The Effective Right to Counsel

The Right to Counsel.

153 of the 194 constitutions currently in effect have a Right to Counsel. [1]

The **Sixth Amendment (1789-91).** provides, in a criminal case "the accused shall enjoy the right ... to have the assistance of Counsel for his defense." As a result, federal defendants had long enjoyed the right to counsel under the Sixth Amendment to the Constitution. Cooke v. United States, 267 US 517, 69 L Ed 767, 45 S Ct 390. (1925).

Washington Const. Art. I, § 22. (1889)

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases; and, in no instance, shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

In **1932** the Supreme Court in **Powell v. Alabama**, 287 US 45, 77 L Ed 158, 53 S Ct 55, 84 ALR 527(1932) (the "Scottsboro Boys Case") held that "in a **capital case**, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of *ignorance, feeblemindedness, illiteracy, or the like*, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." Id., 287 US at 71. The appointment of counsel must occur sufficiently in advance of the trial date so that effective representation is not precluded.

In 1945 the right to counsel was extended to a non-capital felony case *where the legal issue was complex,* and *the defendant was ignorant of the law*. Rice v. Olson, 324 US 786, 89 L Ed 1367, 65 S Ct 989 (1945). However, the Court held the Fourteenth Amendment Due Process Clause did not mandate representation in a non-capital case absent compelling circumstances. Bute v. Illinois, 333 US 640, 92 L Ed 986, 68 S Ct 763 (1948).

[1] Elkins, Zachary, Tom Ginsburg, and James Melton. 2013. Constitute: The World's Constitutions to Read, Search, and Compare. https://www.constituteproject.org/

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Counsel was not required in a robbery case where the issues were not complex and where the defendant possessed "ordinary intelligence." Betts v. Brady, 316 US 455, 86 L Ed 1595, 62 S Ct 1252 (1942).

In **1948**, counsel was mandated where the defendant was only seventeen years old and inexperienced in the intricacies of criminal procedures. He pleaded guilty to crimes that carried a maximum sentence of eighty years without first having been advised of the consequences of the plea. Uveges v. Pennsylvania, 335 US 437, 93 L Ed 127, 69 S Ct 184. (1948).

In **1963,** the Supreme Court in **Gideon v. Wainwright**, 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, (1963), redefined the range and extent of the right to counsel. The Court held that the Sixth Amendment **right to counsel applies to state criminal trials**, thereby **incorporating the Sixth Amendment right to counsel into the due process clause of the Fourteenth Amendment**. In the same **(1963)** session the Supreme Court recognized this right extended to the **first level of state appellate review**. Douglas v. California, 373 US 905, 10 L Ed 2d 200, 83 S Ct 1288 (1963). [2]

By 1970 the Supreme Court had made it clear that the "**the right to counsel is the right to effective assistance of counsel**" at the criminal trial. McMann v. Richardson, 397 U.S. 759, 771, n 14, 25 L Ed 2d 763, 90 S Ct 1441 (1970); Reece v. Georgia 350 U.S. 85, 100 L Ed 77, 76 S Ct 167 (1955). The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309 (2012).

[2] There is **no constitutional right to counsel beyond the first level of appellate review**, such as a petition to a state's highest court for discretionary review or a petition for writ of certiorari to the United States Supreme Court. Ross v. Moffitt 417 US 600, 41 L Ed 2d 341, 94 S Ct 2437(1974). **State defendants do not have a constitutional right to counsel in collateral proceedings**. Murray v. Giarratano 492 US 1, 106 L Ed 2d 1, 109 S Ct 2765 (1989); Pennsylvania v. Finley 481 US 551, 95 L Ed 2d 539, 107 S Ct 1990 (1987)

The Effective Right to Counsel
When and where does the Right to Counsel Apply:

The Right to Counsel under the Sixth Amendment & Art I, § 22 arises wherever the defendant may lose his or her personal freedom if convicted. Lassiter v. Department of Social Services 452 U.S. 18, 68 L Ed 2d 640, 101 S Ct 2153 (1981). People are not constitutionally entitled to counsel where the maximum punishment is just a fine. Id.

That works both ways, if you don't give the defendants a lawyer, then you can't put them in jail. Scott v. Illinois 440 U.S. 367, 59 L Ed 2d 383, 99 S Ct 1158, (1979) (defendant cannot be sentenced to imprisonment in either jail or prison where counsel was not waived). Conversely, a person may be entitled to counsel on a Due Process theory on the ground that the risk of an erroneous result due to the complexities of the issues outweighs the interest of the government in not appointing counsel, regardless of whether the litigant is subject to imprisonment. Lassiter v. Department of Social Services, 452 U.S. 18, 68 L Ed 2d 640, 101 S Ct 2153 (1981).

The Constitutional Right applies at the **first appearance** before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty. Rothgery v. Gillespie County, Tex., 554 U.S. 191, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008) (Where the accused learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger the Sixth Amendment right to counsel). The right to legal representation (i.e., effective representation), then applies **to trial proceedings** and continues throughout **the first stage of appellate review**. Evitts v. Lucey, 469 U.S. 387, 83 L Ed 2d 821, 105 S Ct 830 (1985).

People may have some statutory (juvenile interrogation; formal lineups) or court rule (RAP allows Chief Judge to appoint counsel on collateral attack) based right to assistance of counsel. That may include representation prior to arraignment or after first appeal. State defendants have the statutory right to counsel in federal habeas corpus proceedings where the court orders an evidentiary hearing.

The Effective Right to Counsel
Absence of Counsel (Cronic)

In **1984**, Supreme Court recognized a presumption of prejudice where counsel is effectively absent, including (1) the complete denial of counsel, e.g., the accused is denied counsel at a critical stage of trial; (2) situations in which counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and, (3) where, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small (conflict of interest) that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

The obvious circumstance warranting the presumption is **the complete denial of counsel**, i.e., when counsel is either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. State v. Heddrick, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009). A "critical stage" is one 'in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected." Heddrick, 166 Wn.2d at 910. This presumption applies whenever there is a breakdown in the adversarial process envisioned in the Sixth Amendment. Wright v. Van Patten, 552 U.S. 120, 124-25, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008).

The second category is where **counsel does not or cannot provide representation**. For example, where trial counsel was appointed on the date of the trial and was not prepared to defend the defendant even though it was only a simple assault case. Singer v. Court of Common Pleas, Bucks County, 879 F2d 1203 (CA3 Pa. 1989). Giving rape defendant the opportunity to make a pro se statement at sentencing and in support of his new trial motion was not an adequate substitute for affording him representation from an informed, prepared, and effective counsel. State v. Stovall, 312 P.3d 1271 (Kan. 2013).

Purpose of relieving defendant of need to show that defects in attorney's assistance had probable effect on outcome of proceeding, such as when his attorney was **actively representing conflicting interests**, is not to enforce Canons of Legal Ethics, but to apply needed prophylaxis where the ordinary requirements of *Strickland* are inadequate to assure vindication of defendant's Sixth Amendment right to counsel. Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). "Actual conflict of interest," for Sixth Amendment purposes, is conflict of interest that adversely affects counsel's performance. Id.

Having a **non-lawyer may be okay.** DUI defendant had law student represent him and, through oversight, defendant had not been asked to formally

consent to student representation. Defendant was not prejudiced by representation, he had been represented by law students in prior proceedings, and he failed to object to student representation despite having several opportunities to do so. State v. Dwyer 181 Wis.2d 826, 512 NW2d 233. (1994). Similarly, unlicensed law school graduate's cross-examination of witnesses in bank fraud did not constitute per se ineffective assistance of counsel where, trial court, opposing counsel, and defendant knew law school graduate's status, none of testimony of witnesses he cross-examined or declined to cross-examine was subject to dispute, this testimony was corroborated by documents and other witnesses' testimony, and defendant was also represented by licensed attorney throughout trial. United States v. Rimell, 21 F3d 281 (CA8 Mo. 1994).

Disbarred defense counsel could still be competent enough. United States v. Bosch 914 F.2d 1239 (CA9 Cal. 1990) See also United States v. Mouzin 785 F2d 682 (CA9 Cal. 1986) *cert den* 479 US 985, where counsel's disbarment did not justify a presumption of ineffective representation without a further showing where the unlicensed attorney advised the defendant to cooperate with the jail officials to increase the likelihood of a reduction of the charges. Huckelbury v. Dugger, 847 F2d 732 (CA11 Fla. 1988).

Finally, where defense counsel did not meet a state's five-year statutory experience requirement prior to his appointment in a capital case the appellate court held that the defendant must still demonstrate that some prejudice resulted. Sawyer v. Butler 848 F2d 582 (CA5 La. 1988). Counsel in a federal criminal proceeding was not admitted to practice in federal court, was not aware of the local federal rules, and had only one year experience in the practice of law, but there was no showing of prejudice. United States v. Lewis, 786 F2d 1278 (CA5 La. 1986).

Personal conflicts with prosecutor where prior attorney had actual conflict of interest based on attorney's failure to disclose her pending disciplinary proceedings, did not preclude waiver of related argument, but that attorney had actual conflict of interest because she brought baseless lawsuit against prosecutor for participating in pedophile ring. Young v. Runnels, 435 F.3d 1038 (9th Cir. 2006), cert. denied, 2006 WL 2158353 (2006).

Defense counsel's prior representation of rival gang member, even in unrelated case, amounted to **actual conflict of interest** that deprived defendant of effective assistance of counsel in murder case premised on shooting death during gang-related drive-by shooting. Counsel had learned confidential information in his representation of rival gang member that he could not use to

defend defendant considering his ongoing duty to former client. State v. Kitt, ___ Wn.App. ___, 442 P.3d 1280 (Div. 2, 2019) (published in part).

On the other hand, no disqualifying conflict where another attorney in defense counsel's firm previously gave legal advice to defendant's sister, who was not a witness or a party in defendant's case. Defendant failed to establish a conflict of interest or that he was prejudiced in a prosecution for theft and securities fraud. State v. Reeder, 181 Wn.App. 897, 330 P.3d 786 (Div. 1 2014).

Collapse of attorney-client relationship between defendant and counsel did not so degrade quality of defense as to deny defendant effective representation: Counsel remained capable and determined advocate despite defendant's unrelenting insolence, verbal abuse, and refusal to cooperate. Counsel filed motions to suppress evidence, opposed state's efforts to present evidence of defendant's past sex crimes, used cross-examination and closing argument to highlight gaps in evidence, managed to accommodate defendant's view that he was victim of a conspiracy, and attempted during closing arguments to explain defendant's obviously untruthful testimony in way jury might understand. State v. Thompson, 169 Wn.App. 436, 290 P.3d 996 (Div. 1 2012).

Interference with paid counsel arrangement where defendants showed the government wrongfully interfered with their Sixth Amendment **right to use their own funds to retain counsel of their choice by** threats to prosecute the defendants' employer if it continued to advance funds for defendants' counsel. This wrongfully induced the defendants' employer to breach its contract to advance such fees. The government had no legitimate interest in defendants' arrangement with their employer for the advancement of legal fees, while defendants had a constitutional right at stake. U.S. v. Rosen, 487 F. Supp. 2d 721 (E.D. Va. 2007).

The Effective Right to Counsel
Right to *Effective* Counsel (Strickland)

In 1984, along with Cronic, the Court defined where the constitutional right to effective representation of counsel is breached. It involves two parts:

(1) the defendant must show that the attorney's performance was **deficient**, and

(2) they must show that they were **prejudice**d by that deficient performance.

Strickland v. Washington 466 U.S. 668, 80 L.Ed.2d 674, 104 S Ct 2052 (1984)

Before Strickland, the courts often employed a "***farce and mockery***" standard, i.e., the ineffective representation rendered the trial a **farce and a mockery**. Gillihan v. Rodriguez 551 F2d 1182 (CA10 1977), cert den 434 US 845.

Ineffective Assistance of Counsel claims**,** often called ***"the last refuge of the damned*****,"** are the most frequently raised issue in post-conviction proceedings in both the state and federal courts. In the typical case, the ineffective representation claim will be raised in state collateral attack or federal habeas corpus proceedings or both. Some state jurisdictions, not Washington, create parallel proceedings.

It must be shown that the record on review supports the defendant's claims of deficient representation but matters not supported by the appellate record will not be considered by the reviewing court. Because ineffective representation claims usually involve issues that cannot be resolved only from the transcript of the trial proceedings they normally cannot be raised on direct appeal. State v. McFarland, 127 Wn.2d 322, 334-38, 899 P.2d 1251 (1995). RAPs may permit parallel or consolidated proceedings if appropriate.

Beware of waivers of right to raise an ineffective assistance of counsel claim that may be a provision in a plea agreement. Such a waiver cannot cover claims that implicate the validity of the waiver itself. U.S. v. Racich, 35 F.Supp.2d 1206 (S.D. Cal. 1999).

The Effective Right to Counsel

1. Deficient Performance.

Under Strickland, review of an attorney's performance is highly deferential. “[E]very effort must be made to eliminate the distorting effects of hindsight,”and to reconstruct the circumstances and to evaluate the conduct from counsel's perspective at the time. Bell v. Cone, 535 U.S. 685, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (counsel for capital murder defendant did not provide ineffective assistance during sentencing phase when he chose not to call defendant as a witness, or to recall as witnesses’ medical experts who had testified during guilt phase and defendant's mother, and in deciding to waive final argument).

The defendant must demonstrate that counsel's error or omission was the result of failing to act within the range of competence demanded for attorneys in criminal cases. The petitioner must also demonstrate that trial counsel's errors or omissions were not the result of strategy made after thorough investigation of the pertinent law and facts.

The deficient performance component of the Strickland test need not be addressed first if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice. Smith v. Robbins, 528 U.S. 259, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000).

Strickland held that "***strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable***; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation .... In any ineffective case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 US at 690–91.

a. Thorough Investigation of the Facts.

Defense counsel has a duty to conduct a reasonable investigation under prevailing professional norms. In re Pers. Restraint of Elmore, 162 Wn.2d 236, 252, 172 P.3d 335 (2007). This duty includes making reasonable investigations or making a reasonable decision rendering particular investigations unnecessary. In re Pers. Restraint of Gomez, 180 Wn.2d 337, 355, 325 P.3d 142 (2014). The investigation must allow counsel to make informed decisions about representing the defendant, for example by investigating reasonable lines of defense. Elmore, 162 Wn.2d at 253. However, "[t]he degree and extent of investigation required

will vary depending upon the issues and facts of each case." State v. A.N.J., 168 Wn.2d 91, 111, 225 P.3d 956 (2010).

The first step in the effective representation in a criminal case is to determine the facts by interviewing the client to ascertain the nature of the alleged criminal conduct.

The second step is to assess discovery. Study this material meticulously!

The third step is interviewing **all** necessary witnesses suggested by the client and the discovery.

Consider the following when planning for the initial interview with the defendant:

- Commence the interview by informing the client of the confidentiality of the communications and the importance of providing truthful and accurate information.
- Obtain the names, addresses and telephone numbers of all possible witnesses.
- Share any statements made to or by the officer, and other witnesses.
- Determine whether the client was subjected to a search and/or interrogation. If so, whether it was pursuant to relevant constitutional and statutory standards. (CrR 3.5 & 3.6)

After the initial client interview, effective counsel should **renew discovery requests and interview all pertinent witnesses**.

Discovery. Complete discovery should include all arrest reports, the names and addresses of State's witnesses, and the statements of the client and of any witnesses. CrR 4.4. Discovery requests should be broad and inclusive, setting forth a relevant factual basis that demonstrates the need for the information sought. See Pennsylvania v. Ritchie, 480 U.S. 39, 94 L Ed 2d 40, 107 S Ct 989, (1987). See also Brady v. Maryland, 373 U.S. 83, 10 L Ed 2d 215, 83 S Ct 1194, (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.")

Interview the witnesses. The reporters are full of cases where attorneys provided deficient representation by failing to interview relevant witnesses:

Failing to interview the defendant or witnesses and virtually admitting the defendant's guilt during argument to the jury was not constitutionally effective

representation of counsel. Counsel also failed to object to improper damaging cross-examination by the prosecution and advised the defendant to take the stand even though there was no strategic reason for such a course of action. Magill v. Dugger, 824 F2d 879 (CA11 Fla. 1987).

Defense counsel failed to investigate an insanity defense under circumstances that warranted such an investigation. Becton v. Barnett, 920 F2d 1190 (CA4 NC 1990).

Counsel did not try to contact alibi witnesses identified by the defendant. Grooms v. Solem, 923 F2d 88 (CA8 SD 1991).

Defense counsel failed to fully investigate the defendant's criminal history before advising him not to accept a plea offer on charges including attempted murder. Defendant was convicted at trial and received a prison sentence twice as long as that offered in plea negotiations because of his criminal history. Crawford v. Fleming, 323 F.Supp.3d 1186 (D. Or. 2018).

Counsel's strategic choices, made after less than complete investigation are considered reasonable only to the extent that reasonable professional judgments support limitations on investigation. Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)). Counsel's failure to adequately investigate possibility of morphine overdose defense by not hiring a toxicologist in prosecution for murder, and instead choosing to rely on improper venue defense, (that victim died by drowning after defendant threw her into a river in another county), was deficient. Counsel knew that defendant had a history of supplying women with drugs to engage in sexual activity, that defendant believed he found victim dead in his home, and that, if he were correct, that victim did not die by drowning. Counsel should have known that improper venue defense had little chance of acquittal, and a request to hire a toxicologist would most likely have been granted.. Johnson v. Premo, 277 Or. App. 225, 370 P.3d 553 (2016).

Trial counsel's failure to identify his potential conflict of interest when State called another client of his to present aggravation evidence in capital murder case amounted to deficient performance, as element of ineffective assistance claim; counsel was given notice of State's witnesses prior to hearing, and he should have recognized the potential for conflict then. State v. Hall, 163 Idaho 744, 419 P.3d 1042 (2018).

b. Thoroughly investigate the law.

The right to effective assistance of counsel includes the corresponding duty on the part of defense counsel to research relevant statutes and case law. In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102, 351 P.3d 138 (2015) (counsel has a duty to advise on immigration consequences for a noncitizen defendant). Failing to conduct research falls below an objective standard of reasonableness where the matter is at the heart of the case. State v. Kyllo, 166 Wn.2d 856, 868, 215 P.3d 177 (2009). For example, in State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006), the Court found deficient performance when defense counsel knew that her client had an extensive criminal record but failed to conduct additional research to ascertain whether the client was at risk of a third strike. And in State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999), the Court found deficient performance where reasonably adequate research would have prevented the possibility of conviction based on acts predating the relevant statute's effective date. State v. Estes, 188 Wn.2d 450, 395 P.3d 1045 (2017) (Estes's trial counsel was deficient because he was unaware a felony conviction with a deadly weapon enhancement qualified as a strike offense).

1. Is the Information defective?

Check the RCW under the section charged in the information or complaint. A defendant has the constitutional right to be informed of the charges. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). This requires that the charging document include each essential element of the charged offense; merely citing the appropriate statute is insufficient. Id. The statutory manner or means of committing a crime is an element that the State must include in the charging document. State v. Bray, 52 Wn.App. 30, 34, 756 P.2d 1332 (1988). When a charging document fails to state a crime, the remedy is to dismiss the charge without prejudice to the State's refiling of a correct charge. Vangerpen, 125 Wn.2d at 792-93.

2. Was the offense charged within the statute of limitations? Or was the statute otherwise amended during the charging period?

3. Does the court in which the case was filed have jurisdiction? Is the venue proper?

4. Is the statute constitutional?

a. Is it void for vagueness? Would a reasonable person know the charged conduct is proscribed by it? Does it encourage arbitrary or ad hoc enforcement?
b. Is the statute overbroad? Does it prohibit activity protected by the First Amendment?
c. Does it violate Equal Protection by punishing the same conduct under a felony and a misdemeanor provision? Under different classes of felony? Under different SRA seriousness levels?
d. Does it violate Equal Protection by making an irrational classification, such as punishing possession of marijuana the same as heroin?
e. Does it violate Due Process? Did the defendant have reasonable notice that the statue applied?
f. Does it punish exercise of a constitutionally protected right, such as freedom of religion, right to abortion, privilege against self-incrimination, right to bear arms?
g. Is there a presumption in the statute that does not follow beyond a reasonable doubt from the established facts such as the presumption that a kidnapping beyond a specific time is presumed to be interstate? Whether you can draw an adverse inference from a constitutionally granted right?
h. Does the statute violate the 8th Amendment prohibition against cruel and unusual punishment or Const. art. 1, § 14, the cruel punishment clause of the state constitution, by allowing punishment grossly disproportionate to the offense?
i. Did the manner of passage of the statute (or initiative) violate the State Constitution? Single subject/logrolling?

Check the annotations for the crime charged and any contested issues, e.g., searches and seizures, speedy trial, sentencing, etc.

Compare the WPIC for the (presumptive) elements of the charged offense and potential defenses, etc. and consult resources such as Washington Practice regarding potential issues surrounding the charge and proof.

Search for possible issues on sufficiency evidence, admissibility if evidence the prosecution hopes to offer, potential constitutional or state statutory procedural errors, etc., and gather the relevant case authority.

Consider pertinent national resources, e.g., ALR., CJS, etc., whenever the law is not settled in an area, or your research has not otherwise borne fruit.

Conclude the research by Shepard-izing or Auto-Cite-ing all pertinent cases to ensure that none of the authorities have been overruled and to locate more recent decisions.

C. Advise the client regarding options.

After determining the relevant facts of the case and applicable law, effective counsel must evaluate the case to determine the realistic, potential alternatives available to the client. It is the client that defines the goals of the representation. RPC 1. After that, a client's choices are limited –plead guilty, or not (& testify, or not). As for pleading guilty or not, 90 percent of all criminal charges result in a guilty plea.

The Sixth Amendment right to effective representation by counsel applies to the plea bargain process. Missouri v. Fyre, 566 U.S. 134, 132 S.Ct. 1399 (2012) (defense counsel received a 90-day-sentence plea offer from the prosecutor but failed to inform Frye and the offer expired. Frye ultimately plead guilty and received a three-year sentence). The defendant must prove prejudice by showing (i) they would have taken the plea offer, and (ii) the prosecutor and court would follow the agreement. United States v. Blaylock, 20 F3d 1458 (CA9 Cal 1994).

Effective assistance includes assisting the defendant in making an informed decision to accept or reject a plea offer. State v. Estes, 188 Wn.2d 450, 395 P.3d 1045 (2017). Counsel must communicate plea offers, discuss plea negotiations, and review the strengths and weaknesses of the defendant's case. State v. Edwards, 171 Wn.App. 379, 394, 294 P.3d 708 (2012). This process is intended to inform the defendant of what to expect and allow him to make an informed decision on whether to plead guilty. Id. Counsel is in the best position to enter the best possible plea bargain when he or she has completed a ***thorough factual and legal investigation***. Counsel must be familiar with the facts and law relevant to each clients' case. RPC.

Counsel must consider the defendant's desires prior to proceeding with plea negotiations. RPC 1. Counsel also has a duty to assist a defendant in evaluating a plea offer. A.N.J., 168 Wn.2d at 111. This duty includes assisting the defendant in making an informed decision about whether to plead guilty or to proceed to trial. Id. "**[A]t the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty**." Id. at 111-12.

The attorney's obligation to assist includes a requirement that, before the defendant accepts a plea, the attorney informs him of the pleas' direct consequences. A.N.J., at 113. One direct consequence is the maximum sentence to which a defendant will be exposed. State v. Knotek, 136 Wn.App. 412, 423, 149 P.3d 676 (2006). It can also include potential immigration consequences. Padilla

v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010); State v. Sandoval, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). A plea based on misinformation of sentencing consequences is not entered knowingly and is invalid. Knotek, 136 Wn.App. at 423.

Trial counsel was deficient in advising defendant to plead guilty to first-degree manslaughter based upon nothing more than prosecutor's representation he had new evidence "pinpointing" defendant's location near place where murder victim was found; counsel failed to review purported evidence and failed to consult with expert, thereby making him ill equipped to evaluate strength of prosecution's case. Roberts v. Howton, 13 F. Supp. 3d 1077 (D. Or. 2014).

Ultimately, when the defendant insists on trial, counsel has no authority to seek a favorable plea bargain. See Boykin v. Alabama, 395 US 238, 23 L Ed 2d 274, 89 S Ct 1709 (1969). Constitutional right to a jury trial can only be waived personally by the defendant; counsel cannot enter the waiver of the right.

Successful plea negotiations involve an amalgam of factors:

- **The maximum and minimum punishment** the client could receive if convicted following a trial.
- **The strengths of the client's case** in comparison with the weakness or strengths of the prosecution's case.
- **The judge's sentencing practices.** (Public defenders are usually the best source of information because of the numerous cases they try before the same court. Consider how the court's and the prosecution's workload affect their amenability to plea bargain.)
- **The client's understanding of defense counsel's assessment** and determination as to whether a plea bargain should be considered and the nature of the bargain, if appropriate.
- **Defense counsel's ability to craft a compelling proposal** on behalf of the client to the prosecutor.
- **Inform the client** of the results of the plea negotiations and the final offer of the prosecution along with counsel's recommendation.
- **Advise the client of the rights that are being waived by entering a guilty plea** along with the **maximum punishment** that may be received following the entry of the plea.

d. Professionally (and zealously!) Litigate.

The evidence against the defendant was plainly insufficient to support the court verdict; nevertheless, trial counsel did not object to the verdict or move to exclude the victim's speculative testimony. Holsclaw v. Smith, 822 F2d 1041 (CA11 Ala. 1987).

Defense counsel failed to challenge jurors for cause on the ground they were related to the victim or to the victim's mother. Smith v. Gearinger, 888 F2d 1334 (CA11 Ga. 1989).

Defense counsel failed to object to an instruction that erroneously informed the jurors that they must reach unanimous agreement in order not to impose the death sentence. Kubat v. Thieret, 867 F2d 351 (CA7 Ill. 1989), cert den 493 US 874.

Trial counsel failed to participate in petitioner's trial under the erroneous assumption that participation would either waive pretrial motions or would render their denials harmless error. The "prejudice" requirement of Strickland was presumed. The court analogized the situation to the case where the petitioner's counsel was absent. Martin v. Rose, 744 F2d 1245 (CA6 Tenn. 1984).

Defense counsel disregarded favorable evidence that the defendant was not the ringleader of the group that killed the victim, and the state court's decision to impose the death sentence following a guilty plea was based on the erroneous assumption that the defendant was the ringleader. Defense counsel also failed to object to an ex parte communication to the trial court to the effect that the defendant was the ringleader. Osborn v. Shillinger, 861 F2d 612 (CA10 Wyo. 1988).

Counsel unreasonably failed to make a motion to suppress his client's confession. Smith v. Dugger, 911 F2d 494 (CA11 Fla. 1990).

Defense counsel was silent throughout the trial and failed to object even when the trial court directed the jury to render a verdict against the defendant. Harding v. Davis, 878 F2d 1341 (CA11 Ala. 1989).

Trial counsel rendered ineffective assistance in defendant's murder trial by not interviewing the only two witnesses who placed defendant at scene of murder, by neglecting to examine relationship of reward to their pivotal testimony, and by not cross-examining those witnesses effectively about their motivation for testifying. Reynoso v. Giurbino, 462 F.3d 1099 (9th Cir. 2006).

The Effective Right to Counsel

e. Failure to Preserve Right to Appeal.

Reasonably effective defense counsel has a duty to make and preserve objections in improper proceedings during trial. That duty then extends to preserving the right to appeal those rulings by timely filing a Notice of Appeal and if necessary a motion to proceed *in forma pauperis*.

As a result, when defense counsel failed to advise the defendant of the right to appeal the Court of Appeals upheld the district court's granting petitioner an out-of-time appeal. Martin v. Texas, 737 F2d 460 (CA5 Tex. 1984).

Counsel's failure to file notice of appeal, depriving defendant of appellate proceeding altogether, was presumably prejudicial. Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Closer to home, the presumption of prejudice for Sixth Amendment purposes applies regardless of whether a defendant has waived the right to appeal. A defendant retained the right to appeal at least some issues despite waiver, but he was denied appeal altogether as result of counsel's deficient performance. There was no disciplined way to accord any presumption of reliability to judicial proceedings that never took place. Garza v. Idaho, 586 U.S. ___, 139 S. Ct. 738 (2019).

Appellate counsel failed to perfect the record on appeal, resulting in the appeal's dismissal. Evitts v. Lucey 469 U.S. 387, 83 L Ed 2d 821, 105 S Ct 830 (1985) (upholding the district court's granting the defendant's release unless he was either retried or his appeal was reinstated).

The Effective Right to Counsel
2. Strickland's Prejudice Prong

The second prong of the *Strickland* effectiveness test focuses on whether counsel's presumably deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. U.S. v. Haese, 162 F.3d 359 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1795 (1999). Even if trial counsel was deficient in some way in defending gang-related drug conspiracy, defendant was not prejudiced where jury considered and rejected arguments raised by defendant and his co-defendants,, but jury apparently credited cooperating witnesses' contrary testimony considering overwhelming evidence of defendant's participation in drug and racketeering conspiracy. United States v. Wilson, 15 F. Supp. 3d 126 (D.D.C. 2014).

AEDPA requires prejudice plus an independent judgment the state court decision applied Strickland standard incorrectly; rather, he must show that the state court applied Strickland to the facts of his case in an objectively unreasonable manner. Bell v. Cone, 535 U.S. 685, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

So, the state court's determination that petitioner was not denied effective assistance of counsel in capital murder prosecution due to trial counsel's failure to object to prosecutor's reference, during his closing argument, to state voters' "overwhelming" support for death penalty was not contrary to, or unreasonable application of, clearly established federal law in *Strickland*, and thus did not warrant federal habeas relief, where state court reasonably found that prosecutor's comment did not amount to serious misconduct and did not mislead jury. Rowland v. Chappell, 876 F.3d 1174 (9th Cir. 2017).

Similarly, where counsel was provided psychological evaluation prior to trial in which petitioner "denied the use of illegal drugs or alcohol," and analyses of petitioner's hair samples indicated no detectable amounts of marijuana, cocaine, or other substances, the state court's determination that petitioner was not denied effective assistance of counsel due to trial counsel's purported failure to investigate and present voluntary intoxication defense was not contrary to, or unreasonable application of, clearly established federal law in *Strickland*. Cain v. Chappell, 870 F.3d 1003 (9th Cir. 2017).

The California Supreme Court did not unreasonably apply *Strickland* where any failure of defense counsel to investigate claimed alibi was not prejudicial where evidence of petitioner's guilt was overwhelming, including eyewitness testimony, a confession, and forensic evidence. Andrews v. Davis, 866 F.3d 994 (9th Cir. 2017).

The Effective Right to Counsel

Defense counsel was **not** deficient in failing to object to prosecutor's inflammatory, fabricated and ethnically charged epithets, delivered in the moments before the jury was sent to deliberate in prosecution for first-degree murder. Zapata v. Vasquez, 788 F.3d 1106 (9th Cir. 2015).

Because attorneys in state court criminal proceedings had no reason to doubt that defendant was competent at time he pleaded guilty, petitioner could not establish that his counsel's performance was deficient. Hibbler v. Benedetti, 693 F.3d 1140 (9th Cir. 2012).

Defendants must show that they were prejudiced as the result of the unprofessional errors of counsel. In this connection, the Strickland court held that prejudice is presumed where the state interferes with counsel's assistance; thus, it follows that prejudice is presumed where the trial counsel was not afforded a sufficient opportunity to consult with the defendant. Also, prejudice is presumed where counsel is representing two or more defendants and such representation results in a conflict of interest which adversely affected counsel's performance. See Cuyler v. Sullivan 446 US 335, 64 L Ed 2d 333, 100 S Ct 1708, (1980) (thoroughly analyzing conflict-of-interest issues).

The right to effective assistance applies to defendants who retain their own lawyers. They are entitled to no less protection under the Sixth Amendment than defendants for whom the state appoints counsel. Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002).

Recent cases have highlighted the constitutional importance of maintaining proper caseloads in indigent defense cases. See, e.g., Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013) State v. Graham, 194 Wn.2d 965, 454 P.3d 114 (2019); State v. A.N.J., 168 Wn.2d 91, 102, 225 P.3d 956 (2010)."

IAC on Appeal. Since the right to effective representation applies to the first stage of appellate review, the Strickland standard for determining whether the defendant has met the burden of showing ineffective trial representation applies to appellate representation. Alford v. Rolfs, 867 F2d 1216 (CA9 Wash. 1989). Thus, to prevail it must be shown that appellate counsel failed to raise viable issues or that appellate counsel did not set forth the pertinent facts and the applicable law. Further, it must be shown that it is reasonably likely that the appellant would have received a more favorable appellate decision if it were not for the unprofessional errors of appellate counsel.

The Effective Right to Counsel
Strategic decisions and judgment calls

The defendant must show "there is no conceivable legitimate tactic explaining counsel's performance." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Defendant failed to establish that trial counsel rendered ineffective assistance by conceding admissibility of defendant's tape-recorded statements to officer, where such decision was a **legitimate trial tactic**. Taped statement showed lack of premeditation and planning, counsel used tape to show defendant's remorse, defendant denied prior acts of domestic violence against victim, and core issue during penalty phase was whether there were sufficient mitigating factors. In re Cross, 180 Wn.2d 664, 327 P.3d 660 (2014).

No claim of ineffectiveness can be made where, e.g., defendant's decision not to present mitigating evidence was informed and knowing. Defendant's unsworn denial of crimes during statutory allocution made refusal to seek mitigation a **logical strategy**. Counsel's acquiescence in defendant's decision did not constitute deficient performance. Note that defense counsel was prepared to present mitigation evidence and discussed ramifications of failing to present that evidence. Jeffries v. Blodgett, 974 F.2d 1179 (CA9 Wash. 1992).

The Privilege Problem

Where a defendant raises a claim of ineffective assistance of counsel, he or she waives the attorney-client privilege as to the communications with the allegedly ineffective lawyer. Bittaker v. Woodford, 331 F.3d 715 (9th Cir.), cert. denied, 124 S. Ct. 536 (2003). Although the precise boundaries of the waiver will vary from case to case, alleging that defense counsel made unreasonable strategic decisions waives any claim of privilege over the contents of communications with counsel relevant to assessing the reasonableness of those decisions in the circumstances. Johnson v. Alabama, 256 F.3d 1156 (11th Cir. 2001).

The Effective Right to Counsel

Providing Effective Representation requires:

Investigate the facts of each client's case, including:
Interview the client.
Review discovery.
Question witnesses.
Research the applicable law given the facts of the case.
Evaluate the case for potential resolutions.
Apprise the client of recommendations regarding an appropriate course of action in defending the case.

If the case proceeds to trial effective representation includes:

The defendant's right to a speedy trial. If the defendant wants a speedy trial, has CrR 3.3 been complied with? Was the defendant timely charged? Were proper objections made, in a timely and specific manner, to the trial setting? Was there a constitutional speedy trial violation under Barker v. Wingo independent of whether the court rule was violated?

Is the defendant competent to be tried? A person is not competent to stand trial if he or she lacks "the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense." RCW 10.77.010(15). Whether a hearing should have been ordered is reviewed for abuse of discretion. In re Pers. Restraint of McCarthy, 193 Wn.2d 792, 802, 446 P.3d 167 (2019).

Properly picking a jury.
Does the jury venire adequately reflect the area's population by race, sex, age, social class? Does the mechanism for selecting venire cause disproportionate representation of these groups?
Is voir dire improperly restricted, especially as to subject directly pertinent to the case, as attitudes towards sex, drugs, guns, etc.?
Defense requests to strike jurors for cause?
Did the State requests to dismiss for cause have a valid basis?
Did the state use peremptory challenges to exclude jurors based on race, sex? New Court Rule.

Obtain the necessary information regarding the rules and procedures of the court where the client will be tried and, if possible, observe a criminal trial before the court.

Associate an expert if the ordinary jury does not have sufficient expertise to understand the defense. Where an *expert witness's opinion was crucial to the defense theory*, defense counsel's **failure to have questioned the expert prior to trial was inexcusable** and amounts to ineffective assistance. Stevens v. McBride, 489 F.3d 883 (7th Cir. 2007) (Per Wood, Circuit Judge, with one circuit judge concurring.).

Consider whether severance be requested. CrR 4.4 provides the trial court with the authority to separate multiple offenses into different proceedings when severance "will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b); State v. Bluford, 188 Wn.2d 298, 306, 393 P.3d 1219 (2017); State v. Dent, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). Remember, the motion to sever must be renewed before the end of the evidence – in limine motions isn't enough.

Motions to suppress evidence.

Was any search or seizure conducted without a warrant proper?

1. Do search warrant affidavits establish probable cause?
2. Were any informants used and was the information provided reliable? Was the informant named? Does the informant have a demonstrable history in giving reliable information? Do the facts recited establish probable cause? Is the information recent and based upon personal observation?
3. Was any warrant sufficiently specific?
4. Did any search exceed the scope of the warrant?
5. Was there a violation of the Privacy Act by recording private conversations?

Was there an improper warrantless search or seizure? Does the intrusion fall within a recognized exception to the warrant requirement?

Was a warrantless arrest or seizure of the defendant proper?

Were the client's statements or other evidence "poisonous fruit" of an improper arrest or stop? A confession following an illegal arrest is admissible only if obtained "by means sufficiently distinguishable to be purged of the primary taint" and not through "exploitation of that illegality". State v. Byers, 88 Wn.2d 1, 8, 559 P.2d 1334 (1975); Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Are the defendant's custodial statements to the police admissible or wa there a Miranda violation? (CrR 3.5)

Was the defendant's right to counsel prior to making a statement violated?

Are any prior identifications of the defendant admissible or the result of an improperly suggestive line-up or photo-montage?

The Effective Right to Counsel
TRIAL

Don't make promises in Opening that you can't keep: Defense counsel did not break alleged **promise to jury that murder defendant would testify**, **as would amount to ineffective assistance**; rather, counsel merely told jury, in his opening statement, that evidence would show that defendant shot victims in self-defense during a drug deal, and he presented evidence in support of that theory, even though defendant did not testify as a witness. Mann v. Ryan, 774 F.3d 1203 (9th Cir. 2014).

1. Admission of evidence.

The general rule is that all relevant evidence is admissible, unless restricted by constitutional limitations, statutes, court rules, or other regulations. On the other hand, evidence which is not relevant is not admissible, and you probably want to keep it out. ER 402. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401.

The decision whether to cross-examine a witness, call a witness, or to object to evidence all involves trial tactics which are vested in the sound discretion of the trial attorneys. See e.g., In re Pers. Restraint of Davis, 152 Wn.2d 647, 720, 101 P.3d 1 (2004) (cross-examination); State v. Robinson, 79 Wn.App. 386, 392, 902 P.2d 652 (1995) (call witness); State v. Madison, 53 Wn.App. 754, 763, 770 P.2d 662 (1989) (object). A reviewing court, therefore, presumes that a "failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption." State v. Johnston, 143 Wn.App. 1, 20, 177 P.3d 1127 (2007).

Are the witnesses **competent** to testify? Too young, too senile, too crazy, too retarded? There is a statutory presumption of competency. See RCW 5.60.020 ("Every person of sound mind and discretion ... may be a witness in any action or proceeding"); ER 601 ("Every person is competent to be a witness except as otherwise provided by statute or by court rule.")

Can the prosecutor lay a proper **foundation** and establish chain of custody for physical evidence? If so, a stipulation as to facts may represent a reasonable tactical decision. State v. Mierz, 127 Wn.2d 460, 476, 901 P.2d 286 (1995).

Hearsay. Is the evidence hearsay or is there an exception which applies? If offered as child hearsay (RCW 9A.44), business record (RCW 5.45.020), etc., was

the statute satisfied? Does the Confrontation Clause, or some othe constitutional provision, supersede the evidence rule? Crawford, Davis v. Alaska, etc.

Are the **expert witnesses** properly qualified? ER 701. If so, what can they talk about. ER 702. Know the Rules because defense counsel's failing to object to social worker's expert testimony commenting on six-year-old complainant's truthfulness in sex offense case, and failing to redact portions of social worker's videotaped interview of the victim in which social worker stated that she was "*sorry that [defendant] did that to you*," "[h]e should not have been touching you down there" and "we don't want him to do this to you anymore," was prejudicial and amounted to ineffective assistance of counsel. Whether the complainant was telling the truth was sole issue before the jury, given lack of physical evidence of abuse and absence of witnesses who could corroborate complainant's version of events. Earls v. McCaughtry, 379 F.3d 489 (7th Cir. 2004).

Character evidence and ER 404(b). Are prior bad acts of the defendant or witnesses being offered? Are they so unique or so like the present crime as to constitute evidence of a distinctive *modus operandi* or common plan? Are they necessary to show intent or identity? The trial court must balance probative value against the prejudice on the record. Failure to present evidence of victim's character and reputation to bolster the claim of self-defense in domestic battery prosecution can amount to deficient performance where victim had criminal history and was known for being belligerent while intoxicated. Marr v. State, 408 P.3d 31 (Idaho 2017).

Defense counsel's **decision not to call witness** who would have impeached assault victim's testimony that it was defendant who started a fight, **was deficient performance**. Counsel knew that *petitioner's only hope was to prevail on his claim of self-defense*. For the jury to reach petitioner's claim of self-defense, it was crucial to first discredit victim's testimony that petitioner attacked him. Cartrette v. Nooth, 284 Or. App. 834, 395 P.3d 627 (2017).

Defense **counsel performed deficiently** by eliciting testimony from defendant sufficient to waive his marital privilege concerning inculpatory statements he made to his wife about killing the victim. Edwards v. Lamarque, 439 F.3d 504 (9th Cir. 2005).

Advise the defendant on testifying or remaining silent. The right to testify on one's own behalf is a right that is personal to the defendant. Rock v. Arkansas, 483 U.S. 44, 49 (1987). The right to testify derives from the Fourteenth Amendment's due process clause, the compulsory process clause of the Sixth Amendment, and as a corollary to the Fifth Amendment's privilege against self-

incrimination. Id., at 51-52. Article I, § 22, of the Washington Constitution expressly provides the accused with the right "to testify in [his] own behalf…" "Even more fundamental to a personal defense than the right to self-representation… is an accused's right to present his own version of events in his own words." Rock, at 52. It is the defendant, not trial counsel, who has the authority to decide whether he will testify. See e.g., RPC 1.2(a); Jones v. Barnes, 463 U.S. 745, 751 n. 6, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); State v. Stegall, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994); State v. King, 24 Wn.App. 495, 499, 601 P.2d 982 (1979) ("a criminal defendant has an absolute right to testify in his own behalf which cannot be abrogated by defense counsel").

2. Jury instructions. Duty to object to improper instructions. Offering instructions waives objections as invited error. The "to convict" instruction should include all the essential elements of the alleged offense. State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998). Be aggressive in asking for ones that help illuminate your facts in a more favorable light.

3. Closing argument. Prosecutorial misconduct during a closing argument occurs when the prosecutor's statements are both improper and prejudicial. State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Prosecutors will eventually misstate the facts or the law, invoke inflammatory rhetoric, refer to matters not proven or to evidence that was ruled inadmissible, and then comment on the failure of the defendant to testify or exercise Miranda rights. Finally, the prosecutor will at some point indicate a personal belief in the defendant's guilt and the credibility of the witnesses. State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014); State v. Walker, 182 Wn.2d 463, 478, 341 P.3d 976 (2015).

Defense counsel's closing argument can also raise issues. Defense counsel should be very wary of conceding elements or offenses, particularly without the defendant's prior approval.

SENTENCING

1. Ensure the sentence is within the standard range.
   a. The standard range must be properly calculated based on criminal history – including washout, comparability, and potential multipliers.
   b. Are multiple counts the same criminal conduct.
2. Enhancements.
3. Exceptional sentences.
4. The terms and conditions of community custody.

The Effective Right to Counsel

Provide Effective Representation and document it by making and retaining detailed notes of your efforts to defend each client including:

What transpired during the initial interview.

The pertinent information obtained during the interview, including each potential witness.

The names of each witness the defendant has suggested counsel interview, along with the action content of the interviews. In the event some witnesses were not interviewed, that should be noted, as should the reasons for not conducting those interviews.

Efforts that were made to obtain a plea bargain and the reasons for entering or declining to enter the plea bargain.

Efforts that were made to obtain documents and other information from the prosecution.

Reasons for not making certain pretrial motions that were available, such as motions to suppress the product of an arrest or a search.[47]

The reasons counsel asked the court not to give various instructions to which the defendant was entitled, such as lesser included offense instructions.

The strategic reasons for declining to make certain potential objections during the trial when applicable.

The advice you gave to the client regarding the right to appeal.

Legal resources you utilized to research the pertinent law.

Evaluating meritorious IAC claims

Did the defendant have a right to representation?

Can it be shown that the attorney in those proceedings made unreasonable professional errors or omissions?

Must prejudice be demonstrated under the facts of the client's case, and if so, has it been shown?

Has the defendant exhausted any other administrative or judicial remedies?

IAC doesn't establish malpractice: Proving actual innocence**,** not simply legal innocence, is essential to proving the proximate causation element of a legal malpractice claim arising from the plaintiff's representation in a criminal prosecution. Unless criminal malpractice plaintiffs can prove by a preponderance of the evidence their actual innocence of the charges, their own bad acts, not the alleged negligence of defense counsel, should be regarded as the cause in fact of their harm. Ang v. Martin, 154 Wn.2d 477, 114 P.3d 637 (2005).