he would have risked the longer sentence had he been aware that he would be eligible for parole in fifteen, not five, years. Additionally, the court found that counsel's failure to correctly inform the defendant of the amount of time he would serve before becoming eligible for parole was unreasonable conduct because "[m]inimal research would have alerted counsel to the correct parole eligibility date." The defendant therefore satisfied both Strickland prongs.

The Ninth Circuit Court has further elaborated on the adverse effect standard. While the court has acknowledged that Cuyler does not require a showing of actual prejudice, it has also established that Cuyler's adverse effect prong " remains a substantial hurdle." *Maiden v. Bunnell*, 35 F.3d 477, 481 (9th Cir. 1994). The court has said that to demonstrate adverse effect, a defendant "need only show that some effect on counsel's handling of particular aspects of the trial was 'likely'." *Mannhalt v. Reed*, 847 F.2d 576, 583 (9th Cir. 1988). However, in a more recent case, the Ninth Circuit Court has qualified the defendant's burden, stating, "We believe that an adverse effect in the Cuyler sense must be one that significantly worsens counsel's representations of the client before the court or in negotiations with the government."

The Tenth Circuit Court of Appeals has concluded that "[d]efense counsel's performance was adversely affected by an actual conflict of interest in a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to other or to his own personal interests." ***US. v. Bowie***, 892 F.2d 1494, 1500, 29 Fed. R. Evid. Serv. 689 (10th Cir. 1990).

Thomas v. Foltz, 818 F.2d 476, 480 (6th Cir. 1987) "Appellants must make a factual showing of inconsistent interests and must demonstrate that the attorney 'made a choice between possible alternative courses of action ... helpful to one client but harmful to the other.'"

Thomas v. Lockhart, 738 F.2d 304, 307 (CA8 1984). The Eighth Circuit found that counsel rendered ineffective assistance where he did essentially nothing to investigate his client's case before advising him to plead guilty.

U.S. v. Fulton, 5 F.3d 605, 609-12 (2d Cir. 1994). Criminal activity by counsel.

U.S. v. Loughery, 908 F.2d 1014, 1018 (D.C. Cir. 1990); the defendant's ineffective assistance of counsel claim focused on her attorney's failure to become aware of a recent Supreme Court case which provided a basis for dismissing many of the counts against her, and his failure to advise her of its effect. Despite the defendant's inquiries to her attorney regarding this case and her expressed reluctance to plead guilty, her counsel continued to advise her to enter the plea. The court found that this failure was both unreasonable conduct and prejudicial to the defendant. Counsel's failure to learn of and apprise the

defendant of the case fell below a reasonable standard of attorney conduct because "[c]riminal defense attorneys practicing in the federal courts are expected to keep abreast of Supreme Court decisions affecting their client's interest." The court stated that this was not an instance of reasonable trial strategy that proved ill-advised in hindsight. Instead, "[counsel's] conduct evinces an addiction of his responsibility to his client, and it is in such cases that courts most typically find that counsel's performance was below the requisite level of competence."

U.S. v. Morris, 259 F.3d 894, 899 (7th Cir. 2001). The district court acknowledged that there was a potential conflict since counsel could not argue in favor of a new plea without admitting to malpractice, but did not address it further.

The Seventh Circuit Court reached the issue on Morris' second appeal, which he pursued pro se. After first deciding that the argument had not been waived, the Court of Appeals had no difficulty concluding that Morris had shown that counsel's self-interest presented an actual conflict of interest. Furthermore, the record established that the district court was well aware of the conflict, yet did not inquire further or attempt to remedy the situation. In such circumstances, the Seventh Circuit Court held, where counsel cannot argue a motion without admitting his own errors, prejudice must be presumed. Since the defendant had demonstrated a possible denial of effective assistance, the action was remanded for a hearing to establish whether Morris should be permitted to withdraw his guilty plea.

U.S. Supreme Court Cuyler v. Sullivan, 446 U.S. 335 (1980). The Cuyler Court ruled, "In order to establish a violation of the Sixth Amendment, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance." P. 350. "But," the Court added, where the issue of a conflict is raised in the first instance after trial, "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance". See Glasser, supra, at 72-75. Hence, the Cuyler Court held that the lower court had inappropriately granted Sullivan relief on the ground that he had demonstrated the existence of a "possible" conflict of interest. The matter was remanded for a determination whether, instead, Sullivan had been adversely affected by an actual conflict of interest.

U.S. v. Williams, 372 F.3d 96 (2d Cir. 2004) (plausible alternative defense strategy not pursued where counsel had

engaged in criminal conduct with the defendant, and failed to pursue a plea or cooperation agreement for his client in order to conceal his own wrongdoing); *Burger v. Zant*, 510 U.S. 1020, 114 S. 492, 126 L. Ed. 2d 589 (1993) (Statement of Blackmum J.) ("[S]hortcomings by counsel, which were never remedied, leave me convinced that [defendant's] conviction, sentencing proceeding, and appeal cannot 'be relied on as having produced a just result.'").

Other courts, however, do apply Cuyler's prejudice per se standard where an attorney's duty of loyalty is compromised by self-interest. For instance, the Ninth Circuit has stated, "we have specifically held that Cuyler applies to conflicts of interest generated by an attorney's acquisition of publication rights relating to his client's trial. *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir. 1980) (Hearst), cert. denied, 451 U.S. 938 (1981). We have also applied the Cuyler test to conflicts resulting from counsel's desire to keep information about himself from the court. *United States v. Hoffman*, 733 F.2d 596, 601-02 (9th Cir.) (Hoffman), cert. denied, 469 U.S. 1039 (1984). The court held that "[t]o show a lapse in representation, a defendant need not demonstrate prejudice -- that the outcome of her trial would have been different but for the conflict -- but only 'that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.'" Here, the court found, the defendant sufficiently alleged that trial counsel chose not to pursue a strategy which could have minimized the daughter's culpability, because of his fealty to her mother. The Second Circuit remanded for the necessary hearing.