

SUMMARIES OF PUBLISHED SUCCESSFUL
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS
April 1 to June 30, 2016

TERESA L. NORRIS

Blume Norris & Franklin-Best, LLC
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
(803) 765-1044
teresa@blumelaw.com

UNITED STATES SUPREME COURT CASES

Woods v. Etherton, ___ U.S. ___, 136 S. Ct. 1149 (2016) (Per Curiam). The Court reversed the Sixth Circuit’s grant of habeas relief because a “fairminded jurist” could have concluded that repetition of an anonymous tip by police officers in state court cocaine possession trial did not establish that the uncontested facts it conveyed were submitted for their truth, in violation of the Confrontation Clause, or that appellate counsel was ineffective for failing to assert plain error or ineffective assistance of trial counsel based on the Confrontation Clause issue. The police stopped the car driven by the defendant based on an anonymous tip. Drugs were found in the driver’s side door compartment. The defendant and his passenger were arrested. The passenger/co-defendant, who testified as part of a plea agreement, testified the drugs were the defendant’s. Three police officers described the content of the anonymous tip leading to the arrest. Trial counsel objected the third time and the prosecution agreed just to move on. The prosecution also discussed the content of the tip during closing arguments. The jury was instructed “that ‘the tip was not evidence,’ but was admitted ‘only to show why the police did what they did.’” In addressing the claim of appellate counsel’s ineffectiveness, the state court reasoned that appellate counsel may reasonably have decided not to raise the issue of trial counsel’s ineffectiveness because trial counsel’s failure to object was a strategic decision. The state court also held that, even if trial counsel’s conduct had been deficient, there was no prejudice because there was ample evidence of guilt. The Sixth Circuit, reviewing the case under AEDPA, held that appellate counsel was ineffective “and that no fairminded jurist could conclude otherwise. *Etherton v. Rivard*, 800 F.3d 737 (2015). Without ruling on the merits of the court’s holding that counsel had been ineffective, we disagree with the determination that no fairminded jurist could reach a contrary conclusion, and accordingly reverse.” The Sixth Circuit concluded that “the contents of the tip were admitted for their truth because the tip was referenced by three different witnesses and mentioned in closing argument.” The Sixth Circuit then found prejudice by finding that the “evidence was not enough to convict” without the co-defendant’s testimony. And that is where the tip came in.” “In reaching these conclusions, the Sixth Circuit did not apply the appropriate standard of review under AEDPA,” because a “fairminded jurist” could conclude otherwise on each of these points. A “fairminded jurist” could also conclude that trial counsel did not object “because the facts of the tip were uncontested and in any event consistent with Etherton’s defense.” Likewise, a “fairminded jurist” could conclude that

appellate counsel was not ineffective for reaching the same conclusion. “Given AEDPA, both Etherton’s appellate counsel and the state habeas court were to be afforded the benefit of the doubt. Because the Sixth Circuit failed on both counts,” reversal was required.

I. TRIAL PHASE

A. NUMEROUS DEFICIENCIES AND INADEQUATE DEFENSE

2. U.S. District Court Cases

Fenn v. United States, ___ F. Supp. 3d ___, 2016 WL 1161441 (E.D. Va. Mar. 23, 2016). Counsel ineffective in receipt and possession of child pornography case for failing to lay the proper foundation for admission of the out-of-court statement of the defendant’s father that he downloaded the pornography. The defendant lived in the house with his parents and his brother. Several computers/hard drives in the defendant’s room contained pornography, including one which remained in the basement until just several days before the search. The basement was where the father often stayed working on computers. The father’s laptop also contained pornography. The day after petitioner’s arrest, his father told him and his mother that the father had been downloading pornography. Counsel’s entire defense was arguing a reasonable doubt by asserting that the father was the guilty party. He called defendant’s mother to testify about the father’s out-of-court statements against interest, but the government’s hearsay objection was sustained because counsel failed to establish that the father was “unavailable” under Federal Rule of Evidence 804(a). Counsel’s conduct was deficient in failing to subpoena the defendant’s father and call him to testify. While the father would not have provided exculpatory testimony, he would have asserted his Fifth Amendment right against self-incrimination. By doing so, he would have been “unavailable” and his prior statements admissible under Rule 804(b)(3)’s hearsay exception. Counsel’s conduct was not explained by strategy. While counsel claimed that he chose to rely only on the pornography on the father’s computer rather than calling him to testify, this explanation was “not credible for several reasons.” First, counsel never interviewed the father. Second, counsel stated that he expected the government to call the father to testify. Prejudice established as the father’s admissions “would have gone to the central issue at trial” of whether the defendant “knowingly” received and possessed the files. The admissions also directly substantiated the theory of defense.

4. State Cases

Commonwealth v. Millien, 50 N.E.3d 808 (Mass. 2016). Retained counsel was ineffective in assault and battery on a child resulting in death case for failing to seek public funds to retain an expert witness to assist the defense with testimony and cross-examination of the state’s experts. The defendant’s six-month old daughter died in his care. The state’s experts testified that the baby died due to “shaken baby syndrome” and the injuries could not have been caused by the baby falling off a couch onto the floor as the defendant claimed. Counsel had asked the defendant’s father, who had retained him, for the necessary funds but failed to apply to the court for funds when the father refused retainer of an expert. Counsel’s conduct was deficient, “not because he failed to understand that he needed an expert witness to advise him regarding the medical evidence and to offer opinion testimony, but because he failed to seek funds from the court to retain an expert witness for his

indigent client.” “Where, as here, the defendant was indigent and the family member who was otherwise furnishing funds for the defense refused to pay for an expert witness, it was manifestly unreasonable for defense counsel not to apply to the judge for the funds needed to retain an expert witness.” *Id.* at ___ (citing *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014)). Prejudice also established. A defense expert would have “called into question whether shaken baby syndrome is a valid and scientifically supported medical diagnosis.” Likewise, a defense expert could have provided “numerous scientific studies supporting the view that shaking alone cannot produce injuries of the type and severity suffered by” the victim in this case and would have “put forth an alternative theory of the cause” of the child’s injuries consistent with the defendant’s statements that the injuries were caused by the baby accidentally falling off the couch. There were also “numerous scientific studies in support of an opinion that accidental short falls can produce injuries of the nature and severity suffered by” the victim in this case. The prejudice was especially clear because, in post-conviction, one of the state’s experts even changed her opinion “that shaking alone” caused the injuries.

State v. Weber, ___ P.3d ___, 2016 WL 3172342 (Mont. 2016). Counsel ineffective in felony theft case for failing to adequately prepare and present defense evidence concerning the value of the property stolen. The defendant was a janitor at a high school charged with stealing a tool used to cut metal and steal. The defendant was charged with theft of property in excess of \$1,500. Counsel sought to show that the value was less than \$1,500, which would have reduced the conviction to a misdemeanor. The prior teacher of the shop class that used the tool had created an inventory of property listed the machine as a 2009 model and valuing it at \$1500. The list was provided in discovery. During trial, the state called the new shop teacher, who had been in the job for three weeks at the time of the theft, to testify that the school purchased a new replacement tool for \$2,100. Counsel tried to introduce the prior inventory during cross-examination but was denied due to lack of foundation. Counsel then called the defense investigator to try to establish a lesser value. “In the end, Weber’s counsel did not successfully introduce evidence that could support his theory of reduced value of the plasma cutter (other than the fact it was not new) that could reduce Weber’s felony charge to a misdemeanor.” Counsel’s conduct was deficient in failing to offer the inventory list as a business record admissible under Montana Rule of Evidence 803(6). Likewise, if counsel had investigated, he would have realized that the inventory was created by the prior teacher, who could have been called to testify and the inventory offered through his testimony. More broadly, counsel’s conduct was deficient in his general failure to establish the value of the used tool, leaving the state’s replacement value more or less unchallenged. Prejudice established as, “barring an acquittal for Weber” the valuation evidence was key to the defense and could have made the difference between a maximum sentence of 10 years and a maximum sentence of six months.

- B. ONE DEFICIENCY:
 - 3. MOTIONS AND NOTICE
 - a. U.S. Court of Appeals Cases

United States v. Bankston, 820 F.3d 215 (6th Cir. 2016). Counsel ineffective for failing to move to dismiss the charge of making false statements to a judge. The defendant already had charges of

mail and wire fraud pending when she wrote a letter to the judge complaining about defense counsel and accusing the government of planting evidence in her home. In a superseding indictment, the government added the false statement charge based solely on the letter. Counsel's conduct was deficient in failing to move to dismiss this charge because 18 U.S.C. § 1001(b), which criminalizes false statements, explicitly provides that it "does not apply to a party to a judicial proceeding ... for statements, representations, writings or documents submitted by such party ... to a judge or magistrate in that proceeding." Prejudice established because if counsel had moved to dismiss this count, there is a reasonable probability the charge would have been dismissed.

c. State Cases

Monroe v. State, ___ So. 3d ___, 2016 WL 1700525 (Fla. Apr. 28, 2016). Counsel ineffective in sexual battery on a child under 12 years of age by a defendant 18 years of age or older and lewd and lascivious molestation, with the same age requirements, in failing to move for judgment of acquittal due to the state's failure to prove that the defendant was 18 years old or older at the time of the offenses that, according to the alleged victim, happened on only one occasion. Counsel's conduct was "patently unreasonable," especially in light of counsel's vigorous arguments concerning the defendant's age in closing arguments. Prejudice also established as the penalty for sexual battery for a defendant 18 years or older was a mandatory life sentence. If the defendant was under 18, the judge had far greater discretion in sentencing. Here, the trial court had already indicated "obvious hesitation" in imposing a life sentence.

4. PROSECUTION EVIDENCE OR ARGUMENT
c. State Cases

Eubanks v. Commissioner of Correction, ___ A.3d ___, 2016 WL 3074403 (Conn. Ct. App. Jun. 7, 2016). Counsel ineffective in possession of a weapon without a permit in a motor vehicle case for failing to object on hearsay grounds to the substantive use of portions of a state witness' prior testimony during which she was impeached with her statement to police. A police officer, who was parked in the early morning on a deserted street, heard gunshots and then saw a vehicle coming from that direction with "screeching" tires. He followed the vehicle and saw what he believed to be guns thrown out from both sides of the car. After the vehicle stopped, police found a .45 caliber pistol in the area where items were thrown from the car. The defendant's girlfriend was driving the vehicle with her brother in the back seat and the defendant in the front passenger seat. At trial, the state sought to present the girlfriend's testimony from an earlier court hearing in which she testified that she heard gunshots but never saw a gun. She was impeached with a prior recorded statement to the police in which she said the both the defendant and her brother were shooting guns from the vehicle. She denied the truth of this statement in her court testimony and said she made it only because police were threatening to take her children if she did not cooperate. While counsel unsuccessfully objected at trial to use of the prior testimony because the state failed to prove that the witness was unavailable, counsel failed to object to the substantive use of the witness' prior statement to police, which was inadmissible "hearsay within hearsay" under state law. Counsel's conduct was deficient in failing to make this objection because counsel was unaware the objection was available. "An attorney's

ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.” *Id.* at ___ (quoting *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014)). Prejudice established because without the girlfriend’s statement to the police, “there was very little evidence to establish that the petitioner was in actual possession of a gun in a motor vehicle. The petitioner’s mere presence in the SUV was an insufficient basis for an inference that he possessed a gun in a motor vehicle.” Moreover, the shell casings recovered at the scene of the shooting were .40 caliber and did not match the .45 caliber pistol recovered.

Taylor v. State, ___ S.E.2d ___ (Ga. Jun. 21, 2016). Counsel ineffective in vehicular homicide and traffic offenses case for failing to object to hearsay testimony of a police officer that the defendant was driving without a license and operating a vehicle without a current registration. The officer testified that this information came from a computer check or from another police officer’s report. Either would be hearsay. Under Georgia law, “[w]hen an officer testifies about the results of a computer check of a registration tag or driver’s license, the testimony is hearsay,” unless the information was “obtained from a terminal lawfully connected to the Georgia Crime Information Center.” Here, the state offered no such proof. Counsel’s conduct was deficient and prejudicial as this hearsay testimony was the only evidence supporting the misdemeanor convictions of driving without a license and operating a vehicle without a current registration.

People v. Shaw, ___ N.W.2d ___, 2016 WL 3263902 (Mich. Ct. App. Jun. 14, 2016). Counsel ineffective in criminal sexual conduct case for failing to object to hearsay testimony of five witnesses concerning the alleged victim’s statements to them about the crimes and failing to present evidence of an alternative source of the victim’s injuries. In essence, when the alleged victim was 23 years old, she reported that the defendant, her stepfather, sexually molested her between the ages of 8 and 16. Three family members, a pediatrician, and a police detective testified concerning her statements to them about the crimes. Counsel’s conduct was deficient in failing to object to this testimony. The state conceded the family member testimony was improper, but argued the statements to the pediatrician were admissible because they were statements made for the purposes of medical treatment. As the examination was conducted seven years after the last incident of alleged abuse and was for purposes of investigation, rather than gynecological treatment, Michigan Rule of Evidence 803(4) did not apply. Failure to object to the detective’s testimony was even worse, as she recounted the alleged victim’s statements to her but also the alleged victim’s statements to the pediatrician and testified extensively about how she “confirmed” and “corroborated” the alleged victim’s statements with investigation. Thus, the detective also vouched for the alleged victim’s credibility. Prejudice established as the state’s entire case “turned largely on the complainant’s credibility.” By failing to object, the jury heard her version of events six times rather than once. And, with regards to the pediatrician and detective, “the hearsay was offered with what amounted to an official stamp of approval” as both of these witnesses testified that they believed the alleged victim. Counsel’s conduct was also deficient and prejudicial in failing to investigate and present evidence that the complainant was sexually active with her live-in boyfriend beginning at age 19. Counsel did not do so because he believed the evidence was barred by the rape shield law. That law does not, however, prevent admission of other instances of sexual activity “to show the origin of a physical condition”

offered by the prosecution to prove an element of the crime. Here, the pediatrician had testified to “hymenal changes” and a “chronic anal fissure” that were consistent with the complainant’s description of the alleged abuse, but also could be consistent with consensual vaginal and anal intercourse the complainant had with her boyfriend.

Baranovich v. Brockamp, ___ P.3d ___, 2016 WL 3511813 (Or. Ct. App. Jun. 22, 2016). Counsel ineffective in burglary and theft case under both the Sixth Amendment and the Oregon Constitution for failing to object to hearsay evidence identifying the defendant as the perpetrator of the burglary and commenting on petitioner’s character. On the day of the burglary and theft at the home of Rosabal and Alvarez, a neighbor saw a car drive by the house and thought the woman in the passenger seat looked “slightly familiar.” Later when Rosabal and Alvarez returned home, the neighbor discussed the possible identity of the woman with Alvarez. Alvarez showed the neighbor pictures of the defendant from his cell phone. The neighbor testified that he told Alvarez that the defendant “may have been” the woman in the car. Alvarez testified, however, that the neighbor “had identified” the defendant as the perpetrator. Rosabal testified that he had gone to the defendant’s house to confront her. She was not home, but her brother told Rosabal that she “was a really bad person, and he hopes she gets in trouble, and she does a lot of things like this.” Counsel’s conduct was deficient in failing to object to the hearsay evidence in the testimony of both Alvarez and Rosabal. Prejudice also established, particularly with respect to the hearsay testimony that the defendant’s “own brother [thought] that she is a chronic thief who needs punishment.” “[E]ither alone or ‘certainly in combination,’” the errors were prejudicial.

Tappeiner v. State, ___ S.C. ___, 785 S.E.2d 471 (2016). Counsel ineffective in criminal sexual conduct with a minor case for failing to object to the prosecutor’s improper arguments vouching for the child victim’s credibility, mischaracterizing a rape counselor’s testimony, and appealing to the jurors’ emotions. The defendant was accused of sexually abusing her 13-year-old neighbor on a night when he and his sister stayed with the defendant and her husband. The alleged victim testified that the defendant sexually assaulted him after the others went to bed and that he had screamed for help but no one heard him. A school resource officer who had interviewed the alleged victim also testified, including statements that he believed the alleged victim. An expert in forensic interviewing from a local rape crisis center interviewed the alleged victim but testified only in response to hypothetical questions “as to why child victims of sex crimes may delay reporting the abuse.” Defense counsel called only the defendant’s husband as a witness. He testified that his wife had gone to bed at the same time as he did and remained there all night. He also testified that he was a light sleeper and he and the family dog would have reacted if there had been screaming. He also testified that the alleged victim was asleep in the living room when he awoke and behaving normally while having breakfast with him. In closing arguments, the prosecutor reminded the jury that the resource officer believed the boy, asserted that the expert testified that she believed the boy, and also asked the jurors if they would be comfortable with the defendant babysitting their children or grandchildren. Counsel’s conduct was deficient in failing to object to the prosecution’s improper arguments. Not only was it impermissible for witnesses to testify that they believed the victim, but the prosecutor misrepresented the evidence by asserting that the expert had done so when she had not even testified that she had interviewed the boy. The prosecutor’s appeal to the jurors’ emotions

was also improper. Prejudice also established as the state's evidence depended almost entirely on the boy's credibility.

5. IMPEACHING WITNESS
c. State Cases

Ex Parte Saenz, ___ S.W.3d ___, 2016 WL 1359214 (Tex. Crim. App. Apr. 6, 2016). Counsel ineffective in murder case for failing to impeach Gonzalez, the State's primary witness, with a prior inconsistent statement. The defendant was charged with shooting four people, including Gonzalez, in a drive-by shooting. One of those shot died. The state's theory was that the defendant, who was a member of Suicidal Barrio, a Corpus Christi gang, did the shooting in retaliation against the La Quarenta gang for a prior assault against Pimentel, who was allegedly associated with Suicidal Barrio. One day after the shooting, Gonzalez was interviewed at the hospital by the police. When asked if he would recognize the shooter if he saw him again, Gonzalez said no. Nonetheless, during trial, Gonzalez identified the defendant as the shooter and a police officer testified that Gonzalez identified the defendant out of a photo array of six people. Counsel's conduct was deficient in failing to impeach Gonzalez with his prior inconsistent statement. Counsel conceded that this failure was not a strategy as he was challenging Gonzalez's identification and had intended to use the prior inconsistent statement. Prejudice was also established, as Gonzalez was the only person to identify the defendant as the shooter and the State stressed this fact in closing arguments. Gonzalez's credibility "would have been severely crippled by his prior inconsistent statement denying his ability to identify the shooter." While the state also relied on statements the defendant had made to a friend on the night of the shooting, her belief that the defendant was involved in the shooting based on what he said was "largely speculative." Cell phone records that placed the defendant in the general vicinity of the crime allowed a range of approximately a quarter mile only. Likewise, while the State relied on a jailhouse snitch, who testified that the defendant confessed to being the shooter, this testimony was "questionable," as the snitch "had a criminal history, a motive to falsify his statements, and his description of the offense was inconsistent with the other evidence." His testimony was also contradicted by another witness, who testified that he heard the snitch say that the defendant denied being the shooter but the snitch intended to lie in court and say that he confessed. Finally, the evidence that the defendant had a motive based on the prior attack on Pimentel was "insubstantial," as Pimentel was not associated with Suicidal Barrio and denied knowing the defendant.

8. INSTRUCTIONS
c. State Cases

Dumas v. State, ___ S.E.2d ___, 2016 WL 2891329 (Ga. Ct. App. May 18, 2016). Counsel ineffective in rape and child molestation case for failing to ask for a curative jury instruction following improper comments by the state concerning the defendant's post-arrest silence. During the defendant's testimony, the state questioned him six times about his post-arrest silence. Each time counsel objected and the court sustained the objections. Counsel failed, however, to object or request a curative instruction or mistrial when the prosecutor also commented on the defendant's

post-arrest silence in closing arguments. This conduct was deficient and prejudicial as the evidence of guilt was “not overwhelming.” The alleged victim waited 10 years to report the alleged abuse and the state’s case was built entirely on her testimony and her family’s testimony about changes in her behavior.

Hoerber v. State, ___ S.W.3d ___, 2016 WL 2343821 (Mo. May 3, 2016). Counsel ineffective in statutory sodomy case for failing to object to “verdict directors” (instructions on specific elements the state must prove in order to convict) that were so broad that the defendant could have been convicted in violation of his right to a unanimous verdict. Missouri law requires that the verdict must be definite and certain as to the crime committed. Here, the two “verdict directors” failed to identify a specific act or incident of abuse despite testimony at trial regarding multiple incidents of sexual molestation. Thus, the jurors could have convicted the defendant without unanimous agreement as to the specific acts on which the guilty verdict was based. Counsel’s conduct was deficient and prejudicial as “one juror could have found Mr. Hoerber guilty of an act that occurred in the kitchen, while another juror could have found him guilty of an act that occurred in the bathroom.”

Gibson v. State, ___ S.C. ___, ___ S.E.2d ___, 2016 WL 2737285 (May 11, 2016). Counsel ineffective in murder case for failing to object to the court’s omission of permissive inference language in the jury instruction on malice and the use of a deadly weapon. The evidence showed that there was a fight between two groups at a bar. Afterwards, the defendant’s brother called him for a ride. After the defendant arrived at the bar, there was a physical altercation between the two groups in the parking lot. Several gunshots were heard and the victim died from a single shot to the back of his shoulder. The defendant told police that he pointed his weapon at someone he thought was going to hit his brother but he only fired the weapon into the air three to four times as he drove away. The malice instruction included that “[i]nferred malice may also arise when the dead is done with deadly weapon.” Nowhere in the charge did the court include the permissive inference language approved in *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983):

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, [sic] are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Because the court’s charge in this case did not include the *Elmore* language, the charge was erroneous and counsel was deficient in failing to object. Prejudice was also established as there was little evidence of malice in this case other than the use of a deadly weapon.

II. CAPITAL SENTENCING PHASE ERRORS

A. NUMEROUS DEFICIENCIES AND INADEQUATE MITIGATION

5. State Cases

**State v. Bright*, ___ So. 3d ___, 2016 WL 3348432 (Fla. Jun. 16, 2016) (sentencing in 2009). Counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence. The defendant was sentenced to death by an eight to four vote. The defendant, who was a former Marine, killed his two roommates with a hammer. His ex-wife testified that he had had problems with the roommates, who had essentially taken over the house for the purpose of selling drugs. They had made multiple calls to the police but did not pursue charges out of fear of retaliation. After his arrest, the defendant made statements to multiple people consistent with this testimony. He also said that on the night of the killing, one of the two victim's was waving a gun around and the defendant "lost it." The defendant struggled with him and the gun went off. The gun then jammed and the defendant grabbed a hammer and killed both men. In sentencing, counsel presented testimony that the defendant had been a good Marine for over nine years but was discharged due to abuse of alcohol. Friends, family, and co-workers described him as a good man, who struggled with alcohol and drug abuse. Before the judge, a psychologist (Miller) testified about the defendant's dependency problems. While he had attempted rehabilitation, the treatment never addressed the underlying emotional issues. Relying on this testimony, the court found one statutory mitigating circumstance – extreme mental or emotional disturbance – but still imposed death. Counsel's conduct was deficient in failing to adequately investigate and present other available mitigation evidence. Lead counsel designated his co-counsel as "penalty phase counsel." Co-counsel retained a psychologist (Krop) to evaluate competence to stand trial and potentially to evaluate mitigation. In an initial letter, Krop informed counsel that the defendant was competent, "but asked whether he should conduct a more comprehensive mitigation evaluation and requested additional background information and records, particularly his VA psychiatric records," as well as family interviews. In a subsequent letter ten days later, Krop provided a detailed history report based on the defendant's statements, "alerting counsel to a history of family mental health problems, bipolar disorder, as well as a prior involuntary commitment." Following that letter, co-counsel obtained information that the most of the defendant's prior arrests were drug-related and obtained some VA medical records, but "the investigation ended there." A year later, Krop, who had been provided no additional information, wrote to co-counsel requesting the same documents and interviews earlier requested. With still no response, Krop wrote two months later noting that counsel had not arranged the family interviews requested. Krop was never contacted again until post-conviction counsel contacted him. "[L]ead counsel was predominantly out of the loop" and knew nothing about Krop. He scrambled only after the conviction to prepare and present the limited sentencing evidence that was presented. If counsel had investigated and provided the available records and information to the experts, Dr. Miller's suspicions of "deeper emotional and mental health struggles" would have been confirmed. Between 1983 and 1997, the defendant had been treated for mental health problems on multiple occasions. In 1997, he was involuntarily committed because he was suicidal and behaving erratically. He was diagnosed with depressive disorders. Correctional records indicated diagnoses of depression, anxiety, and bipolar disorder. These records also reflected a family history of mental health problems. School records reflected low academic performance related to the "effect of a horrific childhood." While the defendant's sister had testified in sentencing, her testimony in post-conviction provided far more information about how the defendant "grew up in a situation that could have easily been referred to as child labor and slave

labor.” The sister described “destitute” living; forced labor in their father’s junkyard; physical, verbal, and emotional abuse of the defendant, his siblings, and their mother by their alcoholic father; and physical and sexual abuse of the defendant by his older brother. Expert testimony “explained for the first time” in post-conviction how this abuse caused severe trauma leading to severe mental disorders, including major depression, obsessive compulsive disorder (OCD), social phobia, substance abuse, and post-traumatic stress disorder (PTSD). Prejudice established. At minimum, this additional evidence would have supported the additional mitigating factor of lack of capacity to conform conduct to the law. Moreover, even without this additional information, the sentencing court “expressed notable hesitation” in imposing a death sentence.

III. NON-CAPITAL SENTENCING ERRORS

D. State Cases

Richardson v. Belleque, ___ P.3d ___, 2016 WL 1579300 (Ore. Ct. App. Apr. 20, 2016). Counsel ineffective in manslaughter for failing in sentencing to consult with or call an expert witness to testify in rebuttal to the state’s expert who diagnosed antisocial personality disorder. While counsel cross-examined the state’s expert, in an attempt to show that the diagnosis was improper, the jury found that the defendant qualified as a dangerous offender. Counsel’s conduct was deficient in failing to investigate to determine what evidence was available. Prejudice was also established. A defense expert with all the available evidence would have opined that the defendant’s juvenile records reflected an adjustment disorder due to his mother’s abuse rather than a conduct disorder. If the jury had accepted this and not found the dangerous offender status, the defendant would not have been facing a maximum punishment of 30 years and the sentence imposed could have been much reduced.

IV. ADVISING CLIENT

A. GUILTY PLEA AFTER INADEQUATE INVESTIGATION OR RESEARCH

3. State Cases

Van Sellner v. State, ___ S.C. ___, ___ S.E.2d ___, Op. No. 27644 (Jun. 29, 2016). Counsel ineffective for advising the defendant to enter plea agreement and plead guilty to armed robbery for which a 12-year sentence was imposed. Counsel advised the defendant that, because of his prior convictions in New Jersey and New York for robbery and various drug offenses, he faced a possible life without parole sentence under S.C. Code § 17-25-45. Counsel’s conduct was deficient because there was no evidence that the defendant displayed a weapon or alleged that he had a weapon and displayed an object a person would reasonably believe to be a deadly weapon as required by S.C. Code § 16-11-330(A) for an armed robbery conviction. While the defendant passed the bank teller a note saying that if she did not provide the money he would shoot her, under state law, “words alone” are insufficient to support a conviction of armed robbery. Prejudice established.

D. BAD ADVICE LEADING TO REJECTION OF PLEA OFFER OR FAILURE TO NEGOTIATE

4. State Cases

State v. Estes, ___ P.3d ___, 2016 WL 1569471 (Wash. Ct. App. Apr. 19, 2016). Counsel ineffective in assault and felony harassment case for failing to investigate the impact of the deadly weapon enhancements on the defendant's persistent offender status and failing to adequately advise the defendant to enter plea negotiations. Prior to trial, the state served a persistent offender notice indicating that the defendant faced a third strike, as he already had two violent offense convictions, which were strikes. Prior to sentencing, the state again mentioned that the defendant had three strikes. Defense counsel erroneously argued that the defendant had not been convicted of a strike offense without realizing that the deadly weapon enhancements were strikes. The court thus imposed the mandatory life without the possibility of release sentence. At the conclusion of sentencing, the prosecutor noted that it was their possibility to seek something other than "third strike resolution" but the defendant had "declined to enter into any negotiations." Counsel's conduct was deficient: "Where an attorney is ignorant of a point of law that is fundamental to the case and fails to perform basic research on the point, his conduct is unreasonable." Here, counsel clearly did not realize until after conviction that the defendant faced mandatory life imprisonment. As a result, counsel failed to adequately advise the defendant. "Representation must include not only communicating actual offers, but discussion of tentative plea negotiations and the strengths and weaknesses of a defendant's case so that the defendant knows what to expect and can make an informed judgment whether or not to plead guilty." Prejudice established. "Where the failure to plea bargain is based on ignorance of the law and, consequently, a failure to advise a client of the potential consequences of failing to negotiate, prejudice is demonstrated." New trial ordered.

C. FAILURE TO INFORM DEFENDANT OR STATE OF PLEA OFFER

2. U.S. District Court Cases

Green v. Attorney General, State of Florida, ___ F. Supp. 2d ___, 2016 WL 3421940 (M.D. Fla. Jun. 22, 2016). Under AEDPA, counsel ineffective in escape case in failing to adequately communicate favorable plea offer. The defendant was charged with escape when he failed to return to community transition center from work release. Counsel was appointed the next day. Under state law, the State had 40 days after the arrest to file an information formally charging the defendant. After about a month, appointed counsel's associate visited the defendant and informed him that the state had offered a plea deal of twelve months, consecutive to the sentence he was already serving, but that the offer would expire in 40 days. The defendant told associate counsel he was very interested in accepting the deal but wanted to talk to his mother first. The associate counsel promised to return the next day for his decision, but did not. Neither appointed counsel nor his associate communicated the defendant again until after the offer had expired and the state had filed both the information and notice of intent to seek habitual felony offender status. The defendant was brought before the Repeat Offender Court and pled guilty with no plea agreement with the state. The court held that he was a habitual offender. The state asked for a 15-year sentence while defense counsel asked for a 12-month sentence. The court imposed a 10-year sentence. The state conceded that counsel's conduct was deficient in failing to follow-up with the defendant, failing to communicate the defendant's interest in accepting the offer to the state, and allowing the plea offer

to lapse without further communication with the defendant. On prejudice, the state conceded that the prosecution would not have withdrawn the offer and the defendant would have accepted, but argued, as the state post-conviction court had found, that the state court would not have accepted the plea agreement because defense counsel's request for a 12-month sentence had been rejected. This ignores the context, however, because if the plea agreement had been entered the defendant would have been in regular felony court (not Repeat Offender Court) in an uncontested hearing with a jointly recommended 12-month sentence. The state post-conviction's court failure to consider "the relevant context" was an unreasonable determination of the facts. "Rejecting a defendant's request for a particular sentence is not the same as rejecting a plea agreement specifying the same sentence." Having found the state court's determination unreasonable under AEDPA, the court conducted *de novo* review, and found prejudice. Because the defendant had already served more than five years more than the plea offer contemplated and "[n]o court is able to turn back the clock and effectuate a twelve-month sentence," the remedy ordered was for the state to resentence the defendant to time served and release him.

V. FAILURE TO COMPEL COMPLIANCE WITH PLEA AGREEMENT

State v. Wilke, ___ N.W.2d ___, 2016 WL 3545821 (Wis. Ct. App. Jun. 30, 2016). Counsel ineffective in plea case with two charges as a habitual offender in failing to object to the state's breach of the plea agreement in which the state had agreed to recommend that the sentence run concurrent to a revocation sentence the defendant was already serving. Counsel's conduct was deficient in failing to object to the state's failure to make the concurrent sentence recommendation and also in failing himself to ask for a concurrent sentence. Under state law, "when a prosecutor materially breaches a plea agreement, prejudice is presumed."

VI. PERFECTING APPEAL

C. State Cases

State v. Jones, ___ A.3d ___, 2016 WL 3369261 (N.J. Super. Ct. App. Div. Jun. 20, 2016). Counsel ineffective in armed robbery case for failing to file a notice of appeal, despite the defendant's request that he do so. While the trial court found deficient conduct, it found no prejudice under *Strickland* because the defendant failed to present any claim that would have been meritorious on appeal. Prejudice was presumed, however, under *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). Appeal reinstated.

VII. APPEAL

B. U.S. District Court Cases

United States ex rel. Winfield v. Acevedo, ___ F. Supp. 3d ___, 2016 WL 1247401 (N.D. Ill. Mar. 30, 2016). Appellate counsel ineffective in attempted murder case for failing to challenge the conviction under the Illinois "corpus delicti rule," which requires independent corroboration evidence in order to convict based on extrajudicial confessions. Here, the defendant was convicted at a bench trial based almost entirely on his confession that he carried a gun because of past problems

with the victim, that he was riding in a car with others when they saw the victim, he and another person were the persons who got out of a car and shot at the victim, and then the others drove away leaving him to get away on foot. At trial, the defendant denied guilt and said that he signed the statement under duress and physical abuse by the police. In convicting the defendant, the trial court stated that most of the state witness' lacked credibility and there was no evidence connecting the defendant to the crime other than his confession. The only credible state witness described the shooter as being significantly taller than the defendant and contradicted the confession by saying there was only one shooter and not two and that the shooter left in the car rather than on foot. Counsel's conduct was deficient in failing to assert the "corpus delicti" issue and instead raising only a "weak" sentencing issue. Counsel's conduct was not excused by strategy as his research file contained nothing related to "corpus delicti" and counsel could not recall his thought process or strategy. Prejudice established. New appeal ordered.

C. State Cases

Daugherty v. State, ___ N.E.3d ___, 2016 WL 1321208 (Ind. Ct. App. Apr. 5, 2016). Appellate counsel was ineffective in multiple charge case for failing to argue that the defendant's aggregate sentence of 33 years exceeded the statutory limitation for consecutive sentences arising out of a single episode of criminal conduct. The defendant was stopped for driving under the influence and found to have weapons in the car. He was tased during the arrest and taken to the hospital where he threatened officers. Under the statute, which limits the trial court's ability to impose consecutive sentences arising out of a single episode, the trial court was prohibited from imposing an aggregate sentence of more than 30 years. Counsel's conduct was deficient in failing to raise this issue as "a single episode includes 'a connected series of offenses that are closely related in time, place, and circumstance.'" Even though there was a change of location, this was a single episode. Prejudice established.

VIII. POST-CONVICTION

People v. Downs, ___ N.E.3d ___, 2016 WL 3551789 (Ill. App. Ct. Jun. 30, 2016). Post-conviction counsel ineffective for abdicating his role to represent the defendant by abandoning the defendant's non-frivolous claims of ineffectiveness of trial counsel.

Removed Due to Reversal

Etherton v. Rivard, 800 F.3d 737 (6th Cir. 2015), *rev'd*, 136 S. Ct. 1149 (2016). Appellate counsel ineffective in possession with intent to deliver cocaine case for failing to assert plain error and ineffective assistance of trial counsel due to admission of hearsay concerning anonymous tip offered into evidence through police detectives and trooper without objection by trial counsel. The police stopped the car driven by the defendant based on an anonymous tip. Drugs were found in the driver's side map compartment under a potato chip bag, which had no usable fingerprints on it. The defendant, who owned the car, denied knowledge of the drugs. The passenger/co-defendant, who testified as part of a plea agreement, testified the drugs were the defendant's. The only other

evidence of the defendant's knowledge was testimony about the anonymous tip that was introduced for its truth. The anonymous tip was elicited by the prosecution on three separate occasions. The prosecution also used the content of the tip during closing arguments, both opening and rebuttal. The state post-conviction court declined review of the Confrontation Clause issue and trial counsel ineffectiveness issue because these claims had not been raised on direct appeal. These issues were thus procedurally defaulted in habeas. The state court did review the claim of appellate counsel's ineffectiveness. Appellate counsel's conduct was deficient in failing to challenge admission of the anonymous tip, which "should have alerted" counsel "to the presence of a serious Confrontation Clause issue." As a number of less meritorious issues were raised on appeal, this failure "was an oversight and not deliberate strategy." While trial counsel had eventually objected, the objection was inadequate to preserve the issue for appeal. The admission of the anonymous tip amounted to plain error, however, and that error was prejudicial notwithstanding the trial court's attempt at a curative instruction. Prejudice was also clear because, "absent the tip, the evidence was underwhelming as to Etherton's knowledge of the presence of the cocaine." The government's case rested "almost entirely on the uncorroborated testimony of a codefendant." Moreover, the fact that the state's case largely corroborated the information in the anonymous tip otherwise "exacerbates the error" rather *than* rendering it harmless. There is a reasonable probability that the defendant would have prevailed if this issue had been raised on direct review. The state court determination otherwise was an unreasonable application of clearly established Federal law. Belated appeal granted. Likewise, if appellate counsel had asserted the ineffectiveness of trial counsel on appeal, he likely would have prevailed. Belated appeal was granted on that issue also.

Long v. Butler, 809 F.3d 299 (7th Cir. 2015), *vacated and rehearing en banc granted*, 2016 WL 1621711 (Apr. 20, 2016). Habeas relief granted under AEDPA, due to appellate counsel's ineffectiveness in murder case for failing to assert on appeal a due process claim due to the state's use of perjured testimony. The defendant was charged with a shooting outside a housing development. When the police arrived, 50-60 people were gathered around the shooting victim. No physical evidence linked the defendant to the crime, but four witnesses identified the defendant as the shooter. During trial, however, two of these witnesses recanted. The other alleged eyewitnesses were Edwards and Irby. Irby also recanted her identification. She testified that she told the prosecutors prior to trial that her story about seeing the defendant shoot the victim was a lie compelled by police threats to have her children removed from her care. The defendant's initial conviction was reversed. During the second trial, the state again presented the same four witnesses. Edwards testified that she saw the defendant shoot the victim and then cradled the victim's head in her hands afterwards. The two recanting witnesses again recanted pretrial statements identifying the defendant as the shooter. Irby testified that she saw the defendant shoot the victim but did not see anyone cradle his head in their hands. On cross-examination, she denied ever telling prosecutors that her statements were false. The state did nothing to correct this testimony, but the defense called a police officer who testified that Irby had recanted her identification of the defendant during the first trial. In a *pro se* state post-conviction petition, the defendant asserted ineffective assistance of appellate counsel for failing to challenge admission of Irby's perjured testimony. The state court rejected this claim by finding that the defendant was not prejudiced by the State's failure to correct the false testimony at trial. Therefore, appellate counsel was not ineffective. In federal habeas, the

defendant raised the substantive due process/state misconduct claim under *Napue v. Illinois*, 360 U.S. 264 (1959) and also raised the appellate ineffectiveness claim. On the substantive claim, the district court rejected the state’s arguments of procedural default because: (1) the *pro se* petition was given “generous interpretation”; (2) the issue was “embedded” in the ineffectiveness claim and fairly presented to the state court; and (3) the state court actually considered the claim on its merits. On this claim, the district court held that the state court’s finding of no prejudice was an unreasonable application of Supreme Court precedent, which required reversal, due to the knowing use of perjured testimony, “if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *Id.* at ___ (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). Here, the same prosecutor from the initial trial presented Irby’s testimony identifying the defendant without correcting her testimony that she had never recanted and then argued in closing that, if she changed her story prior to trial, it was only because she did not want to testify, which only made her trial testimony more credible. The prejudice was not diminished by the defense counsel’s efforts “to minimize the damage of Irby’s perjured testimony.”

Additionally, the fact that the jury heard from another witness who challenged Irby’s recollection merely set up the kind of credibility comparison that is the bread and butter of a trial – it does not address the problem that the jury should never have heard that testimony in the first place. Even if this evidence was only used by the jury to assess Irby’s credibility, the State’s failure to correct that evidence was a clear due process violation and the Illinois court’s decision to the contrary was unreasonable.

Beyond the issue of credibility, the state’s case “was weak.” Edwards, the only “eyewitness” who had not recanted, was contradicted by Irby who saw no one cradling the alleged victim’s head after the shooting. Edwards’ testimony was also different from her testimony in the first trial. Thus, the “perjured testimony creates a reasonable likelihood that, with so little other evidence, the State’s failure to fairly present her shifting story influenced the jury’s verdict.” Appellate counsel’s failure to raise this claim was deficient and not based on strategy as the *Napue* claim was obvious from the trial record and stronger than the two claims appellate counsel had raised. One of those claims was a challenge to improper state arguments in closing. While it was rejected, “a strongly worded dissent” asserting state misconduct in argument made it more likely that the state court would have found prejudice if the *Napue* claim had been asserted on direct appeal. Because the state court had rejected the claim of appellate counsel’s ineffectiveness in post-conviction by finding that the *Napue* claim lacked merit, the state court’s finding on the ineffectiveness claim was also “clear error and a misapplication of the Supreme Court’s holding in *Napue*.” Later, the court concluded with language that the state court’s finding was an unreasonable application “of the *Strickland* prejudice standard.”

Anthony v. State, 457 S.W.3d 548 (Tex. Ct. App. 2015), *rev’d*, 2016 WL 3355849 (Tex. Crim. App. Jun. 15, 2016). Counsel was ineffective in aggravated sexual assault of child under six case for incorrectly advising the defendant that he was eligible for deferred adjudication community supervision. The minimum sentence for the charged offense is 25 years imprisonment. Deferred

adjudication community supervision is not available for any offense with a minimum sentence in excess of ten years. Here, however, the defendant pled guilty and was placed on deferred adjudication community supervision for a period of eight years. The state moved to revoke the illegal sentence. Counsel's conduct was deficient in providing incorrect legal advice concerning the range of punishment applicable to the crime charged. "Not knowing the law applicable to the offense charged is competence below the professional norm." The incorrect advice "was reinforced and compounded by the acquiescence of both the prosecutor and the trial judge." Prejudice was established as the defendant would not have pled guilty if he had been adequately advised.