Ineffective Assistance of Counsel

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As an accompaniment to the surge of litigation, we have witnessed an increase in the claims of ineffective representation by counsel. As more and more litigants are called upon to respond to such claims, the appellate courts have been forced to delineate a basic threshold of competence. Not only is the standard by which counsel is deemed effective or ineffective constantly changing, but also decisions of the higher courts have been devoid of a guideline by which future problems may be anticipated.

The following review of case law traces the evolution of both state and federal decisions during the past fifteen years in an attempt to demonstrate the manner in which such claims are resolved.

I. Historical Backdrop

In two cases decided in the 1980s, the Supreme Court of the United States elaborated on the appropriate standards for judging claims of ineffective assistance of counsel.[1] *United States v. Cronic* involved a conviction for mail fraud that was reversed by the Tenth Circuit on the grounds that a young attorney who was inexperienced in criminal law was given only twenty-five days to prepare a complex matter for trial. While ineffectiveness was found by the Tenth Circuit on the basis of these factors alone, the Supreme Court reversed this judgment and required a finding of actual prejudice to the defendant.

In *Strickland v. Washington*, where it was held that the defendant was not denied effective assistance of counsel because he failed to affirmatively prove prejudice, the Supreme Court went on to define this prejudice as a "reasonable probability sufficient to undermine confidence in the outcome, that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The *Strickland* Court noted that future courts need not ascertain whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of these alleged deficiencies.

Three years later in *Commonwealth v. Pierce*,[2] the Supreme Court of Pennsylvania unequivocally established that the defendant must show prejudice in order to emerge successfully from an ineffectiveness claim. Confronted with what had been argued as uncertainty on this subject in its earlier decision of *Commonwealth ex rel. Washington v. Marony*,[3] the Pennsylvania Supreme Court went on to note that the protection granted under Article 1, §9 of the Pennsylvania Constitution was neither greater nor lesser than the federal standard announced in *Strickland*. At least concerning future consideration, a complaining defendant was not only required to show ineffectiveness on the part of counsel but also carried the additional burden of depicting resulting prejudice.

With the end of the 1980s came a further subdivision of the two-prong test of *Strickland* and *Pierce* by the Supreme Court of Pennsylvania in *Commonwealth v. Durst*.[4] The *Durst* Court required a petitioner to establish that the issue, argument or tactic that had been foregone

by counsel had arguable merit, that the particular course chosen by counsel had no reasonable basis designed to effectuate his client's interest, and that counsel's commission or omission prejudiced the defendant.

Before proceeding to examine categories detailing specific instances of ineffectiveness, it is important to realize that the constitutional guarantee of effective assistance of counsel not only applies to juvenile proceedings,[5] but has also received favorable greeting in summary offenses where the effective conviction was not *de minimus*.[6] Plea proceedings, including investigation and negotiation,[7] are not immune from the right to conflict-free representation. Indeed, the proceeding upon which the Strickland Court opined was not a trial but rather a sentencing proceeding following a guilty plea to first-degree murder.

If, however, the defendant is represented on appeal by the same attorney who represented him/her at trial, raising an ineffective assistance claim is not practical and thus not waived by the defendant.[8] Further, where the claim of ineffectiveness is based on a collateral attack, the Post-Conviction Relief Act renders the prejudice requirement more stringent than those claims that are raised on direct appeal.[9]

II. Basic Qualifications

Exceptions do exist, of course, to the requirement that a defendant claiming ineffective assistance of counsel must show prejudice. At the start of the 1990s, the Second Circuit Court of Appeals held that a defendant, represented by a New York attorney who was specially admitted to try the case in Vermont and who had obtained bar admission in New York by fraudulent means, was entitled to relief without having to prove prejudice.[10] One year later, this same circuit held that representation in a criminal matter by an attorney with an admitted physical incapacity entitled the defendant to a new trial without having to demonstrate prejudice.[11] The Tenth Circuit, however, held that legal assistance provided by an attorney who, unbeknownst to anyone, had been disbarred seven days before trial was not per se ineffective.[12] Three years later, the Third Circuit held that an attorney whose license was revoked for unrelated professional conduct after a defendant?s trial did not provide ineffective counsel.[13] Following a similar philosophy, the Fifth Circuit in 1998 failed to find ineffectiveness where an attorney had been barred from practicing law at the time that he represented the defendant.[14]

In 1991, the Third Circuit vacated the result in a medical malpractice case and ruled that a parent who was not an attorney is not entitled to represent his children in a federal court action.[15] Employing a similar logic, the Eighth Circuit held that non-lawyer trustees had no right to represent the trust in court.[16]

Also on the federal level, prejudice was presumed where the defendant was verbally assaulted by defense counsel,[17] and falling asleep for extended periods of time was held to constitute ineffective assistance.[18]

III. Conflict of Interest

The possibility that a defendant received ineffective assistance due to counsel's divided interests has served as the subject matter of numerous cases. Thematic to these cases is either the personal activities of the attorney, the attorney's prior representation of individuals connected with the case or the attorney's joint representation of several defendants in the same action.

A. Divided Loyalties

In 1984, the Third Circuit held that the Sixth Amendment guarantee of effective assistance of counsel comprises two co-relative rights: the right to counsel of reasonable competence and the right to counsel's undivided loyalty.[19] The *Zepp* Court found ineffectiveness in the fact that defense counsel faced potential criminal liability on the same charges for which the defendant was being tried. Counsel was likewise found ineffective when a prosecution witness accused him of purchasing some of the stolen goods in question.[20] Defense counsel's subsequent indictment, however, failed to establish per se conflict of interest.[21]

Where defense counsel did not inform the defendant that he was under investigation by the same prosecutor and further failed to institute plea bargaining, counsel was ruled ineffective.[22] In a situation where an attorney was required to present a defense that inculpated a former client, the petitioner was at least entitled to a hearing on whether an impermissible conflict existed.[23] While these cases required a showing that the conflict

actively affected counsel's performance, they did not necessitate that the defendant show prejudice.

B. Dual Representation

Situations involving conflict claims over the fact that an attorney represented someone connected with the litigation on a prior occasion, as well as those involving the joint representation of defendants, are often decided in advance of the actual representation. Where a conflict scenario becomes apparent, a duty exists to bring the issue to the court's attention and move for the disqualification of offending counsel if necessary.[24] If defendants can show that their attorney actively represented conflicting interests and that this action adversely affected the lawyer's performance, no further showing of prejudice is required.[25] At pretrial hearings before the trial judge, defendants are asked to waive their right to claim ineffective assistance of counsel at some future date in order to allow counsel's continued representation. In some instances, the court is asked to determine whether counsel's prior representation of a witness might result in restricting the attorney's cross-examination of that witness due to confidential facts disclosed in the past. In the event that the trial court disqualifies defense counsel, that order is not immediately appealable in the federal system;[26] it is, however, in Pennsylvania.[27]

The Superior Court has recognized a presumption in favor of a defendant's counsel of choice and requires that it be overcome by a demonstration of either actual conflict or a serious potential for conflict.[28] The fact that an attorney representing witnesses before an investigating grand jury was formerly associated with an attorney representing the target of the grand jury investigation is not sufficient grounds to disqualify the attorney representing the witnesses.[29] It is the same court, however, that found an attorney's representation of a subsequent client, whose interests were materially adverse to a former client in a case substantially related to matters in which he represented the former client, was an impermissible conflict of interest that required removal.[30]

The principles involved in deciding conflict of interest cases that deal with the multiple representation of defendants further transcend to matters involving the defendant?s prior representation of a witness.[31] The Third Circuit not only disqualified an attorney who had previously represented the employees of the defendant who would be testifying for the government and against the defendant at trial, but also took the opportunity to suppress statements of these employees given to counsel on the basis of the attorney/ client privilege.[32]

Indeed, the earlier representation of a wife barred an attorney from representing her husband in an action dissolving a marriage.[33] Further, an actual conflict occurred when defense counsel represented both the defendant and a Commonwealth witness.[34] Even the overwhelming weight of evidence could not justify the denial of relief upon a finding of actual conflict of interest by counsel's simultaneous but undisclosed representation of a Drug Enforcement Agency (DEA) agent who testified against the defendant at trial.[35] Exemplifying the logic behind the rule was *Commonwealth v. Westbrook*,[36] a case where the Defender Association represented both the defendant and the defendant?s brother. The defendant attempted to show that the robbery was actually committed by his brother but was unable to do so because the defender would not permit the brother to make a statement. The *Westbrook* Court found the existence of an actual conflict of interest.

The joint representation of codefendants is not, per se, violative of the constitutional guarantee of effective assistance of counsel.[37] However, requiring one attorney to represent two defendants with conflicting interests is most certainly a violation.[38]

The Eleventh Circuit found that an actual conflict of interest adversely affected the performance of an attorney who concurrently represented both the defendant, who claimed self-defense, and the victim?s life insurance policy beneficiary, who could have lost benefits if the victim was found to be the aggressor.[39] In a case where neither defendant relied upon a defense that was antagonistic to the codefendant, joint representation did not give rise to a conflict of interest.[40]

C. Waiver

The Supreme Court of the United States has held that the trial court must be allowed substantial latitude in granting or refusing waivers of conflict of interest.[41] This waiver of the right to conflict-free counsel in dual representation cases can be valid even if the court does not conduct an on-the-record inquiry as long as the waiver is found to be knowing,

voluntary and intelligent.[42] The appellate courts on both the federal and the state levels have upheld the validity of a defendant's waiver of his right to claim ineffective assistance of counsel.[43] The Seventh Circuit, however, has held that a defendant who consents to joint representation must later show actual, rather than potential, conflict of interest.[44]

Requiring defendants to waive their rights to future claims alleging that their attorneys did not properly represent their interests is highly speculative. The ability to specifically outline the risk that the defendant is agreeing to take is very often beyond the informed imaginings of either the prosecutor or the court. Further, our legal system makes up for shortcomings in the intellectual ability of certain defendants to comprehend the proceedings against them by requiring that they be represented by individuals trained and experienced in the law. Yet it is a possible lack of loyalty that a defendant on his own is asked to evaluate.

In *United States ex. rel. Duncan v. O'Leary*,[45] the Seventh Circuit was faced with a state court murder conviction in which a defendant of limited intellectual ability waived his right to claim ineffective assistance of counsel in open court. The waiver was based upon the court's disclosure that defense counsel was then serving as campaign manager for the prosecuting attorney. What was not disclosed was that defense counsel, the prosecuting attorney and a female police officer had conspired together in order to persuade the defendant's family to retain defense counsel. The court held that the defendant could not waive "that of which he had no knowledge."

In addition to those cases dealing with the basic qualifications of counsel and the complex problems presented by conflict of interest claims, thousands of allegations have been made regarding specific action or inaction on the part of individual attorneys. Since the claims concern highly specific instances, they do not easily support a guide for future conduct. While they were decided under the standard of review established by the Supreme Court of the United States in *Strickland v. Washington*[46] and the Supreme Court of Pennsylvania in *Commonwealth v. Pierce*,[47] they spoke more to the specific type of conduct on the part of counsel than to the prejudice of the defendant. While defendants are definitely required to show that they were prejudiced by their attorneys' errors, those determinations encompass an overall view of the strength of the prosecution's cases as well as judicial speculation as to the level of the strength absent counsel's errors. The following cases concern themselves not with this decision but merely with the type of conduct that has been held, in specific instances, to be error on the part of counsel.

IV. Advice of Counsel

When the advice of counsel is challenged, as it often is in guilty pleas, the relevant test is whether that advice was within the range of competence demanded of attorneys in criminal cases. In order to establish ineffectiveness regarding counsel's advice to reject a plea bargain, defendants carry the burden of proving that counsel had no reasonable basis for their advice.[48] Additionally, a claim of ineffective counsel cannot be based upon advice from outside counsel whom the defendant chose to consult.[49] Even if counsel's advice is indeed deemed deficient, defendants must nevertheless still demonstrate that, but for counsel's errors, they would not have pled guilty and would have instead insisted on going to trial.[50] In 1995, however, the Fourth Circuit held that defendants who entered guilty pleas must show merely that there is a reasonable probability they would not have done so otherwise.[51]

Various circuits in the federal system have uniformly held ineffectiveness to exist in counsel's failure to file an appeal after a client's request to do so.[52] Moreover, the Pennsylvania Superior Court held that, unless expressly waived, counsel's failure to properly effectuate an appellant's right to appeal is per se ineffective.[53]

Mere allegations of promises made by counsel are insufficient to support a claim of ineffective assistance.[54] On the other hand, not only has the Third Circuit held that counsel's misrepresentation regarding the appealability of a case was ineffective,[55] but the Eighth Circuit has also held that a defendant was denied effective assistance of counsel when his attorney incorrectly informed him that he would have to serve only one-sixth of his plea bargain sentence.[56] The Second Circuit in 1998 similarly characterized counsel's gross underestimation of the sentence facing the client.[57] Further, counsel was held to be ineffective not only for failing to move to withdraw a *nolo* plea where the defendant had not been advised that he would be exposed to consecutive sentences,[58] but also for failing to move to withdraw a guilty plea after the defendant's motion to suppress had been

granted.[59]

Counsel's failure to advise the defendant of the pros and cons of an appeal as well as the time limit, coupled with the failure to determine whether the defendant wanted to embark upon such a course, was deemed ineffective.[60] Advising a guilty plea prior to conducting an investigation has been held ineffective,[61] as has the failure to advise the defendant of the deportation consequences of such a plea.[62] Threatening to withdraw as counsel if the defendant chose to testify exemplified behavior that required a new trial,[63] while failing to inform the defendant he could and should testify during the penalty phase constituted ineffectiveness.[64] A petitioner was entitled to a hearing on whether his plea was coerced after his attorney threatened to withdraw if the plea were not entered.[65]

Failure to inform the defendant of a plea offer was ineffective,[66] as was the advice to plead guilty rather than stand trial.[67] On the other hand, counsel has been held to be ineffective in advising a defendant not to accept a plea offer of two years.[68] Confusion on the part of trial counsel regarding the law made him ineffective in failing to advise the defendant that if he successfully withdrew his plea of guilt to second-degree murder, he would be subject to a first-degree murder conviction.[69] A similar fate of ineffectiveness was met by counsel whose failure to advise a client about the withdrawal of a guilty plea to third-degree murder resulted in the imposition of the death penalty.[70]

In *Underwood v. Clark*,[71] however, the Seventh Circuit noted that an attorney was not ineffective in advising his client not to testify despite his constitutional right not to take the stand. Further, counsel is not required to consult with the client on all tactical moves. More recently, the Superior Court voiced that in order to sustain a claim that counsel was ineffective for failing to call the defendant to testify, he/she must demonstrate that counsel either interfered with his/her right to testify or else gave advice so unreasonable as to vitiate a knowing and intelligent decision.[72]

V. Trial Tactics

In reviewing those cases in which a claim of ineffective assistance of counsel is advanced regarding an attorney's action or inaction during the litigation process itself, the First Circuit has noted that "the Constitution does not guarantee a defendant a letter-perfect defense or a successful defense; rather, the performance standard is that of reasonably effective assistance under the circumstances."[73] The *Natanel* Court specifically held that counsel's waiver of a closing argument did not constitute ineffective assistance. However, a contrary result was reached by the Superior Court of Pennsylvania in *Commonwealth v. Sparks.*[74] Calling a witness to the stand merely on a hunch was deemed ineffective when the witness identified the defendant as a robber.[75] Advising a defendant not to testify that she had ingested methamphetamine under a mistaken belief that it was illegal to ingest this substance dictated a similar result.[76]

A. Investigation

1. Witnesses

Counsel's failure to properly prepare for trial has served as the subject of appellate inquiry. A constant theme regarding effective representation concerns witnesses. Counsel's failure to interview or call eyewitnesses was deemed ineffective,[77] as was the failure to attempt to find and interview potential alibi witnesses78 and the failure to use reasonable efforts to procure three alibi witnesses.[79]

On the other hand, the claim of ineffective assistance of counsel was rejected by the Tenth Circuit when the defendant failed to supply counsel with names and addresses of prospective witnesses.[80] A decision not to interview prosecution witnesses did not result in ineffective assistance of counsel where counsel was aware of the substance of the witnesses' testimony in advance.[81] In 1994, however, the Pennsylvania Supreme Court held that the failure to interview witnesses in a death penalty prosecution was ineffective, arguably per se.[82] More recently, this same court delineated the standard for the successful launching of an ineffectiveness claim to include the existence and availability of the witness, counsel's awareness of or duty to know about the witness, the willingness and ability of the witness to appear on the defendant?s behalf, and the necessity of the proposed testimony for an avoidance of prejudice.[83]

In *United States v. Gray*,[84] the Third Circuit was faced with a claim of ineffectiveness based upon counsel?s failure to conduct a pretrial investigation. The defendant had supplied the names of potential witnesses but expressed his reluctance to subpoena these witnesses and compel their attendance at trial. Counsel went no further. The *Gray* Court found ineffectiveness in light of its belief that counsel could have well established a credible defense had he interviewed and subpoenaed these witnesses. The court further noted that the effect of counsel's inadequate performance must be evaluated in light of the totality of evidence at trial and opined that an outcome that was only weakly supported by the record is more likely to have been affected by errors than one for which the record harbors overwhelming support.

One year later, a different panel of the Third Circuit reached the exact opposite result in *Lewis v. Mazurkiewicz*.[85] In finding that the defendant failed to show any prejudice as a result of counsel's failure to interview and present potential defense witnesses in reference to his claim of self-defense, they stated that they believed such a decision was within the exercise of counsel's reasonable professional judgment.

Not only was a defendant denied effective assistance of counsel due to an attorney's failure to interview witnesses, but ineffectiveness was also found in counsel?s failure to ascertain that a witness was in jail rather than at home speaking to the defendant, per his testimony.[87] Counsel was held ineffective in the federal system for failing to interview witnesses and the codefendant before trial[88] as well as for failing to not only confer with the defendant for two months but also to seek discovery, investigate the crime and interview witnesses.[89] Failure to investigate and present evidence that a shooting was accidental and at close range,[90] as well as failure to contact and subpoena alibi witnesses and notify the prosecution of their existence,[91] met a similar fate of ineffectiveness.

2. Mental Health
In 1991, various circuits held that defense counsel's almost complete lack of investigation and resulting ignorance regarding the defendant's mental and family history, as well as the failure to argue mitigating factors to the jury during the death penalty phase of a homicide trial, constituted ineffective assistance.[92] In an interesting sidelight, the *Brewer* Court refused to hold that the presentation of perjured testimony at the defendant?s request was adequate to constitute ineffectiveness.

Failure to investigate the defendant's psychiatric background and competency has been greeted with a similar reception in the federal system.[93] For failing to investigate mental illness[94] and for abandoning all consideration of an extreme emotional disturbance at an early stage for no apparent reason, ineffectiveness has also been found.[95]

Following a similar philosophy, counsel's performance in obtaining and presenting a psychiatric witness has been held to be deficient,[96] while the failure to pursue an independent psychological analysis of the defendant in a death case has been deemed to be professionally unreasonable.[97] Further, the Third Circuit has found ineffective assistance in the failure to investigate an insanity defense despite the presence of a letter from a psychiatrist,[98] while the Fifth Circuit has viewed the failure to investigate the defendant's competency to stand trial or the viability of an insanity defense with a similar eye.[99] Lastly, the Pennsylvania Supreme Court in 1998 found ineffectiveness in the failure to investigate and present a defense of diminished capacity.[100]

3. Miscellaneous
Both in 1997 and 1998, the Ninth Circuit has consistently held that the failure to investigate the defendant's denial of presence at the scene and, if appropriate, to present an alibi defense was ineffective.[101] Counsel's decision not to investigate the lack of medical evidence of abuse met a similar fate,[102] as did the failure to follow up on an exculpatory report regarding semen.[103]

4. Mitigation
In two consecutive years, the Seventh Circuit has held that counsel in a capital case was ineffective not only in preparation and presentation,[104] but also in failing to investigate mitigating circumstances.[105] A similar result emerged from the Ninth Circuit due to counsel's failure to prepare and present a case for mitigation at sentencing.[106] After evaluating counsel's failure to override the defendant?s decision not to present mitigating evidence during the penalty phase, however, the Pennsylvania Supreme Court in 1998

declined to breathe life into the defendant's ineffectiveness claim.[107]

B. Courtroom Performance

Counsel's courtroom performance has always been the subject of much judicial hindsight. Reporting ready for trial when essential defense witnesses were unavailable was deemed ineffective,[108] as was the failure to request a continuance in order to produce necessary defense witnesses.[109] A haven for ineffective assistance has also been found nestled not only in counsel's failure to *voir dire* the jury after a juror brought a newspaper story into the jury room,[110] but also in the absence of a request for a mistrial following the prosecution's mention of post-arrest silence.[111]

1. Argument

The failure to present adequate argument has been viewed with disfavor.[112] Moreover, where trial counsel told the jury during the opening statement that he would call an expert witness and then failed to do so, his assistance was deemed ineffective.[113] Defense counsel?s concession during closing that no reasonable doubt ex-isted regarding the only factual issues in dispute was per se prejudicial.[114]

2. Miscellaneous

Both attitude as well as conduct displayed during a trial made an attorney ineffective,[115] as did becoming angry at the judge and failing to present a defense.[116] Counsel was further ineffective in failing to have a theory, cross-examine witnesses, voice objections to evidence, and present witnesses or mitigation.[117] In a rape case, failure to develop a defense of impotency was categorized as ineffective.[118] In one situation, counsel?s failure to call the defendant to the stand embodied ineffective assistance,[119] whereas, in another case, a similar result ensued from counsel's strategy in calling the defendant to the stand and proceeding to characterize him as both a thief and a liar.[120] Ineffectiveness was absent, however, not only where the defendant was provided with the opportunity to testify as opposed to being asked specific questions in a situation where counsel suspected the defendant of lying,[121] but also where counsel failed to require that the government prove the methamphetamine to be of type D rather than L.[122]

3. Pretrial Motions

With regard to pretrial motions, assistance provided by attorneys has been catergoried as ineffective for their failure to file a proper suppression motion[123] or even one at all.[124] The failure to challenge a lineup met the same fate,[125] as did the failure to claim a violation of the Speedy Trial Act.[126] Remand for a hearing was required due to counsel's failure to raise a suppression issue concerning a wired informant entering a house.[127]

4. Witnesses

Failure to actually call a potential witness is not per se ineffective assistance, absent positive demonstration that his/her testimony would have been helpful to the defense.[128] Similarly, the viability of an ineffectiveness claim was not established for the failure to call character witnesses without evidence that any specific witness would have presented character evidence at the trial.[129] Both the Pennsylvania Supreme Court as well as the Superior Court, however, deemed the failure to call character witnesses as ineffective.[130] Indeed, counsel's failure to call character witnesses in a first-degree murder trial resulted in the kind of prejudice that required a new trial.[131] In reference to a claim of ineffective assistance in connection with counsel's failure to call two named alibi witnesses, the Pennsylvania Supreme Court found that the trial court should have granted a hearing.[132] On the federal level, ineffectiveness was found nestled in counsel's failure to contact two witnesses who could vouch for the defendant's whereabouts at the time of the incident.[133]

5. Cross-Examination

On both the state and federal level, even the highly individualized practice of conducting cross-examination has been held ineffective where counsel has failed to take advantage of universally acknowledged tools of impeachment.[134] Ineffectiveness has found haven in counsel's failure to both impeach an informant[135] and to use a letter written by the victim that had found its way into counsel's possession.[136] In the Third Circuit, ineffective assistance took the form of failing to use a witness' inconsistent testimony, opening the door, and failing to call defense witnesses.[137] In the state system, the Superior Court held that failing to cross-examine regarding motivation, as well as presenting bad character

testimony, was ineffective,[138] as was neglecting to impeach the victim's credibility with evidence of charges pending against her at time of trial.[139]

6. Objections
Not objecting to the admission of a codefendant's confession and hearsay as well as failing to request a missing witness instruction were deemed ineffective.[140] Further, allowing the victim's wife to testify without objection to hearsay statements, which provided principal evidence of premeditation, constituted ineffective assistance.[141] Failing to lodge objections to questions regarding an untrue statement given to police by the defendant[142] and neglecting to object to an improper opening and closing by the prosecutor also gave birth to successful claims of ineffectiveness.[143] Counsel's failure to object to inadmissible evidence or arguments has provided a shelter for ineffective assistance,[144] as has the lack of objections to both an erroneous verdict sheet[145] and to the introduction of the defendant's criminal history.[146]

For failing to lodge an objection to testimony from a detective regarding the hearsay statement of a non-testifying codefendant[147] and for not objecting to a trooper's testimony that commented on a defendant's silence after he was advised of his rights, ineffectiveness prevailed.[148] Ineffective assistance also appeared in counsel's failure to object to a prosecutor's cross-examination during which the defendant was forced to admit that he made no assertion of self-defense prior to trial,[149] as well as in counsel's failure to object when the prosecutor attempted to impeach the credibility of a defense witness with untried criminal charges.[150]

7. Mental Health
Failure to pursue an insanity defense after the defendant had been ruled incompetent was held to be ineffective by the First Circuit.[151] Other circuits have deemed counsel ineffective for failing to introduce psychiatric evi-dence during the penalty phase[152] and for failing to introduce evidence of the defendant's long history of mental illness at a similar proceeding.[153]

8. Jury Instructions
Counsel's failure to request or object to jury instructions also has not escaped scrutiny.[154] Ineffectiveness has surfaced as a result of failing to request proper jury instructions,[155] specifically in reference to instructions on "preponderance of evidence",[156] self-defense,[157] recklessness[158] and receiving identification evidence with caution.[159] Attorneys have also been held ineffective not only for failing to voice objections to charges on mitigating circumstances,[160] but also for not lodging objections to both an alibi charge[161] and to the omission of such a charge.[162]

9. Post-Trial Matters
In reference to post-trial matters, failure to request a downward adjustment for minimal or minor participation was found to be ineffective,[163] as was the failure to argue that the government breached the plea argument by not moving for a downward departure.[164] Also ineffective was counsel's failure to educate the jury about aggravating and mitigating factors[165] as well as failure to pursue a defendan's mental state[166] during the penalty phase.[167] Ineffective assistance also found refuge in counsel's neglect to move for the reconsideration of a sentence to which the deadly weapon enhancement was applied to automobiles[168] and in the absence of a *Rosario* claim raised on appeal.[169] Finally, the failure of counsel to raise error of the trial court in post-verdict motions has been greeted with a similar reception,[170] as has counsel's neglect to request plain error appellate review for an erroneous first-degree instruction.[171]

10. Time Frame
A remaining dilemma centers around the appropriate time frame during which an ineffectiveness claim should be brought to the court's attention. Pennsylvania requires that this be done at the earliest stage in the proceedings at which counsel whose ineffectiveness is being challenged no longer represents the defendant.[172] Federal courts, however, are a little less certain and, despite similar language, the Seventh Circuit has held that defendants who wish to support their claims with facts outside the record would be well advised to wait until the post-conviction stage before raising a claim of ineffective counsel.[173] Although it felt that such claims should initially be brought to the trial court, the

Second Circuit nevertheless noted that they may be decided when raised for the first time on appeal when either the resolution is beyond any doubt or when doing so would be in the interest of justice.[174] The First Circuit, on the other hand, has ruled that the defendant's failure to alert the trial court to his claim of ineffective assistance precluded appellate review.[175] A similar view was adopted by the Third Circuit in requiring that a claim of ineffective assistance of counsel should have properly been raised in a post-conviction proceeding.[176]

VI. Conclusion

What emerges quite clearly from this review of case law as it has developed through the years is that there is great difficulty attached to trying to predict exactly what type of conduct may be deemed ineffective in the future. Indeed, a refuge for ineffectiveness was not to be found in an attorney's failure to anticipate a new Supreme Court rule concerning the element of willfulness in money laundering.[177] Moreover, even an obvious deviation from reasonable trial strategy can fail to effect relief because the requisite prejudice is not shown.[178] Only a continuing review of appellate court decisions can serve as a manual for effective legal representation.

Endnotes

1. United States v. Cronic, 104 S.Ct. 2039 (1984); Strickland v. Washington, 104 S.Ct. 2052 (1984).
2. 527 A.2d 973 (Pa. 1987).
3. 235 A.2d 349 (Pa. 1967).
4. 559 A.2d 504 (Pa. 1989).
5. Matter of Smith, 573 A.2d 1077 (Pa.Super. 1990).
6. Compare Commonwealth v. Jenkins, 523 A.2d 813 (Pa.Super. 1987) and Borough of Kennett Square v. Lal, 643 A.2d 1172 (Pa.Commw. 1994).
7. Moore v. United States, 950 F.2d 656 (10th Cir. 1991).
8. Guinan v. United States, 6 F.3d 468 (7th Cir. 1993).
9. Commonwealth v. Buehl, 658 A.2d 771 (Pa. 1995).
10. United States v. Novak, 903 F.2d 883 (2nd Cir. 1990).
11. Bellamy v. Cogdell, 952 F.2d 626 (2nd Cir. 1991).
12. United States v. Stevens, 978 F.2d 565 (10th Cir. 1992).
13. Vance v. Lehman, 64 F.3d 119 (3rd Cir. 1995).
14. United States v. Maria-Martinez, 143 F.3d 914 (5th Cir. 1998).
15. Osei-Afriyie v. Medical College of Pennsylvania, 937 F.2d 876 (3rd Cir. 1991).
16. Knoefler v. United Bank, 20 F.3d 347 (8th Cir. 1994).
17. Frazer v. United States, 18 F.3d 778 (9th Cir. 1994).
18. Tippins v. Walker, 77 F.3d 682 (2nd Cir. 1996).
19. Virgin Islands v. Zepp, 748 F.2d 125 (3rd Cir. 1984).
20. Mannhalt v. Reed, 847 F.2d 576 (9th Cir. 1988).
21. Taylor v. United States, 985 F.2d 844 (6th Cir. 1993).
22. United States v. McLain, 823 F.2d 1457 (11th Cir. 1987).
23. Church v. Sullivan, 942 F.2d 1501 (10th Cir. 1991).
24. United States v. Greig, 967 F.2d 1018 (5th Cir. 1992); United States v. Tatum, 943 F.2d 370 (4th Cir. 1991).
25. Buenoano v. Singletary, 963 F.2d 1433 (11th Cir. 1992); Mathis v. Hood, 937 F.2d 790 (2nd Cir. 1991); Commonwealth v. Eskridge, 604 A.2d 700 (Pa. 1992).
26. Flanagan v. United States, 104 S.Ct. 1051 (1984).
27. Commonwealth v. Cassidy, 568 A.2d 693 (Pa.Super. 1989).
28. Commonwealth v. Cassidy, supra.
29. Philadelphia Grand Jury v. Vladimer, 650 A.2d 318 (Pa. 1992).
30. Maritrans GP Inc. v. Pepper, Hamilton and Scheetz, 602 A.2d 1277 (Pa. 1992).
31. United States v. Winkle, 722 F.2d 605 (10th Cir. 1983).
32. United States v. Moscony, 927 F.2d 742 (3rd Cir. 1991).
33. Thomas v. Municipal Court, 878 F.2d 285 (9th Cir. 1989).
34. In re Saladin, 518 A.2d 1258 (Pa.Super. 1986).
35. Brown v. United States, 665 F.2d 271 (9th Cir. 1982).
36. 400 A.2d 160 (Pa. 1979).
37. Hayes v. Lockhart, 766 F.2d 1247 (8th Cir. 1985).
38. Hoffman v. Leeke, 903 F.2d 280 (4th Cir. 1990).
39. McConico v. Alabama, 919 F.2d 1543 (11th Cir. 1990).
40. Commonwealth v. Rodriguez, 549 A.2d 578 (Pa.Super. 1988).
41. Wheat v. United States, 108 S.Ct. 1692 (1988).
42. Williams v. Meachum, 948 F.2d 863 (2nd Cir. 1991); Henderson v. Smith, 903 F.2d 534 (8th Cir. 1990).
43. United States v. Roth, 860 F.2d 1382 (7th Cir. 1988); Commonwealth v. Szekeresh, 515 A.2d 605 (Pa.Super. 1986).

44. Bush v. United States, 765 F.2d 683 (7th Cir. 1985).
45. 806 F.2d 1307 (7th Cir. 1986).
46. See footnote 1.
47. See footnote 2.
48. Commonwealth v. Boyd, 688 A.2d 1172 (Pa. 1997).
49. United States v. Martini, 31 F.3d 781 (9th Cir. 1994).
50. Jackson v. United States, 976 F.2d 679 (11th Cir. 1992).
51. Ostrander v. Green, 46 F.3d 347 (4th Cir. 1995).
52. Martin v. United States, 81 F.3d 1083 (11th Cir. 1996); United States v. Nagib, 56 F.3d 798 (7th Cir. 1995); United States v. Peak, 992 F.2d 39 (4th Cir. 1993).
53. In the Interest of A.P., 617 A.2d 764 (Pa.Super. 1992).
54. United States v. Rodriguez-Luna, 937 F.2d 1208 (7th Cir. 1991).
55. Dickerson v. Vaughn, 90 F.3d 87 (3rd Cir. 1996).
56. Garmon v. Lockhart, 938 F.2d 120 (8th Cir. 1991); Hill v. Lockhart, 894 F.2d 1009 (8th Cir. 1990).
57. United States v. Gordon, 156 F.3d 376 (2nd Cir. 1998).
58. Commonwealth v. Jones, 640 A.2d 1330 (Pa.Super. 1994).
59. United States v. Alverez-Tautimez, 160 F.3d 573 (9th Cir. 1998).
60. United States v. Gipson, 985 F.2d 212 (5th Cir. 1993); Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991); Commonwealth v. Quier, 531 A.2d 8 (Pa.Super. 1987).
61. Esslinger v. Davis, 29 F.3d 594 (11th Cir. 1996).
62. Commonwealth v. Fromenta, 531 A.2d 434 (Pa.Super. 1987); see also Rabiu v. INS, 41 F.3d 879 (2nd Cir. 1994) and United States v. Castro, 26 F.3d 557 (5th Cir. 1994).
63. Buenoano v. Singletary, 963 F.2d 1550 (11th Cir. 1992).
64. Foster v. Delo, 11 F.3d 1451 (8th Cir. 1993).
65. Heiser v. Ryan, 951 F.2d 559 (3rd Cir. 1991).
66. Boria v. Keane, 99 F.3d 492 (2nd Cir. 1996); United States v. Rodriguez, 929 F.2d 747 (1st Cir. 1991); see also Commonwealth v. Korb, 617 A.2d 715 (Pa.Super. 1992).
67. Woodward v. Collins, 898 F.2d 1027 (5th Cir. 1990); Commonwealth v. Nelson, 574 A.2d 1107 (Pa.Super. 1990).
68. Turner v. Tennessee, 858 F.2d 1201 (6th Cir. 1988).
69. Lewandowski v. Makel, 949 F.2d 884 (6th Cir. 1991).
70. Commonwealth v. Bradley, 715 A.2d 1121 (Pa. 1998).
71. 939 F.2d 473 (7th Cir. 1991).
72. Commonwealth v. Breisch, 719 A.2d 352 (Pa.Super. 1998).
73. United States v. Natanel, 938 F.2d 302 (1st Cir. 1991).
74. 539 A.2d 887 (Pa.Super. 1988).
75. Commonwealth v. Tippens, 598 A.2d 553 (Pa.Super. 1991).
76. Morris v. California, 945 F.2d 1456 (9th Cir. 1991).
77. Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990).
78. Lawrence v. Armontrout, 900 F.2d 127 (8th Cir. 1990).
79. Tosh v. Lockhart, 879 F.2d 412 (8th Cir. 1989).
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81. Wing v. Sargent, 940 F.2d 1189 (8th Cir. 1991).
82. Commonwealth v. Perry, 644 A.2d 705 (Pa. 1994).
83. Commonwealth v. Priovolos, 715 A.2d 420 (Pa. 1998).
84. 878 F.2d 702 (3rd Cir. 1989).
85. 915 F.2d 106 (3rd Cir. 1990).
86. Commonwealth v. Woodward, 614 A.2d 239 (Pa.Super. 1992).
87. Commonwealth v. Baxter, 640 A.2d 1271 (Pa. 1994).
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89. Crandell v. Bunnell, 144 F.3d 1213 (9th Cir. 1998).
90. Sims v. Livesay, 970 F.2d 1575 (6th Cir. 1992).
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92. Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991); Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991).
93. Agan v. Singletary, 12 F.3d 1012 (11th Cir. 1994); Agan v. Singletary, 9 F.3d 900 (11th Cir. 1993).
94. Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997).
95. DeLuca v. Lord, 77 F.3d 578 (2nd Cir. 1996).
96. Bloom v. Calderon, 132 F.3d 1267 (9th Cir. 1997).
97. United States v. Whitley, 977 F.2d 149 (5th Cir. 1992).
98. United States v. Kauffman, 109 F.3d 186 (3rd Cir. 1997).
99. Boucchillon v. Collins, 907 F.2d 589 (5th Cir. 1990).
100. Commonwealth v. Legg, 711 A.2d 430 (Pa. 1998).
101. Brown v. Myers, 137 F.3d 1154 (9th Cir. 1998); Johnson v. Baldwin, 114 F.3d 835 (9th Cir. 1997).
102. Holsomback v. White, 133 F.3d 1382 (11th Cir. 1998).
103. Baylor v. Estelle, 94 F.3d 1321 (9th Cir. 1996).
104. Hall v. Washington, 106 F.3d 742 (7th Cir. 1997).
105. Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996).

106. Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995); see also Hendricks v. Calderon, 64 F.3d 1349 (9th Cir. 1995).
107. Commonwealth v. Taylor, 718 A.2d 743 (Pa. 1998).
108. Commonwealth v. Morocco, 544 A.2d 965 (Pa.Super. 1988).
109. Walker v. Lockhart, 807 F.2d 136 (8th Cir. 1986).
110. Virgin Islands v. Weatherwax, 20 F.3d 572 (3rd Cir. 1994).
111. Commonwealth v. Drass, 718 A.2d 816 (Pa. Super. 1998).
112. United States v. Headley, 923 F.2d 1079 (3rd Cir. 1991); Commonwealth v. McMullen, 530 A.2d 450 (Pa.Super. 1987).
113. Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988).
114. United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991).
115. Ward v. United States, 995 F.2d 1317 (6th Cir. 1993).
116. Tejeda v. DuBois, 142 F.3d 18 (1st Cir. 1998).
117. Groseclose v. Bell, 130 F.3d 1161 (6th Cir. 1997).
118. Foster v. Lockhart, 9 F.3d 722 (8th Cir. 1993).
119. Commonwealth v. Neal, 618 A.2d 438 (Pa.Super. 1992).
120. Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995).
121. Commonwealth v. Jermyn, 620 A.2d 1128 (Pa. 1993).
122. United States v. Warren, 149 F.3d 825 (8th Cir. 1998).
123. Smith v. Dugger, 911 F.2d 494 (11th Cir. 1990); Commonwealth v. Lester, 572 A.2d 694 (Pa.Super. 1990); Commonwealth v. Melson, 556 A.2d 836 (Pa.Super. 1989).
124. Commonwealth v. Kilgore, 719 A.2d 754 (Pa.Super. 1998); Commonwealth v. Arch, 654 A.2d 1141 (Pa.Super. 1995).
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126. United States v. Palomba, 21 F.3d 1456 (9th Cir. 1994).
127. Commonwealth v. Bannister, 656 A.2d 129 (Pa.Super. 1995).
128. Commonwealth v. Carbone, 707 A.2d 1145 (Pa.Super. 1998).
129. Commonwealth v. Jones, 652 A.2d 386 (Pa.Super. 1995).
130. Commonwealth v. Weiss, 606 A.2d 439 (Pa. 1992); Commonwealth v. Gillespie, 620 A.2d 1143 (Pa.Super. 1993).
131. Commonwealth v. Clover, 619 A.2d 1357 (Pa.Super. 1993).
132. Commonwealth v. Stanley, 632 A.2d 871 (Pa. 1993).
133. Workman v. Tate, 957 F.2d 1339 (6th Cir. 1992).
134. Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989); Commonwealth v. Murphy, 591 A.2d 278 (Pa. 1991); Commonwealth v. Bolden, 534 A.2d 456 (Pa. 1987); Commonwealth v. Strutt, 624 A.2d 162 (Pa.Super. 1993).
135. Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997).
136. Williams v. Washington, 59 F.3d 673 (7th Cir. 1995).
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138. Commonwealth v. Kimball, 683 A.2d 666 (Pa.Super. 1996).
139. Commonwealth v. Davis, 652 A.2d 885 (Pa.Super. 1995).
140. Henry v. Scully, 78 F.3d 51 (2nd Cir. 1996); see also Mason v. Hanks, 97 F.3d 887 (7th Cir. 1996).
141. Bolander v. Iowa, 978 F.2d 1079 (8th Cir. 1992).
142. Crotts v. Smith, 73 F.3d 861 (9th Cir. 1996).
143. Seehan v. Iowa, 37 F.3d 389 (8th Cir. 1994); Commonwealth v. Graham, 528 A.2d 620 (Pa.Super. 1987).
144. Atkins v. Attorney General of Alabama, 932 F.2d 1430 (11th Cir. 1991); Commonwealth v. Barnes, 593 A.2d 868 (Pa.Super. 1991); Commonwealth v. Dickerson, 590 A.2d 766 (Pa.Super. 1991); Commonwealth v. Thomas, 578 A.2d 422 (Pa.Super. 1990); Commonwealth v. Smith, 567 A.2d 1080 (Pa.Super. 1989).
145. Commonwealth v. DeHart, 650 A.2d 38 (Pa. 1994).
146. Commonwealth v. Moore, 715 A.2d 448 (Pa.Super. 1998).
147. Mason v. Scully, 16 F.3d 38 (2nd Cir. 1994).
148. Commonwealth v. Hyneman, 622 A.2d 988 (Pa.Super. 1993).
149. Commonwealth v. Clark, 626 A.2d 154 (Pa. 1993).
150. Commonwealth v. Doswell, 621 A.2d 104 (Pa. 1993).
151. Genius v. Pepe, 50 F.3d 60 (1st Cir. 1995).
152. Hill v. Lockhart, 28 F.3d 832 (8th Cir. 1994).
153. Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995).
154. Capps v. Sullivan, 921 F.2d 260 (10th Cir. 1990); Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989); Commonwealth v. Gass, 523 A.2d 741 (Pa. 1987); Commonwealth v. Horwat, 515 A.2d 514 (Pa. 1986); Commonwealth v. Weinder, 577 A.2d 1364 (Pa.Super. 1990); Commonwealth v. Boyd, 514 A.2d 623 (Pa.Super. 1986).
155. Commonwealth v. Hutchinson, 621 A.2d 681 (Pa.Super. 1993).
156. Commonwealth v. Clark, 683 A.2d 901 (Pa.Super. 1996).
157. United States v. Span, 74 F.3d 1383 (9th Cir. 1996); Commonwealth v. Buska, 655 A.2d 576 (Pa.Super. 1995).
158. Commonwealth v. Horton, 644 A.2d 181 (Pa.Super. 1994).
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162. Commonwealth v. Roxberry, 602 A.2d 826 (Pa. 1992).
163. United States v. Soto, 132 F.3d 56 (D.C. Cir. 1997).
164. United States v. De La Fuente, 8 F.3d 1333 (9th Cir. 1993).
165. Waters v. Zant, 979 F.2d 1472 (11th Cir. 1992).
166. Commonwealth v. Smith, 675 A.2d 1221 (Pa. 1996).
167. See Austin v. Bell, 126 F.3d 843 (6th Cir. 1997); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995).
168. Commonwealth v. Batterson, 601 A.2d 335 (Pa.Super. 1992).
169. Mato v. Henderson, 13 F.3d 528 (2nd Cir. 1994).
170. Commonwealth v. Erie, 521 A.2d 464 (Pa.Super. 1987).
171. Roe v. Delo, 160 F.3d 416 (8th Cir. 1998).
172. Commonwealth v. Pizzo, 602 A.2d 823 (Pa. 1992); Commonwealth v. House, 537 A.2d 361 (Pa.Super. 1988).
173. United States v. Taglia, 922 F.2d 413 (7th Cir. 1991).
174. United States v. Matos, 905 F.2d 30 (2nd Cir. 1990).
175. United States v. Hoyos-Medina, 878 F.2d 21 (1st Cir. 1989).
176. United States v. Rieger, 942 F.2d 230 (3rd Cir. 1991).
177. United States v. McNamara, 74 F.3d 514 (4th Cir. 1996).
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