CHAPTER 3: APPEALING YOUR CONVICTION BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

A. INTRODUCTION

Many prisoners appeal their conviction by claiming that their lawyer did not do their job. This sort of claim is referred to as an "ineffective assistance of counsel" claim. Under the Sixth Amendment and the Fourteenth Amendment of the United States Constitution, you have a right to have a lawyer represent you during a criminal trial.[1] You also have this right under the Louisiana state constitution.[2] This means that if your lawyer does not do a proper job in representing you, you have the option of trying to change the results of your case by making an ineffective assistance of counsel claim.

This chapter explains the Louisiana standards for bringing ineffective assistance of counsel claims. It is important to know that the Louisiana standards are the same as the federal standards. Chapter 12 of the main *JLM* explains the federal standards for bringing an ineffective assistance of counsel claim. This chapter will use examples from Louisiana cases to help explain how to argue that your lawyer was "ineffective."

There are three different ways to bring an ineffective assistance of counsel claim. First, you can claim that your lawyer did not meet basic professional standards, or that their representation you was far below what is expected from a lawyer. This is called an actual ineffective assistance of counsel claim. Second, you could argue that you have been denied counsel. This kind of claim is considered a constructive denial of counsel claim. In criminal cases, the Supreme Court has said that people who are not able to afford counsel have a fundamental right to be assigned one in order to ensure a fair trial.[3] Third, you can claim that your lawyer had a conflict of interest while representing you. Examples of potential conflicts of interest include: the lawyer may have a personal relationship with the opposing party or judge, have represented the opposing party before, or may even be currently representing the opposing party. Part B will explain the Louisiana standards for bringing each of these three types of ineffective assistance of counsel claims. Part C will explain the timing for when you should bring these claims, and part D will tell you how you can use ineffective assistance of counsel to get around issues with case procedure. Finally, Part E will give you an idea of some common ineffective assistance of counsel claims that others have brought in Louisiana.

B. LOUISIANA STANDARDS FOR INEFFECTIVE ASSISTANCE OF COUNSEL

Always remember to bring your ineffective assistance of counsel claim as both a state and federal constitutional claim. This is important because otherwise you may not be able to bring up the issue in later proceedings. When you bring these claims, you should say that your lawyer's performance denied you your "due process rights" under both the United States Constitution and the Louisiana state constitution.

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[1] The 6th Amendment of the U.S. Constitution gives you a federal right "to have the Assistance of Counsel." U.S. CONST. amend. VI. The 14th Amendment requires all fifty states, including Louisiana, to make sure that you have a lawyer in a criminal trial, unless you do not want one. U.S. CONST. amend. XIV; Gideon v. Wainwright, 372 U.S. 335, 342–343, 83 S. Ct. 792, 795–796, 9 L. Ed. 2d 799, 804 (1963) (holding that the 6th Amendment right to counsel is a fundamental right essential to a fair trial, and holding that the 14th Amendment makes the right to counsel obligatory on the states). Those two amendments also require that your lawyer is effective in representing you. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (assistance is not considered effective if counsel's errors were so serious as to deprive defendant of a fair trial).

[2] LA. CONST. art. 1, § 13. ("At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment."). However, if the state appoints you a lawyer, you do not have a right to choose your lawyer. Both the U.S. and the Louisiana Supreme Court have also stated that there is no right to a meaningful relationship with your lawyer. State v. Reeves, 2006-2419, pp. 51–52 (La. 5/5/09); 11 So. 3d 1031, 1065–1066 ("The Supreme Court has rejected any claim that the Sixth Amendment guarantees a 'meaningful attorney-client relationship' between an accused and his counsel.") (quoting Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617, 75 L. Ed. 2d. 610, 621 (1983)).

[3] Gideon v. Wainwright, 372 U.S. 335, 342–343, 83 S. Ct. 792, 795–796, 9 L. Ed. 2d 799, 804 (1963).

Under Louisiana law, you have the right to a lawyer both for your criminal trial as well as for your first appeal. In Louisiana, you have the right to appeal your conviction if your case was one that could have been tried by a jury.[4] According to the Louisiana Code of Criminal Procedure, you do not always get a jury trial for misdemeanor charges.[5] You can usually get a jury trial if you are charged with a misdemeanor with a possible fine for more than one thousand dollars or a possible prison sentence of more than six months.[6]

1. Actual Ineffective Assistance of Counsel Claim: The *Strickland* Test

The most common type of ineffective assistance of counsel claims is the claim that your lawyer did not meet professional standards. The test for this claim has two parts. You must show (1) that your lawyer's performance in your case was not good enough and (2) that there is a decent chance that your lawyer's performance changed the outcome of your trial.[7] This two-part test for actual ineffective assistance of counsel is called the *Strickland* test, named for the U.S. Supreme Court case that laid out this test. The Louisiana test for ineffective assistance of counsel claims is the same as the *Strickland* test.[8] This section will explain both parts of the *Strickland* test.

a. Deficient Performance

First, you will need to show that your lawyer did not meet professional standards. In order to figure out whether your lawyer did a bad job, courts will ask if your lawyer acted the way that most lawyers would have in a similar case.[9] In most cases, only serious acts or mistakes will count as ineffective. The courts will usually assume that your lawyer did a good job.[10] They will assume this because there are many different ways that a good lawyer could handle a case, and courts want to let lawyers try different and new strategies. As long as your lawyer's choices were part of his strategy for a case, a court will probably not find that your lawyer was ineffective.[11]

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[4] LA. CONST. art. 5, § 10. ("Except as otherwise provided by this constitution, a court of appeal has appellate jurisdiction of . . . (3) all criminal cases triable by a jury, except as provided in Section 5, Paragraph (D)(2) of this Article.").

[5] LA. CODE CRIM. PROC. ANN. art. 779(B) (2017) ("The defendant charged with any other misdemeanor shall be tried by the court without a jury.").

[6] LA. CODE CRIM. PROC. ANN. art. 779(A) (2017) ("A defendant charged with a misdemeanor in which the punishment, as set forth in the statute defining the offense, may be a fine in excess of one thousand dollars or imprisonment for more than six months shall be tried by a jury of six jurors, all of whom must concur to render a verdict.").

[7] State v. Hampton, 2000-0522, p. 1 (La. 3/22/02); 818 So. 2d 720, 731 (Knoll, J., dissenting) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

[8] *See, e.g.*, State v. Ford, 2010-1151, p. 1 (La. 2/4/11); 57 So. 3d 297, 297 (Johnson, J., dissenting from denial of certiorari) (stating that the Louisiana Supreme Court had adopted the *Strickland* test in the State v. Washington decision).

[9] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); State v. Berry, 430 So. 2d 1005, 1007 (La. 1983) ("The United States Supreme Court recognizes defendants' right to a lawyer who is within the normal range of competence . . . ."); *see also* State v. Moore, 575 So. 2d 928, 931 (La. App. 2 Cir. 1991) ("In determining whether counsel was ineffective, the relevant inquiry is whether counsel's representation fell below an objective standard of reasonableness and competency as informed by prevailing professional standards demanded for attorneys in criminal cases.").

[10] State v. Stewart, 2000-2960, p. 8 (La. 3/15/02); 815 So. 2d 14, 18 ("*Strickland* imposes on a defendant the difficult burden of overcoming a strong presumption that the challenged action of his trial counsel reflected sound trial strategy . . . .").

[11] State v. Brooks, 94-2438, pp. 6–7 (La. 10/16/95); 661 So. 2d 1333, 1337 (finding that counsel's decision not to question any of the State's witnesses was part of the trial strategy and therefore was not ineffective); State v. Skipper, 2011-1346, p. 7 (La. App. 4 Cir. 10/10/12); 101 So. 3d 537, 542 ("If an alleged error falls 'within the ambit of trial strategy,' it does not establish 'ineffective assistance of counsel.'") (quoting State v. Bienemy, 483 So. 2d 1105, 1107 (La. Ct. App. 1986)); State v. Parker, 96-1852, p. 16 (La. App. 4 Cir. 6/18/97); 696 So. 2d 599, 607 (finding that counsel's decision not to give an opening statement was part of strategy to prevent the prosecution from figuring out the defense and therefore counsel's decision was not ineffective).

A court is not going to make its decision by looking back on what your lawyer should have done now that you know the outcome of the trial.[12] Instead, the court will try to determine what most other lawyers would say is what a capable lawyer would have done with your situation.[13] It is possible that a court can consider a lawyer effective even if he makes some mistakes. Courts do not expect that lawyers will always do a perfect job with all of their cases. In order to make a strong argument, you should not just say that your lawyer generally did a bad job or that your lawyer was too busy to spend enough time on your case.[14] You should, however, be as specific as possible about what exactly your lawyer did or did not do that was bad. You will not be able to win if you just make very broad statements that you do not think your lawyer was good enough.

b. Prejudice

The second part of the *Strickland* test is that you have to show prejudice from your lawyer's ineffectiveness. Prejudice means that there is a decent chance that your lawyer's performance changed the outcome of your trial. Even if you can show that your lawyer did not act like most lawyers in a similar situation would have acted, you still cannot win unless you also show that there is a decent chance your case outcome would have been different, based on what your lawyer did or did not do, so that a court thinks that you did not have a fair trial.[15]

If your lawyer did a bad job but your case would have come out the same way, then you cannot win an ineffective assistance of counsel claim.[16] It is not enough to simply show that your lawyer could have hypothetically had a bad effect on your case.[17] You need to show that there is a decent chance that your case would have had different results if your lawyer had done a good job.[18] Like with the first part of the *Strickland* test, you should be as specific as possible about the negative effects your lawyer had on your case.

A criminal trial has two different phases. There is usually a phase where the court is trying to determine whether a defendant is guilty or not-guilty, and there is a phase in which the court is deciding on what the punishment for a guilty defendant should be. The "guilt-innocence" phase is for figuring out whether you are guilty of the charges the prosecution has brought against you. If the court decides that you are guilty, then the penalty phase is for figuring out an appropriate sentence. You can bring a claim of ineffective assistance of counsel for either or both of these phases.[19] Louisiana courts will consider your

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[12] State v. Stewart, 08-1265, p. 11 (La. App. 5 Cir. 5/26/09); 15 So. 3d 276, 283 ("[H]indsight is not the proper perspective for judging the competence of counsel's trial decisions.") (citing State v. Brooks, 505 So. 2d 714, 724 (La. 1987)).

[13] State v. Pierre, 524 So. 2d 1289, 1291 (La. App. 3 Cir. 1988) (""To establish a claim of ineffective representation, the defendant must demonstrate that counsel did not meet the level of competency "normally demanded" in criminal cases."") (quoting State *ex rel.* Graffagnino v. King, 436 So. 2d 559 (La. 1983)).

[14] State v. Broyard, 2000-2290, p. 12 (La. App. 4 Cir. 11/14/01); 802 So. 2d 845, 854 (stating that defendant's argument was not specific enough, where defendant had generally claimed that his trial counsel was ineffective because he had a caseload that was too high).

[15] State v. Matthis, 2007-0691, p. 7 (La. 11/2/07); 970 So. 2d 505, 509 ("[T]he standard for ineffective assistance of counsel . . . requires respondent to show not only that his trial attorney's performance fell below an objective standard of reasonableness under prevailing professional norms but also that counsel's inadequate performance prejudiced him to the extent that the trial was rendered unfair and the verdict suspect . . . ."); State v. Brooks, 94-2438, p. 6 (La. 10/16/95); 661 So. 2d 1333, 1337 ("[The Strickland test] requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.").

[16] State v. Matthis, 2007-0691, p. 7 (La. 11/2/07); 970 So. 2d 505, 509.

[17] State v. Moody, 2000-0886, p. 6 (La. App. 1 Cir. 12/22/00); 779 So. 2d 4, 6 ("It is not enough for defendant to show that his counsel's errors or omissions had some conceivable effect on the outcome of the proceeding. Rather, he must show that, but for counsel's errors, a reasonable probability exists that the outcome of the trial would have been different.").

[18] Schwehm v. Jones, 2003-0109, p. 6 (La. App. 1 Cir. 2/23/04); 872 So. 2d 1140, 1144 ("The defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.") (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 691 (1984)).

[19] *See, e.g.*, State v. Sanders, 93-0001, p. 25 (La. 11/30/94); 648 So. 2d 1272, 1291 ("When a defendant challenges the effectiveness of his counsel at the penalty phase, the court must determine whether there is a reasonable probability that, absent counsel's errors, the sentencer would have concluded that the balance of aggravating and mitigating

lawyer's performance when trying to decide whether to set aside a guilty plea.[20] You should think about these different phases when you are describing how your lawyer's work hurt your case.

The amount and type of evidence that you need to show that your lawyer hurt your case will be different depending on the specific case. For example, if your case went to trial, you will need to show that if it weren't for your lawyer, there is a decent chance that you could have had a different verdict. On the other hand, if you accepted a plea deal, you will probably focus more on trying to show that if it weren't for your lawyer, you would not have taken that plea and would have decided to go to trial instead.[21] If you are saying that your lawyer did not do an adequate job during the sentencing phase of your trial, you will have to show that if it weren't for your lawyer, there is a decent chance you would have gotten a different sentence.

2. **Penalty Phase—Capital Punishment**

Louisiana courts have paid special attention to situations when a lawyer who did not do a good job was part of the reason for someone to receive the death penalty.[22] If you are facing the possibility of the death penalty, your lawyer is supposed to work hard to represent you and to fight for your case.[23] If you claim that your lawyer was ineffective in a death penalty case, the higher court will probably tell your trial court to hold a hearing to gather evidence about whether or not your lawyer did a good enough job.[24] In order to figure out whether your lawyer met professional standards, a court will think about what the jury would have done if your lawyer had done an adequate job. In order to win, you will have to show that if it weren't for your lawyer, the jury probably would have decided that you should not get the death penalty.

In particular, your lawyer is supposed to look for any evidence that would make a jury less willing to give you the death penalty.[25] However, your lawyer could ultimately decide not to use this evidence as

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factors did not warrant death."); State v. Berry, 430 So. 2d 1005, 1010 (La. 1983) ("It is contended that attorney Blanche rendered ineffective assistance of counsel to defendant at trial of both guilt and penalty.").

[20] In order for a guilty plea to be valid, you have to have voluntarily agreed to it. Sometimes a court will decide that your lawyer did such a bad job that you did not really voluntarily agree to your plea. State v. Garza, 623 So. 2d 1288, 1288 (La. 1993) (remanding the case and finding the plea involuntary because counsel did not explain that the circumstances of the case did not support the charge); State v. Washington, 491 So. 2d 1337, 1338 (La. 1986) ("We hold, therefore, that the two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel.").

[21] State v. Calhoun, 96-0786, pp. 10–11 (La. 5/20/97); 694 So. 2d 909, 914–915 (finding that counsel was ineffective because he filed a motion to be relieved as counsel and told the court that he was unprepared but still advised his client to take a plea); State *ex rel.* Clement v. Whitley, 94-0828, p. 1 (La. 9/3/96); 678 So. 2d 538, 538 (remanding to the district court for the lower court to determine whether counsel had misinformed defendant about the terms of a plea bargain and if so, whether misinforming constituted ineffective assistance); State v. Beatty, 391 So. 2d 828, 831 (La. 1980) ("When a defendant enters a counselled plea of guilty, this court will review the quality of counsel's representation in deciding whether the plea should be set aside.").

[22] State v. Sanders, 93-0001, p. 25 (La. 11/30/94); 648 So. 2d 1272, 1291 ("The role of an attorney at a capital sentencing proceeding resembles his role at trial. He must 'ensure that the adversarial testing process works to produce a just result . . . .'") (quoting Burger v. Kemp, 483 U.S. 776, 788–789, 107 S. Ct. 3114, 3122–3126, 97 L. Ed. 2d 638, 653 (1987)); State v. Williams, 480 So. 2d 721, 728 n.14 (La. 1985) ("Ineffective assistance of counsel in the penalty phase of capital cases is a recurring problem. In many cases . . . defense counsel, after vigorously contesting the guilt phase, has turned the case over to the jury for penalty determination with little additional evidence or argument . . . .").

[23] State v. Ford, 2010-1151, p. 2 (La. 2/4/11); 57 So. 3d 297, 297 (Johnson, J., dissenting from denial of certiorari) ("A defendant at the penalty phase of a capital trial is entitled to the assistance of a reasonably competent attorney acting as a diligent, conscientious advocate for his life.").

[24] State v. Wille, 559 So. 2d 1321, 1339 (La. 1990) ("[T]his court on several occasions in capital cases has pretermitted determination of the validity of a death sentence . . . and has remanded the case to the trial court . . . for an evidentiary hearing on the claim and a determination whether the evidence creates a reasonable doubt as to the death sentence."); State *ex rel.* Williams v. Butler, 520 So. 2d 759, 759 (La. 1988) (staying execution and remanding to lower court for an evidentiary hearing).

[25] State v. Sullivan, 596 So. 2d 177, 190 (La. 1992), *rev'd on other grounds*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) ("In evaluating a claim of ineffective assistance of counsel during the penalty phase of a capital case, we

part of his or her strategy for your case.[26] In addition, if you specifically asked your lawyer not to tell the jury or the court some evidence, then you cannot say that your lawyer was ineffective by not providing that evidence.[27] If your lawyer did not have a strategic reason for leaving out the evidence, a court will still ask whether your lawyer's mistake actually harmed you. A court will consider whether the chance that the jury would not have given you the death penalty is high enough so that the court cannot feel confident that the penalty phase of your trial was fair.[28]

Whether or not your case involves capital punishment, you will need to show that what your lawyer did or did not do hurt the outcome of your case. Remember that showing that there was some small chance of a different outcome is not enough. You need to show that there was a decent chance that the outcome would be different. Do not forget to be as specific as possible about how the results in your case would have been different if it weren't for your lawyer.

3. Constructive Denial of Counsel

In addition to actual ineffective assistance of counsel, in some situations, you can say that you had constructive denial of counsel. This claim is usually for a situation that was so bad that it was as if you did not have a lawyer at all. There are three types of situations in which you can bring a constructive denial of counsel claim: (1) if you actually did not have a lawyer during an important part of your criminal proceedings; (2) if your lawyer did little or nothing to challenge the prosecutor's case against you; and (3) if the circumstances of your trial prevented or would prevent your lawyer from doing an adequate job.[29] This test is an exception from the *Strickland* test because you do not need to show that your lawyer's acts or omissions harmed your case. If you successfully bring a constructive denial of counsel claim, a court may assume that you meet the second part of the Strickland test.[30] For example, if your lawyer is really unprepared for your case, a court cannot force you to go on with your case either unrepresented or with a lawyer who is not prepared.[31] In this kind of situation since your trial is still ongoing, you do not have to show that your lawyer hurt your case.

In general, this claim is harder to bring than an actual ineffective assistance of counsel claim.[32] Listed below, you will find some examples of constructive denial of counsel claims that have not worked either in Louisiana state courts or in the United States Court of Appeals for the Fifth Circuit:

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must first determine whether a reasonable investigation would have uncovered mitigating evidence.") (citing State *ex rel.* Busby v. Butler, 538 So. 2d 164, 169 (La. 1988)).

[26] State v. Sullivan, 596 So. 2d 177, 190–191 (La. 1992), *rev'd on other grounds*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) ("Where mitigating evidence is not presented to the jury because of counsel's tactical choice, a defendant must overcome the strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy.") (citing State *ex rel.* Busby v. Butler, 538 So. 2d 164, 169 (La. 1988)).

[27] State v. Bordelon, 2007-0525, p. 36 (La. 10/16/09); 33 So. 3d 842, 865 (finding that counsel was not ineffective because "defendant had the capacity to make a knowing and intelligent waiver of his right to present mitigating evidence and that he did so explicitly during his colloquy with the trial judge at the outset of the sentencing phase").

[28] State v. Hamilton, 92-2639, p. 10 (La. 7/1/97); 699 So. 2d 29, 34 (stating that because the lawyer failed to show the jury defendant's psychiatric history "the degree of likelihood that a jury would not have recommended a death sentence is sufficient to undermine confidence in the outcome of the penalty phase of the trial").

[29] United States v. Cronic, 466 U.S. 648, 658–660, 104 S. Ct. 2039, 2046–2047, 80 L. Ed. 2d 657, 667–669 (1984).

[30] United States v. Cronic, 466 U.S. 648, 658–660, 104 S. Ct. 2039, 2046–2047, 80 L. Ed. 2d 657, 667–669 (1984); State v. Sheppard, 624 So. 2d 1209, 1209 (La. 1993) (per curium) (remanding with instructions to the lower court to determine whether there was a constructive denial of counsel from which the court could presume prejudice).

[31] State v. Knight, 611 So. 2d 1381, 1383 (La. 1993) (finding constructive denial of counsel when the trial court had appointed a new counsel at the time of trial and proceeded without the former lawyer); *see also* State v. Laugand, 1999-1124, p. 1 (La. 3/17/00); 759 So. 2d 34, 35 ("[A] trial judge may not constructively deny the defendant his right to counsel by forcing him to trial represented by an attorney who refuses to participate in any manner in the proceedings because he believes he has not had time to prepare an adequate defense . . . .") (citing State v. Brooks, 452 So. 2d 149, 155–156 (La. 1984)).

[32] State v. Richardson, 2006-0250, p. 10 (La. App. 1 Cir. 11/3/06); 941 So. 2d 198 (unpublished) ("A constructive denial of counsel occurs in only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all."); McInerney v. Puckett, 919 F.2d 350, 353 (5th Cir. 1990) ("[N]o doubt a *total* lack of attorney preparedness . . . might be tantamount to no counsel

1) Counsel failed to challenge possible racial bias in the jury selection;[33]
2) Counsel only casually prepared for trial;[34]
3) Counsel failed to investigate issues;[35]
4) Counsel failed to object even though the indictment did not match the jury charge;[36] or
5) Counsel did not communicate/touch base with client before trial.[37]

To sum up, constructive denial of counsel is a special exception to the *Strickland* test. Successful claims usually have to do with really unprepared lawyers or lawyers who do absolutely nothing during the trial. In most situations, courts will still use the normal *Strickland* test to figure out whether your lawyer did an adequate job.

4. Conflicts of Interest

Another way that you can bring an ineffective assistance of counsel claim is to say that your lawyer had a conflict of interest (a relationship that threatens his ability to best represent you). Louisiana courts have said that effective counsel means that your lawyer cannot be in a position where he or she has responsibilities that conflict with their loyalty to you.[38] Your lawyer has a conflict of interest if he or she has a responsibility to another person and if that responsibility could cause you harm.[39] For example, your lawyer could also represent or have represented the person you are suing. The most important question is whether a conflict of interest would have stopped your lawyer from taking an action that could have helped you out in your case.[40]

If your lawyer represented more than one person in the same trial, it does not necessarily mean that he or she had a conflict of interest.[41] For example, if all of the defendants have the same or similar goals in the trial, then a lawyer can represent all of them without a conflict.[42] Louisiana courts have found that a conflict of interest existed when a lawyer had to cross-examine a witness who was or used to be a client.[43] They have also said that there could be a conflict of interest when a lawyer was facing criminal

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and would call for a presumption of unreliability, but not every case of somewhat deficient preparedness rises to this level.").

[33] Harris v. Johnson, 81 F.3d 535, 540 n.16 (5th Cir. 1996).

[34] McInerney v. Puckett, 919 F.2d 350, 352 (5th Cir. 1990) (stating that the lower court had erred by presuming prejudice rather than figuring out whether defendant had actually suffered harm).

[35] Woodard v. Collins, 898 F.2d 1027, 1029 (5th Cir. 1990) (finding that the normal Strickland test should apply when defendant claims that lawyer failed to investigate some issues).

[36] Ricalday v. Procunier, 736 F.2d 203, 207 n.6 (5th Cir. 1984) (finding that the lawyer's performance was not so bad to meet the test for constructive denial of counsel).

[37] State v. Ford, 2009-0392, p. 5 (La. App. 4 Cir. 10/21/09); 24 So. 3d 249, 252–253 ("While trial counsel has a professional, ethical, and legal duty to confer with her client, her failure to do so prior to trial does not amount to a 'constructive' denial of counsel." (footnote omitted) (citing State v. Johnson, 2004-0178 (La. App. 4 Cir. 12/8/04); 892 So. 2d 28).

[38] State v. Kahey, 436 So. 2d 475, 484 (La. 1983) ("An actual conflict of interest is established when the defendant proves that his attorney was placed in a situation inherently conducive to divided loyalties.") (citing Zuck v. Alabama, 588 F. 2d 436 (5th Cir. 1979)).

[39] State v. Carter, 2012-0614, p. 7 (La. 1/24/12); 84 So. 3d 499, 509 ("'If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interest of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to the other client.'") (quoting State v. Kahey, 436 So. 2d 475, 485 (La. 1983)).

[40] State v. Carter, 2012-0614, p. 7 (La. 1/24/12); 84 So. 3d 499, 509–510 ("The inherent dilemma in conflict of interest situations stems from what counsel finds himself compelled to refrain from doing.") (citing Holloway v. Arkansas, 435 U.S. 475, 490, 98 S. Ct. 1173, 1181, 55 L. Ed. 2d 426, 438 (1978)).

[41] State v. Lobato, 603 So. 2d 739, 749 (La. 1992) ("Multiple representation does not presumptively result in the ineffective assistance of counsel so as to violate constitutional guarantees unless it gives rise to a conflict of interest.") (citing State v. Kahey, 436 So. 2d 475, 485 (La. 1983)).

[42] *See, e.g.*, State v. Smith, 98-2078 (La. 10/29/99); 748 So. 2d 1139, 1142–1144 (finding no conflict of interest because all three defendants could assert a common defense that was consistent with witness testimony and with Louisiana law on second degree felony murder).

[43] State v. Tensley, 41,726, pp. 30–31 (La. App. 2 Cir. 4/4/07); 955 So. 2d 227, 245–246 (finding conflict of interest when defendant's lawyer during early stages of the criminal proceedings switched sides and cross-examined defendant at

charges, especially if the charges were related to the defendant's situation.[44] You should remember though that what counts as a conflict of interest will be different depending on each person's situation.

It is important to note that it is not enough to just say that your lawyer could have had a conflict.[45] You will need to show that your lawyer actually had the conflict of interest.[46] You should try to be as specific as possible about your lawyer's conflict.[47] The standard for showing conflict of interest is different depending on when you bring up this issue. If you are able to show that your lawyer has a conflict before trial, you do not need to show that you would actually be harmed by this conflict.[48] When you bring up conflicts of interest before trial, the court must either appoint you a new lawyer or decide that the conflict is so unlikely that you do not actually need a new lawyer.[49] Unlike with a claim before trial, if you bring up any conflicts of interest after trial, then you must show that the conflict led to harm in your case.[50]

The government may try to say that you waived your right to a lawyer who does not have a conflict of interest. You are allowed to waive a conflict of interest, but only if a court tells you: (1) that a conflict exists; (2) any possible consequences from having a lawyer with a conflict of interest; and (3) that you have the right to get a new lawyer.[51] If the court did not tell you all three of these items, then you cannot have waived the conflict of interest.[52]

C. TIMING: WHEN TO BRING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

In most situations, courts will not hear ineffective assistance of counsel claims on direct appeal.[53] This is especially true if you are basing your claim on actions your lawyer did or did not do before your trial.[54] This is because normally there is not enough evidence from the trial record for a court to figure out whether or not your lawyer has done a good enough job. For example, if you are trying to say that your

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trial). *But see* State v. Carter, 2012-0614, p. 9 (La. 1/24/12); 84 So. 3d 499 (finding no actual conflict of interest when co-counsel was the one who cross-examined counsel's former witness).

[44] State v. Carter, 2012-0614, pp. 9–10 (La. 1/24/12); 84 So. 3d 499, 510–511 (stating that there could be a conflict of interest if the same district attorney's office investigating the defendant was also investigating counsel).

[45] State v. Carter, 2012-0614, p. 7 (La. 1/24/12); 84 So. 3d 499, 509–510 ("The burden of proving an 'actual conflict of interest,' rather than a 'mere possibility of conflict' rests upon the defendant.") (quoting State v. Franklin, 400 So. 2d 616, 620 (La. 1981)).

[46] State v. Carter, 2012-0614, p. 7 (La. 1/24/12); 84 So. 3d 499, 509–510 ("The burden of proving an 'actual conflict of interest,' rather than a 'mere possibility of conflict' rests upon the defendant.") (quoting State v. Franklin, 400 So. 2d 616, 620 (La. 1981)).

[47] State v. Carter, 2012-0614, p. 7 (La. 1/24/12); 84 So. 3d 499, 509 ("To show an actual conflict, a defendant must prove, through specific instances in the record, that his attorney was placed in a situation inherently conducive to divided loyalties." (citing State v. Tart, 93-0772 (La. 2/9/96); 672 So. 2d 116, 125)).

[48] State v. Carter 2012-0614, p. 6 (La. 1/24/12); 84 So. 3d 499, 509 ("'[I]f an actual conflict exists, there is no need for a defendant to prove that he was also prejudiced thereby.'") (quoting State v. Franklin, 400 So. 2d 616, 620 (La. 1981)).

[49] State v. Carmouche, 508 So. 2d 792, 805 (La. 1987).

[50] State v. Tart, 93-0772, p. 20 (La. 2/9/96); 672 So. 2d 116, 125 ("If an objection to an attorney conflict of interest is not raised until after trial, the defendant must show he was actually prejudiced."); State v. Waters, 2002-0356, p. 8 (La. 03/12/01); 780 So. 2d 1053, 1058 (remanding case to district court for an evidentiary hearing on ineffectiveness of counsel, where counsel represented defendant and the police department that arrested defendant).

[51] State v. Cisco, 2001-2732, p. 22 (La. 12/3/03); 861 So. 2d 118, 133.

[52] *See, e.g.*, State v. Olivieri, 10-1064, p. 6 (La. App. 5 Cir. 9/13/11); 74 So. 3d 1191, 1194 (finding that defendant's waiver of his right to conflict-free counsel was invalid because at the time of waiver he did not fully know the possible consequences of his lawyer representing a co-defendant and he was not informed of his right to other counsel).

[53] *See, e.g.*, State v. Watson, 2000-1580, p. 4 (La. 5/14/02); 817 So. 2d 81, 84 (finding that ineffective assistance claim was more appropriate for post-conviction relief, partly due to the limited amount of evidence introduced at trial); State v. Mitchell, 94-2078, p. 6 (La. 5/21/96); 674 So. 2d 250, 255 (finding that ineffective assistance claim was more appropriate for post-conviction relief, where defendant alleged counsel did not explore defendant's intellectual disability and did not try to suppress defendant's confession); State v. Martin, 607 So. 2d 775, 788 (La. App. 1 Cir. 1992) (finding that defendant's claim was inappropriate for direct appeal because without an evidentiary hearing, it was hard to know whether filing pre-trial motions or further investigation was necessary).

[54] State v. Smith, 98-2078 (La. 10/29/99); 748 So. 2d 1139, 1142 (per curiam) (stating that the record before the court could not establish whether counsel discussed potential conflicts of interest with the defendants or whether counsel's preparations for trial could have had some negative effects for joint representation of the defendants).

lawyer did not provide important evidence during the trial, then the trial records will not contain any record of that evidence. The court will need to have a separate hearing in order to bring out that evidence.

If you think there was enough evidence during your trial to show that your lawyer did not do a good job and that as a result your case was hurt, then you can bring this kind of claim on direct appeal.[55] For instance, constructive denial of counsel claims might be the type of claim where you would have enough evidence from the trial to bring the claim on direct appeal. You can also choose to bring your claim before trial if you think there is already enough evidence that your lawyer is not doing enough.[56] A lot of times conflict of interest claims can come up before the trial starts.[57] Otherwise, you should bring the claim either in a state application for post-conviction relief or in a writ for state or federal habeas corpus to the trial court.[58]

After you file an application for post-conviction relief or a writ of habeas corpus, a court will sometimes order that you have a hearing in order to bring out evidence about what your lawyer did and did not do for your case.[59] The good part about this type of hearing is that, unlike with direct appeal, you will be able to show evidence that was not part of the trial.

Even though most of the time courts will say that you should bring your claim through post-conviction relief or habeas corpus, you should know that there is an important exception related to sentencing. Most criminal trials have both a guilt phase and a penalty phase. The penalty phase is sometimes called the sentencing phase. You cannot bring an ineffective assistance of counsel claim for the penalty or sentencing phase in an application for post-conviction relief.[60] If you are trying to say that your lawyer did a bad job with the penalty or sentencing phase, you need to bring up that claim during direct appeal. Since you do not have the option of bringing this claim in a post-conviction proceeding, a court may be willing to address your claim that your lawyer was ineffective during sentencing. [61]

1. *Peart* Motions

Most of the time you should bring an ineffective assistance of counsel claim after conviction. But you can bring a special type of claim before your trial if you think your lawyer does not have the time or resources to do a good job with your case.[62] You do this by making what is called a *Peart* motion. The

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[55] *See, e.g.*, State v. Brumfield, 96-2667, p. 14 (La. 10/20/98); 737 So. 2d 660, 668–669 ("[W]hen the record contains evidence sufficient to decide the issue [of ineffective assistance of counsel], the appellate court may consider the issue . . . .") (citing State v. Ratcliff, 416 So. 2d 528 (La. 1982)).

[56] State v. Peart, 621 So. 2d 780, 787 (La. 1993) ("If the trial court has sufficient information before trial . . . treating ineffective assistance claims before trial where possible will further the interests of judicial economy.").

[57] State v. Peart, 621 So. 2d 780, 787 (La. 1993) ("For example, ineffective assistance of counsel claims based on allegations that the attorney is faced with a conflict of interest are routinely brought to the attention of the trial court and considered before trial.") (citing State v. McNeal, 594 So. 2d 876 (La. 1992)).

[58] State v. Winfrey, 359 So. 2d 73, 76 (La. 1978) ("The proper procedural vehicle for an allegation of ineffective assistance of counsel is by a writ of habeas corpus in the district court."); State v. Mouton, 327 So. 2d 413, 416 (La. 1976) ("'Where it appears that counsel has failed in his professional duty toward a defendant, our system affords a defendant relief through a writ of habeas corpus alleging incompetent or ineffective counsel, in effect the deprivation of the right to the assistance of counsel.'") (quoting State v. Marcell, 320 So. 2d 195, 198 (La. 1975)); State v. Leblanc, 2010-1484, p. 23 (La. App. 4 Cir. 9/30/11); 76 So. 3d 572, 586–587 (finding that the record was inadequate to address whether counsel's failure to investigate or to consult with defendant was ineffective).

[59] *See, e.g.*, State v. Berry, 430 So. 2d 1005, 1007 (La. 1983) (explaining that upon defendant filing an application for a writ of habeas corpus, the judge ordered an evidentiary hearing). An "'application for post conviction relief' means a petition filed by a person in custody after sentence following conviction for the commission of an offense seeking to have the conviction and sentence set aside." LA. CODE CRIM. PROC. ANN. art. 924 (2017).

[60] LA. CODE CRIM. PROC. ANN. art. 930.3 (2017); State v. Thomas, 2008-2912, p. 1 (La. 10/16/09); 19 So. 3d 466, 466 ("[R]elator's claims that the court imposed an excessive sentence and that he received ineffective assistance of counsel at sentencing are not cognizable on collateral review . . . .").

[61] *See, e.g.*, State v. Jones, 46,712, p. 4 (La. App. 2 Cir. 11/2/11); 80 So. 3d 500, 502 (reviewing defendant's claims of ineffectiveness during the sentencing phase because the claim would not be cognizable on collateral review).

[62] State v. Reeves. 2006-2419, p. 66 (La. 5/5/09); 11 So. 3d 1031, 1074 ("[A] claim of ineffectiveness may be raised pretrial, based on counsel's ability to provide constitutionally effective counsel due to resources available and caseload concerns.").

Louisiana Supreme Court has said that an effective lawyer has to have the time and the skills needed to represent you well.[63] For example, a court will not think your lawyer is ineffective because he or she represented many defendants. But, you can still win if you can show that your lawyer had too much work and he or she did not have the time or resources to do a good job on your case.[64] If you make a *Peart* motion, you have to give specific evidence. This evidence must show that your lawyer has too many cases and cannot pay enough attention to your case.[65] Just saying that your lawyer has a lot of clients is not enough for a successful *Peart* motion.

2. Collateral Proceedings and Appeals

Normally, you cannot bring an ineffective assistance of counsel claim out of collateral proceedings.[66] A collateral proceeding is a way of fighting your conviction. Collateral proceedings are based on reasons that were not available when your trial happened. Under the United States Constitution and the Louisiana State Constitution, you do not have a right to a lawyer for post-conviction proceedings. You only have a right to counsel for pre-trial and trial procedures.[67] You also have a right to a lawyer for your first appeal to review your conviction and sentence. But you do not have the same rights for any steps after that appeal.[68] This means that if your lawyer did not do a good enough job with any proceedings after your first appeal, you might not be able to challenge the outcome of those proceedings with an ineffective assistance of counsel claim.

D. HOW YOU CAN USE INEFFECTIVE ASSISTANCE OF COUNSEL TO ADDRESS UNPRESERVED CLAIMS AND PROCEDURALLY DEFAULTED CLAIMS

You can use ineffective assistance of counsel claims to bring up issues on appeal that you normally cannot bring up. Ineffective assistance of counsel claims help with two common problems: 1) unpreserved claims and 2) procedural defaults. Preservation is the idea that you have to first bring up an issue at trial if you want to bring it up in an appeal.[69] So, if your lawyer did not file the correct motions, you might not be able to bring up certain topics. Chapters 9, 11, and 12 of the main *JLM* explain other ways that you can attack your conviction. These chapters also explain the idea of preservation. If you did not bring up an issue because of your lawyer, then a court will let you bring up the problem on appeal. Courts do this because it was your lawyer's fault for not bringing up the issue at trial. You should still have the chance to bring up the issue.

Procedural default is a lot like preservation. Procedural default happens when you cannot bring your claim before an appellate court because you or your lawyer did not follow state appeals procedures. Just like with preservation, you can use ineffective assistance of counsel claims to get around a procedural default problem. You can do this by arguing that your lawyer was ineffective because he or she did not follow a procedural rule, like filing a motion. However, you will have to show that your lawyer's failure to

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[63] State v. Peart, 621 So. 2d 780, 789 (La. 1993) ("We take reasonably effective assistance of counsel to mean that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients.").

[64] State v. Peart, 621 So. 2d 780, 789 (La. 1993).

[65] State v. Lee, 2005-2098, p. 42 (La. 1/16/08); 976 So. 2d 109, 138 (finding that there was no evidence in the record to support defendant's claim that counsel's workload was too heavy); State v. Broyard, 2000-2290, p. 12 (La. App. 4 Cir. 11/14/01); 802 So. 2d 845, 854 (distinguishing defendant's claim from *Peart* because the claim was a general allegation).

[66] State v. Cotton, 2009-2397, p. 2 (La. 10/15/10); 45 So. 3d 1030, 1031 (per curiam) ("[R]espondent's claim that he received ineffective assistance of counsel at his habitual offender adjudication is not cognizable on collateral review so long as the sentenced imposed by the court falls within the range of the sentencing statutes.").

[67] State v. Johnson, 95-711, p. 4 (La. App. 3 Cir. 12/6/95); 664 So. 2d 766, 769 (citation omitted).

[68] Sometimes this first appeal is called "first-tier review." *See, e.g.*, State v. Castillo 2009-1358, p. 9 (La. 1/28/11); 57 So. 3d 1012, 1017.

[69] "A defendant who does not file a motion to suppress an identification, and who fails to contemporaneously object to the admission of the identification testimony at trial, fails to preserve the issue of its admissibility as an error on appeal. Normally, defendant would be precluded from asserting these errors . . . ." State v. Johnson, 95-711, pp. 3–4 (La. App. 3 Cir. 12/6/95); 664 So. 2d 766, 769.

follow that rule met both parts of the *Strickland* test.[70] If you succeed, then you can continue with your claim even though you did not follow the procedural rule.

E. COMMON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

In general, courts will not find that your lawyer did a bad job if the decisions that he or she made were part of their strategy for your case.[71] This is true even if their strategy ended up failing.[72] The following are some examples of ineffective assistance of counsel claims, some of which have been successful and some of which have failed. There are many possible acts or omissions (failure to act) that a court may consider ineffective. But remember that ineffective assistance depends on the facts of each person's circumstance. Even if one of these claims worked for somebody else, that does not guarantee that a court will decide that your case meets the test for ineffective assistance of counsel. These examples will just give you an idea of the arguments other people have made in the past.

1) Counsel failed to call or cross-examine witnesses.[73]
2) Counsel failed to investigate mitigating evidence.[74]
3) Counsel did not file any pre-trial motions.[75]
4) Counsel failed to give an opening statement.[76]
5) Counsel failed to give a satisfactory closing argument.[77]

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[70] *See, e.g.*, State v. Crowell, 99-2238, pp. 8–12 (La. App. 4 Cir. 11/21/00); 773 So. 2d 871, 878–880 (finding that even though counsel had failed to file motions to quash the multiple bill and to reconsider sentence, defendant did not provide evidence that the sentence was unconstitutionally excessive, so defendant had not met second part of the *Strickland* test).

[71] State v. Brooks, 94-2438, pp. 6–7 (La. 10/16/95); 661 So. 2d 1333, 1337 (finding that counsel's decision not to question any of the State's witnesses was part of the trial strategy and therefore was not ineffective); State v. Skipper, 2011-1346, p. 7 (La. App. 4 Cir. 10/10/12); 101 So. 3d 537, 542 ("If an alleged error falls 'within the ambit of trial strategy,' it does not establish 'ineffective assistance of counsel.'") (quoting State v. Bienemy, 483 So. 2d 1105, 1007 (La. Ct. App. 1986)); State v. Parker, 96-1852, p. 16 (La. App. 4 Cir. 6/18/97); 696 So. 2d 599, 607 (finding that counsel's decision not to give an opening statement was part of strategy to prevent the prosecution from figuring out the defense and that therefore counsel's decision was not ineffective); State v. Woodard, 2008-0606, pp. 12–14 (La. 5/5/09); 9 So. 3d 112, 119–120 (finding that counsel could reasonably decide not to call witnesses when their testimony might draw attention to evidence that could weigh against the defendant).

[72] State v. Woodard, 2008-0606, p. 13 (La. 5/5/09); 9 So. 3d 112, 120 ("That a particular strategy fails does not mean that it was professionally unreasonable.") (citing State v. Felde, 422 So. 2d 370, 393 (La. 1982)).

[73] State v. Brooks, 505 So. 2d 714, 723–724 (La. 1987) (finding that counsel's decision not to ask any of the state witnesses questions was not ineffective because it was part of trial strategy); State v. Ratcliff, 416 So. 2d 528, 530 (La. 1982) (finding that counsel's decision not to bring out witnesses that could bring out victim's violent past was not ineffective).

[74] State v. Sparks, 1988-0017, p. 65 (La. 5/11/11); 68 So. 3d 435, 484 (finding that while counsel does not have to present mitigating evidence, failure to investigate such evidence is ineffective (quoting State *ex rel.* Busby v. Butler, 538 So. 2d 164, 171 (La. 1988))); State v. Brooks, 94-2438, pp. 6–11 (La. 10/16/95); 661 So. 2d 1333, 1338–1339 (concluding that lawyer was ineffective for taking no steps to investigate defendant's mental health history and the possibility that defendant was emotionally controlled by another individual).

[75] State v. Seiss, 428 So. 2d 444, 447 (La. 1983) ("[C]ounsel for defense is not required to make motions and objections when they are not necessary, and the defendant must show specific prejudice in order to claim that the failure to make such motions resulted in ineffective assistance of counsel."); State v. Garland, 482 So. 2d 133, 135 (La. Ct. App. 1986) (finding that defendant had not met his burden when he alleged counsel failed to file pre-trial motions but did not explain what effect those motions could have had on his case) (citing State *ex rel.* Fields v. Maggio, 368 So. 2d 1016 (La. 1979)).

[76] State v. Sparks, 1988-0017, p. 62 (La. 5/11/11); 68 So. 3d 435, 482 ("Although we have never held that the failure to give an opening statement is in and of itself ineffective assistance of counsel, the failure to make an opening statement is a factor this Court considers in deciding whether counsel's performance is deficient."); State v. Seiss, 428 So. 2d 444, 447–448 (La. 1983).

[77] State v. Stewart, 2000-2960, pp. 7–10 (La. 3/15/02); 815 So. 2d 14, 18–19 (finding that counsel's performance was not bad enough to count as ineffective even though he gave a very minimal closing statement); State v. Messiah, 538 So. 2d 175, 187–188 (La. 1988) (finding that a short closing argument was not enough to conclude that counsel's performance was ineffective); State v. Myles, 389 So. 2d 12, 31 (La. 1979) (finding that counsel was ineffective for giving a closing statement that was "little more than a mechanical submission of the defendant's fate to the decision-making process with no attempt to influence it").

6) Counsel failed to object to an error by the court or the prosecutor.[78]
7) Counsel failed to thoroughly explore a potential juror's thoughts on the death penalty.[79]
8) Counsel failed to raise an insanity defense.[80]
9) Counsel failed to prepare adequately for trial.[81]
10) Counsel stated that he or she lacked preparation for part of the trial.[82]
11) Counsel failed to discover key evidence.[83]
12) Counsel failed to keep client reasonably informed.[84]
13) Counsel failed to advise client of the right to a jury trial.[85]
14) Counsel failed to advise client of possible immigration consequences.[86]

F. CONCLUSION

A claim of ineffective assistance of counsel can be a useful tool if you did not have an adequate lawyer either at trial or on direct appeal. It is also a way for you to get around procedural problems. If you have access to the main *JLM* and the rest of the Louisiana supplement, try to read all of the chapters related to ineffective assistance of counsel so you can get a complete picture of how to bring these claims. Remember that courts will look at these types of claims on a case-by-case basis and so it is really important to provide as much specific detail as possible about why exactly your lawyer did not do an adequate job and why your lawyer's performance hurt you.

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[78] State v. Bradley, 2008-0195, pp. 9–13 (La. App. 4 Cir. 10/1/08); 995 So. 2d 1230, 1237–1239 (finding that counsel was not ineffective for failing to object to jury instructions that could have been intended to break a deadlocked jury); State v. Hongo, 96-2060, pp. 5–6 (La. 12/02/97); 706 So. 2d 419, 422 (concluding that while counsel's performance was inadequate for failing to object to erroneous jury instructions, counsel did not prejudice defendant and was therefore not ineffective); State v. Winding, 2000-0364, pp. 3–5 (La. App. 4 Cir. 4/11/01); 787 So. 2d 385, 388–389 (finding that counsel was not ineffective by failing to object to the fact that defendant was wearing recognizable prison garb in front of the jury); State v. Williams, 92-2080, p. 6 (La. App. 4 Cir. 12/15/94); 647 So. 2d 1244, 1248 (finding that although counsel failed to object to the admission of evidence, claim of ineffective assistance failed because defendant did not show prejudice).

[79] State v. Smith, 98-1417 (La. 6/29/01); 793 So. 2d 1199 (unpublished) ("Moreover, this Court has held that counsel's failure to traverse a venire person expressing opposition to the death penalty does not constitute ineffective assistance.") (citing State v. Prejean, 379 So. 2d 240, 242–243 (La. 1979)).

[80] State v. Wolfe, 630 So. 2d 872, 882 (La. App. 4 Cir. 1993) (finding that counsel was not ineffective for not raising an insanity defense because such a defense would have been fraudulent); *see also* State v. Roman, 2000-1705, pp. 6–7 (La. 12/7/01); 802 So. 2d 1281, 1285 (finding failure to raise insanity defense did not constitute ineffective assistance of counsel where counsel raised another viable defense); *cf.* State v. Sullivan, 596 So. 2d 177, 190–192 (La. 1992) (finding that failure to investigate mental illness was ineffective assistance of counsel, which prejudiced defendant during penalty phase), *rev'd on other grounds*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

[81] State v. Stewart, 2000-2960, pp. 9–10 (La. 3/15/02); 815 So. 2d 14, 19 (acknowledging that a counsel with better preparation might have employed different tactics, but refusing to find that the deficiency rose to the level of ineffective counsel).

[82] State v. Sanders, 93-0001, p. 26–28 (La. 11/30/94); 648 So. 2d 1272, 1291–1292 (finding ineffectiveness when counsel had said he was unprepared for penalty phase and made several errors, including making ineffective opening statements and presenting very unprepared witnesses).

[83] State *ex rel.* Guise v. State, 2000-2185, p. 1 (La. 10/15/02); 828 So. 2d 557, 557–558 (remanding to lower court to determine whether failure to discover evidence of an agreement between the state and co-defendants amounted to ineffective assistance).

[84] In re Frank, 2006-0727, p. 37 (La. 10/17/06); 942 So. 2d 1050, 1053–1054 (finding that disciplinary action was warranted where counsel gave ineffective assistance by failing to keep client reasonably informed and to pursue client's claims).

[85] State v. Washington, 491 So. 2d 1337, 1339 (La. 1986) ("Counsel was probably also ineffective because of his failure to advise his client of his right to a jury trial.").

[86] Padilla v. Kentucky, 559 U.S. 356, 373–374, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284, 299 (2010) (holding that an attorney has an affirmative duty to correctly advise a client of the possible deportation consequences of a guilty plea and that failure to do so falls below *Strickland's* "objective standard of reasonableness" test).