Getting Back Into the Trial Court:
Developing IAC Claims, Logistics of Evidentiary Hearings, and Effective and Practical Use of Experts and Investigators

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I. Getting Back Into the Trial Court: Mechanics and Timing

a. MCR 7.208(B)(1): "No later than 56 days after the commencement of the time for filing the defendant-appellant's brief as provided by MCR 7.212(A)(1)(a)(iii), the defendant may file in the trial court a motion for new trial, for judgment of acquittal, to withdraw a plea, or to correct an invalid sentence."

b. MCR 7.211(C)(1)(a); "Within the time provided for filing the appellant's brief, the appellant may move to remand to the trial court."
   i. The Court of Appeals may order remand for an evidentiary hearing at any time. MCR 7.216(A)(5); *see also People v LaPlaunt*, 217 Mich App 733 (1996); *People v James Edward Walker*, Docket No. 289323, Order of December 22, 2009; *People v Krogol*, 419 Mich 900 (1984); *People v Mayes*, 433 Mich 894 (1989).

c. Motions to Remand must be supported by an affidavit or other offer of proof regarding the facts to be established at the hearing. MCR 7.211(C)(1)(a)
   - If you say trial counsel should have consulted /contacted/interviewed someone, you need to consult/contact/interview that person and provide an offer of proof summarizing his or her potential testimony
   - If you can't get an affidavit from the potential witness, you can provide an affidavit summarizing the results of your investigation including your communications with an expert, trial counsel, client, or a witness.
     a. How much detail to provide in an affidavit?
   - When trial counsel will not respond . . .
     a. Document all attempts
     b. "To the extent that trial counsel failed to respond to the defendant's request for an affidavit on appeal, the defendant cannot be faulted for failing to overcome the presumption that counsel acted reasonably." *People v McKeever*, __ Mich __; 863 NW2d 330 (2015).

II. Developing IAC Claims

a. Client Communication and Investigation
   i. Meet with client early — ideally with time to file a 56 day motion if appropriate
   ii. Request discovery and exhibits
   iii. Request other records when necessary
      - District court transcripts
      - MDOC or jail records

- FOIA police department file
- Other: DHS, co-defendant's transcripts, etc

iv. Talk to trial counsel

b. The *Strickland* standard

i. The Sixth Amendment guarantees the right to counsel "in order to protect the fundamental right to a fair trial." *Strickland v Washington*, 466 US 668, 685 (1984). To show that he was denied the effective assistance of counsel, a defendant must demonstrate that, considering all of the circumstances, (1) counsel's performance fell below the objective standard of reasonableness and (2) so prejudiced the defendant that he was denied a fair trial and a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, *supra*; *People v Pickens*, 446 Mich 298 (1994); *People v Carbin*, 463 Mich 590 (2011). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694.

Generally, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76 (1999). Though counsel's strategic decisions are entitled to deference, counsel's strategy must be based on reasonable investigative decisions. *Strickland*, 466 US at 691; *People v Grant*, 470 Mich 477, 486 (2004). *People v Trakhtenberg*, 493 Mich 38, 51-52 (2012).

c. Main categories of IAC claims that require development of a factual record and useful case law

i. Failure to call a witness

- "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 US at 690-691; *People v Grant*, 470 Mich 477, 485 (2004).
- "This duty includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence." *Towns v Smith*, 395 F3d 251, 258 (CA 6, 2005).
- Trial counsel "is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo*, 283 Mich App 360, 371 (2009). Counsel's performance may be constitutionally deficient where counsel decides to forgo particular investigations relevant to the defense. *Trakhtenberg*, 493 Mich at 51-52. Examples of such investigations include, identifying the factual predicate of all charges, failing to consult or interview key witnesses who would have revealed weaknesses of the

prosecution's case, and failing to sufficiently develop the defense presented at trial. *Id.* at 53-54.

- An attorney's failure to call a witness constitutes ineffective assistance when it deprives a defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190 (2009). A substantial defense is one that might have made a difference in the trial's outcome. *Chapo*, 283 Mich App at 371.

ii. Failure to consult or call an expert

- Another way an attorney can fail to meet his duties is by failing to consult with and call an expert when an expert's assistance would be critical to the defense. *Harrington v Richter*, 562 US 86, 106 (2011) ("criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both"); *See, e.g., People v Dixon*, 263 Mich App 393, 398 (2004); *People v Kelly*, 186 Mich App 524, 526-527 (1990).
- "While an attorney's selection of an expert witness may be a "paradigmatic example" of trial strategy, that is so only when it is made "*after* thorough investigation of [the] law and facts" in a case." *People v Ackley*, 497 Mich 381 (2015), citing *Hinton v. Alabama*, —— U.S. ——; 134 S. Ct 1081, 1088 (2014).
- See *Trakhtenberg*, 493 Mich at 54 n 9 (noting that "a defense attorney may be deemed ineffective, in part, for failing to consult an expert when counsel had neither the education nor the experience necessary to evaluate the evidence and make for himself a *reasonable, informed determination* as to whether an expert should be consulted or called to the stand ....").

iii. Failure to impeach a witness for the prosecution

- Impeachment evidence is important. *See, e.g., People v Grissom*, 492 Mich 296 (2012); *People v Trakhtenberg*, 493 Mich 38 (2012); *People v Armstrong*, 490 Mich 281 (2011).
- Where impeachment evidence would have provided proof that a witness lied to the jury regarding his or her actions with regard to that very case, the fact that the witness' credibility had previously been attacked does not preclude a finding of prejudice. *See Armstrong*, 490 Mich at 292. On the contrary, there is a greater possibility that the additional attack "would have tipped the scales in favor of finding a reasonable doubt about defendant's guilt." *Id; see also Trakhtenberg*, 493 Mich at 56 ("where there is relatively little evidence to support a guilty verdict to begin with (e.g., the uncorroborated testimony of a single witness), the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt.") (internal quotation omitted).

iv. Other useful case law
    - *People v Ackley*, 497 Mich 381 (2015), "[A] single, serious error may support a claim of ineffective assistance of counsel." *Ackley*, slip op at 4, citing *Kimmelman v Morrison*, 477 US 365, 383 (1986).

III. Logistics of Evidentiary Hearings

a. Preparation/Organization for the day of the hearing
    i. Create a master sheet for yourself with all your witnesses' contact information
    ii. Create information sheets for your witnesses providing them with directions to the court, your contact information, etc. For lay witnesses include general advice such as how to dress, to allow time to get through security, leave phone in car, etc
    iii. Check client's writ in advance of hearing
        - Who is responsible for preparing the writ? Court, prosecutor, defense counsel?
    iv. Have any documents you intend to enter into the record prepared
        - Run by the prosecutor in advance
        - Seek stipulations when possible
        - Mark in advance if that is the court's practice
        - Have extra copies ready
    v. Recruit a second chair if possible
    vi. Know your audience.

b. Witness and Client Prep
    i. Meet with your witnesses and go through their potential testimony step by step
    ii. Prepare witnesses for cross-examination
    iii. Talk to your client about how to behave during the hearing

c. Scope and Extent of Waiver of Attorney Client Privilege
    i. The filing of a claim of ineffective assistance of counsel does not operate as a *complete* waiver of the attorney client privilege. Rather, the waiver is narrowly applied and is limited to the extent that Attorney has to defend himself against such a claim. See MRPC 1.6.

d. Supplemental Briefing
    i. When to request?
        - High publicity case?
        - Did the hearing raise more questions than it answered?
        - Multiple or complex issues?
    ii. Writing for the trial court vs. the Court of Appeals

e. <u>Think about the Record</u>

IV. Effective and Practical Use of Experts and Investigators

a. Know what you want from your expert
    i. Educate yourself
        - What is your theory and how do you think an expert can help you?
    ii. Consult with expert
    iii. Prepare the relevant materials for your expert — don't dump all the transcripts and records for the expert to sort through

b. When consulting with an investigator
    i. Know what you need to prove your case and what is missing from your record
    ii. Keep an open mind
    iii. Supervise/ongoing communication