

Avoiding (Meritorious) Ineffective Assistance of Counsel Claims

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Where ineffective assistance of counsel claims are raised

- Iowa Code § 814.7:
 1. An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822, except as otherwise provided in this section. **The claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes.** (emphasis added)
 2. A party may, but is not required to, raise an ineffective assistance claim on direct appeal from the criminal proceedings if the party has reasonable grounds to believe that the record is adequate to address the claim on direct appeal.
 3. If an ineffective assistance of counsel claim is raised on direct appeal from the criminal proceedings, the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination under chapter 822.
- State postconviction relief (PCR) § 814.7(1)
- Direct criminal appeal § 814.7(2)
- Postconviction appeal – ineffective assistance of counsel claims are exceptions to general error preservation rules *See, e.g.: State v. Ondayog*, 722 N.W.2d 778, 783-784 (Iowa 2006); also note that
- Federal district court 28 U.S.C. § 2254 (federal remedy for prisoners in state custody)
- Federal appellate court – including US Supreme Court *Strickland v. Washington*, 466 U.S. 668 (1984) (defendant convicted in Florida Court)

What ineffective assistance of counsel is

- The right to counsel is the right to effective counsel
 - Sixth Amendment to United States Constitution *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”)
 - Iowa Constitution art. I § 10 *State v. Ondayog*, 722 N.W. 2d 778 (Iowa 2006)
 - Fourteenth Amendment to United States Constitution *Powell v. Alabama*, 287 U.S. 45, 71 (1932)
 - When the state guarantees convicted person one appeal as a matter of right, which Iowa does, due process requires

that appellate counsel must not be ineffective *Evitts v. Lucey*, 469 U.S. 387, 395-396, 402-405 (1985)

- Iowa Code § 822.5 – Iowa’s PCR statute requires that in most circumstances a PCR applicant is entitled to appointed counsel. This creates a statutory (not constitutional) right to effective counsel *Dunbar v. State*, 515 N.W.2d 12, 14-15 (Iowa 1994) (citing Iowa Code § 663A.5 which is now § 822.5)
- The *Strickland* standard:
 - Counsel fails to perform an essential duty and;
 - Prejudice resulted from the failure *Strickland*, 466 U.S. at 687
 - **Both** prongs must be proven *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001)
- Failure to perform essential duty is attorney performance that falls below the normal range of competency *State v. Cromer*, 765 N.W.2d 1, 7-8 (Iowa 2009)
- Prejudice is a reasonable probability that the outcome would have been different if counsel had not breached an essential duty and a reasonable probability is one that undermines confidence in the outcome. *State v. Cromer*, 765 N.W.2d at 10.
 - Prejudice is inherent when a factual basis does not exist for a guilty plea and the reason is not on the record *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001)
 - Do not need to show prejudice if:
 - Counsel was denied during a crucial stage of the proceeding, or
 - Counsel failed to subject State’s case to meaningful adversarial testing, or
 - Circumstances surrounding the conviction justify such a presumption, e.g.: counsel had an actual conflict of interest representing multiple defendants. *State v. Feregino*, 756 N.W.2d 700, 707 (Iowa 2008)
- Courts’ review
 - Standard is the same whether claim is brought under Iowa or Federal Constitution *King v. State*, 797 N.W.2d 565 (Iowa 2011)
 - Standard is same whether counsel is trial counsel, appellate counsel, or PCR counsel *Ledezma*, at 141 (appellate counsel); *Dunbar*, at 15 (PCR counsel)
 - The burden of proof for ineffective assistance is preponderance *Ledezma*, at 142
 - Burden is on defendant to prove it – *State v. Aldape* 307 N.W.2d 32, 42 (Iowa 1981)

- Deferential standard – court presumes that counsel acted competently *State v. Cromer* 765 N.W.2d 1, 7-8 (Iowa 2009)
- When analyzing failure to perform essential duty court does not second-guess, looks at totality of circumstances, and inquiry is an individualized fact-based analysis *Ledezma*, at 142

When counsel can be ineffective

- Iowa Supreme Court notes that “claims of ineffective assistance of counsel can arise from most any stage in the criminal proceedings, and can involve most any action or inaction of counsel.” *Ledezma*, at 142.
- Investigation
- Trial preparation
- Pre-trial
- Plea
- Trial
- Sentencing
- Appeal

How to avoid a meritorious ineffective assistance of counsel claim

- Do your job for your client
- No set checklist or detailed rules for what counsel must do because such a list or guide would “interfere with constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions... [such a list] could distract counsel from the **overriding mission of vigorous advocacy** of the defendant’s cause.” *Strickland*, 466 US at 689.
- Some basic requirements:
 - There is a duty to investigate *Strickland*, 466 US at 690 note: the duty is not unlimited *see, Ledezma*, 626 N.W.2d 134 (Iowa 2001)
 - Duty to know current state of the law *State v. Hopkins*, 576 N.W.2d 374, 379-380 (Iowa 1998)
 - This implies knowing rules of Criminal Procedure, statutes, and case law
 - Effective counsel working with an expert does 2 things:
 - Develop basic working knowledge of the subject matter of expert’s area of expertise and;
 - Consult with the expert and explore the potential issues competently. *King v. State*, 797 N.W.2d 565, 572-573 (Iowa 2011)
 - A guilty plea waives ineffective assistance of counsel claims except those relating to the knowing and voluntary nature of the plea *Manning v. State*, 654 N.W.2d 555, 561 (Iowa 1991)

- Defendant can still raise ineffective assistance of counsel if counsel received advice pre-plea that was below the range of normal competence *State v. Carroll*, 797 N.W.2d 638 (Iowa 2009)
- Direct vs. collateral consequences of a plea:
 - As of April 8, 2016, the Iowa Supreme Court still distinguishes between direct and collateral consequences of a plea – counsel is ineffective for failing to advise defendant of direct consequences but not ineffective for failing to advise of collateral consequences. *State v. Fisher*, 877 N.W.2d 676 (Iowa 2016)
 - U.S. Supreme Court “has never distinguished between direct and collateral consequences in defining the scope of constitutionally ‘reasonable professional [effective] assistance’ [of counsel]...” *Padilla v. Kentucky*, 559 U.S. 356 (2010)
- General ways to avoid being ineffective
 - Know the facts and the law of your case
 - Keep accurate and detailed records
 - Use correspondence to memorialize discussions and advice
 - Act zealously
 - Act ethically

Why counsel should not be ineffective

- It’s our duty to be effective
- System only works when defense counsel puts State’s case to adversarial test