Support For Full and Fair Hearing

Dale Dolifka Testimony

"Other than just an outright payoff of a judge or jury it is hard to imagine anyone being sold down the river more. Your case has shades of Selma in the 60's, where judges, sheriffs, & even assigned lawyers were all in cahoots together. The reason why you have still not resolved your legal problems is corruption. You have a [Appeals] Court sitting there looking at a pile of dung & if they do right by you & reveal you know you have the attorneys going down, you have the judges going down, you have the troopers going down. Everyone in your case has had a political price to pay if they did right by you. You had a series of situations which everyone was doing things to protect everyone rather than you because there was a price to pay. I walked over here & lawyer A says my God they're violating every appeal rule ever. How can it be like this? I think almost everyone goes back to that original seminal issue that how the hell did this case go on when it appears to lay people & to me a lot of it was built on a lie in a sworn affidavit? You're just one of many. It's absolute unadulterated self-bred corruption. It will get worse until the sleeping giant [public] wakes up. Everyone is scared & afraid." [R.00523-3105]

Arthur Robinson Testimony

"*Nobody ever contacted me to talk about Trooper Gibbens & – & – & Margaret [Murphy] running around together in the Trooper car… I saw it during the trial*."

Corruption Law

42 U.S.C. 1983 "[S]tate courts were being used to harass & injure individuals, either because the state courts were powerless to stop the deprivations or were in league with those bent upon abrogation of federally protected rights…Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it."

Joannides Order – "Appearance of impropriety at a minimum" by Judge Murphy during my TRIAL

"Context is everything. It was a truth I had learned through years of experience as an attorney, where the setting, the situation, & the circumstances surrounding a crime can often make all the difference in the final perception of innocence or guilt." United States Attorney David Iglesias.

Law Requiring Evidentiary Hearing

Widermyre v. State 452 P.2d 885 (AK 1969) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the State District Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. The sole question before reviewing court when confronted with an order denying, without hearing, a motion for post-conviction relief is whether the petitioner in his application for relief made such a showing as to require a hearing.

Bracy v. Gramley, 520 U.S. 899 (U.S. Supreme Court 1997) "Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry."

Lott v. State 836 P.2d 371 (AK 1992) It is true that, for purpose of determining whether a PCR claim may be rejected summarily, without affording the defendant an opportunity for an evidentiary hearing, the court must provisionally accept as true any facts asserted by the defendant.

Hampel v. State 911 P.2d 517 (AK 1996) Rejection of claim is premature at first phase of post-conviction relief process since it is in that phase trial court must accept as true all allegations in application and inquire whether those facts, if proven, would entitle applicant to relief sought.

Bentley v. State 397 P.2d 976 (AK 1965) Conviction set aside under this rule and case remanded for new trial, because trial courts exclusion from evidence of tape-recorded inconsistent statements of state witness had resulted in keeping from jury relevant and important facts on the trustworthiness of crucial testimony even though witness had admitted making the statements.

Thompson v. State 412 P.2d 628 (AK 1966) At a fact hearing upon a post-conviction petition which alleged that petitioner was coerced by appointed trial counsel to enter a guilty plea and also alleged that trial counsel had given petitioner false assurance regarding probation, specific finding must be made in the record as to as many of the following matters as may be applicable in addition to others possibly raised… the adequacy of petitioners representation…questions of suppression of evidence or knowing use of perjured testimony… use of involuntary confessions..

Nichols v. State 425 P.2d 247 (AK 1967) Order denying petition to vacate on ground that plea of guilty was coerced by threats and promises of probation officer was reversed and

remanded directing the court below to place the probation officer under oath, to afford full opportunity for cross-examination at a full fact hearing on petitioner's charges, to weigh the testimony and to file written findings and decision.

American Bar Association Post-Conviction Remedies

Standard 22-4.1. (b) Final disposition of applications should be made at the earliest stage consistent with the purpose of deciding claims on their underlying merits rather than on formal or technical grounds.

Standard 22-4.6. A plenary hearing to receive evidence, by testimony or otherwise, is required whenever there are material questions of fact which must be resolved in order to determine the proper disposition of the application for relief.

(b) An appellate court should exercise a broad scope of review so that all pertinent legal issues are considered on their merits insofar as possible, toward the end of a final determination of the entire case concerning the applicant.

AK Rule of Criminal Procedure 35.1(f) Pleadings and Judgment on Pleadings. (3) The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Transactional Immunity

Black's Law Dictionary (9th Ed.2009). "Transactional immunity" affords immunity to the witness from prosecution for the offense to which the compelled testimony relates.

"Government must adhere strictly to the terms of agreements made with defendants—including plea, cooperation, and immunity agreements…" Santobello v. New York, 404 U.S. 257 (U.S. Supreme Court 1971)

Use Immunity

Rule 410. Inadmissibility of Plea Discussions in Other Proceedings. (a) statements or agreements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case or proceeding against the government or

an accused person who made the plea or offer if: (i) A plea discussion does not result in a plea of guilty

To foster negotiations the rule provides that nothing that is said during plea bargaining may be used against the accused in any proceeding, whether criminal, civil or administrative.

Kastigar v. United States, 406 U.S. 441 (U.S. Supreme Court 1972) *"The Government must do more than negate the taint; it must affirmatively prove that its evidence is derived from a legitimate source wholly independent of the compelled testimony."*

State of Alaska v. Gonzalez, 853 P2d 526 (AK Supreme Court 1993) "Procedures & safeguards can be implemented, *such as isolating the prosecution team.*... In a case such as United States v. North, 910 F.2d 843 (D.C. Cir. 1990), *where the compelled testimony receives significant publicity, witnesses receive casual exposure to the substance of the compelled testimony through the media or otherwise. Once persons come into contact with the compelled testimony they are incurably tainted...* This situation is further complicated *if potential jurors are exposed to the witness' compelled testimony through wide dissemination in the media.* Mindful of Edward Coke's caution that 'it is the worst oppression, that is done by colour of justice,' *we conclude that use & derivative use immunity is constitutionally infirm.*"

U.S. v. North, 910 F.2d 843 (D.C. Cir. 1990) "From a prosecutor's standpoint, an unhappy byproduct of the Fifth Amendment is that Kastigar may very well require a trial within a trial (or a trial before, during, or after the trial) if such a proceeding is necessary for the court to determine whether or not the government has in any fashion used compelled testimony to indict or convict a defendant. If the government chooses immunization, then it must understand that the Fifth Amendment & Kastigar mean that it is taking a great chance that the witness can't constitutionally be indicted or prosecuted.This burden may be met by establishing that the witness was never exposed to North's immunized testimony…. If the government has in fact introduced trial evidence that fails the Kastigar analysis, then the defendant is entitled to a new trial."

"[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary statement, without regard for the truth or falsity. . . even though there is ample evidence aside from the statement to support the conviction." Jackson v. Denno, 378 U.S. 368 (U.S. Supreme Court 1964)

“A defendant can be required to give an incriminating statement if he is granted immunity equal to that of the right against self-incrimination, as risk of self-incrimination is removed.” Counselman v. Hitchcock, 142 U.S. 547 (U.S. Supreme Court 1892)

False Evidence/ Testimony Law

Mooney v. Holohan, 294 U.S. 103 (U.S. Supreme Court 1935) "Requirement of 'due process' is not satisfied by mere notice & hearing if state, through prosecuting officers acting on state's behalf, has contrived conviction through pretense of trial which in truth is used as means of depriving defendant of liberty through deliberate deception of court & jury by presentation of testimony known to be perjured."

Napue v. Illinois, 360 U.S. 264 (U.S. Supreme Court 1959) “Conviction obtained through use of false evidence, known to be such by representatives of the State, is a denial of due process.”

Franks v. Delaware, 438 U.S. 154 (U.S. Supreme Court 1978) Indeed, if it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic.

"[T]he dignity of the U.S. Government will not permit the conviction of any person on tainted testimony. The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them." Mesarosh v. U.S., 352 U.S. 1 (U.S. Supreme Court 1956)

Illegally Obtained Evidence

Alaska Evidence Rule 412. Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose… this rule recognizes that such evidence must generally be excluded in order to breathe life into constitutional guarantees and to remove incentives for governmental intrusion into protected areas.

State v. Davenport, 510 P.2d 78, (AK.,1973) *“State & federal constitutional requirement that warrants issue only upon a showing of probable cause contains the implied mandate that the factual representations in the affidavit be truthful.”*

"[A]ll evidence obtained by searches & seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a state. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Mapp v. Ohio, 367 U.S. 643 (U.S. Supreme Court 1961)

Discovery Violation

Brady v. Maryland, 373 U.S. 83 (U.S. Supreme Court 1963) *"Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of prosecution."*

Chauffeuring/ Investigation Corruption

Bracy v. Gramley, 520 U.S. 899 (U.S. Supreme Court 1997) ***"A trial judge's involvement with witnesses establishes a personal, disqualifying bias."***

Evidence Destruction

American Bar Association *"Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence."*

Use of False Information

A sentencing court demonstrates actual reliance on misinformation when the court gives "explicit attention" to it, "found[s]" its sentence "at least in part" on it, or gives "specific consideration" to the information before imposing sentence. "For we deal here not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation..." United States v. Tucker, 404 U.S. 443 (U.S. Supreme Court 1972)

Illegal Orders

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First and Second Circuits have both held that a party can rely on the transparently-invalid-order exception only if the party has made a "good faith effort to seek emergency relief from the appellate court" prior to violating the order.

When the First Circuit first discussed this exception, it reasoned that a court has "no right to expect compliance" with a "transparently invalid" order.

IAOC & False Counsel After Specific Inquiry

"We believe it self-evident that an indispensable component of the guarantee of effective assistance of counsel is the accused's right to be advised of basic procedural rights, particularly when the accused seeks such advice by specific inquiry. Without knowing what rights are provided under law, the accused may well be unable to understand available legal options and may consequently be incapable of making informed decisions." Smith v. State, 717 P.2d 402 (Ak 1986)

Wood v. Endell 702 P.2d 248 (AK 1985) *"It is settled that a claim of ineffective assistance is one that generally requires an evidentiary hearing to determine whether the standard adopted in Risher v State, 523 P.2d 421 (Ak 1974), was met by counsel's performance. Particularly where, as here, it is the pretrial & post-trial performance of counsel as well as the performance during trial that is specifically alleged to have been inadequate, it isn't sufficient that the trial judge found counsel's performance as observed in the course of trial to be adequate."*

Kyles v. Whitley, 514 U.S. 419 (U.S. Supreme Court 1995) *"[Counsel's errors must be] considered collectively, not item by item."*

"It is a denial of the right to effective assistance of counsel for an attorney to advise a client erroneously on a clear point of law." Beasley v. U.S., 491 F2d 687 (6th Cir. 1971)

Notice of Hearing Violation

Waiste v. State, 10 P.3d 1141 (Ak Supreme Court 2000) "This court's dicta, however, and the persuasive weight of federal law, both suggest that the Due Process Clause of the Alaska Constitution should require no more than a prompt postseizure hearing... The State argues that a prompt postseizure hearing is the only process due, both under general constitutional principles and under this court's precedents on fishing-boat seizures, whose comments were not dicta...**But given the conceded requirement of a prompt postseizure hearing on the same issues, in the same forum, 'within days, if not hours' the only burden that the State avoids by proceeding ex parte is the burden of having to show its justification for a seizure a few days or hours earlier...** The State does not discuss the private interest at stake, and Waiste is plainly right that it is significant: even a few days' lost fishing during a three-week salmon run is serious, and **due process**

mandates heightened solicitude when someone is deprived of her or his primary source of income... As the Good Court noted, moreover, **the protection of an adversary hearing 'is of particular importance [in forfeiture cases], where the Government has a direct pecuniary interest in the outcome.'** "

AS 28.05.131 Opportunity For Hearing Required (a) Unless otherwise specifically provided… the Department of Public Safety or the Department of Administration, as appropriate, shall give notice of the opportunity for an administrative hearing before… **a vehicle is impounded by that department. If action is required under this section and prior opportunity for a hearing cannot be afforded, the appropriate department shall promptly give notice of the opportunity for a hearing as soon after the action as possible to the parties concerned.**

Plea Agreement Violation

"Government must adhere strictly to the terms of agreements made with defendants—including plea, cooperation, and immunity agreements…" Santobello v. New York, 404 U.S. 257 (U.S. Supreme Court 1971)

Threats and Harm to Attorneys

Strickland v. Washington, 466 U.S. 668 (U.S. Supreme Court 1984) *"[P]rejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests."*

Cuyler v. Sullivan, 446 U.S. 335 (U.S. Supreme Court 1980) "[T]he conflict itself demonstrated a denial of the right to have the effective assistance of counsel. Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. Because it is in the simultaneous representation of conflicting interests against which the Sixth Amendment protects a defendant, he need go no further than to show the existence of an actual conflict. An actual conflict of interest negates the unimpaired loyalty a defendant is constitutionally entitled to expect and receive from his attorney."

Holloway v. Arkansas, 435 U.S. 475 (U.S. Supreme Court 1978)*"[I]n a case of joint*

representation of conflicting interests the evil – it bears repeating – is in what the advocate finds himself compelled to refrain from doing…."

Powell v. Alabama, 287 U.S. 45 (U.S. Supreme Court 1932) *"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent & educated layman has small & sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, & convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill & knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it though he not be guilty, he faces the danger of conviction because he does not know how to establish his innocence."*

Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988) *"In fact, an attorney who is burdened by a conflict between his client's interests & his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state & the defendant are necessarily in opposition. [Defendant's] attorney didn't simply make poor strategic choices; he acted with reckless disregard for his clients best interests &, at times, apparently with the intention to weaken his client's case. Prejudice, necessary or not, is established under any applicable standard."*

Rickman v. Bell, 131 F.3d 1150 (6th Cir. 1997) *"Prejudice presumed because counsel did not serve as advocate – such that he was a 'second prosecutor' & defendant would have been 'better off to have been merely denied counsel.'"*

Charge Increase

(O)nce a prosecutor exercises his discretion to bring certain charges against the defendant, neither he nor his successor may, without explanation, increase the number of or severity of those charges in circumstances which suggest that the increase is retaliation for the defendant's assertion of statutory or constitutional rights. … The Alaska Supreme Court has consistently held that courts should not hesitate to reverse a conviction when a substantial flaw in the underlying indictment is found, regardless of the strength of the evidence against the accused or the fairness of the trial leading to the conviction." Atchak v. State, 640 P.2d 135 (Ak 1981) Keith v. State, 612 P.2d 977, 980-81 (Ak 1980); Adams v. State, 598 P.2d 503, 510 (Ak 1979).